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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, 1956, TO SEPTEMBER, 1957

Chief Justice

The Hon. Mr. H. H. Basnayake

Puisne Justices

The Hon. Mr. E. H. T. Gunasekara
The Hon. Mr. M. F. S. Pulle
The Hon. Mr. H. W. R. Weerasooriya
The Hon. Mr. K. D. de Silva
The Hon. Mr. M. C. Sansoni
The Hon. Mr. H. N. G. Fernando
The Hon. Mr. T. S. Fernando
The Hon. Mr. N. Sinnetamby
The Hon. Mr. L. W. de Silva (acting)

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ERRATA

Page 17—Footnote 2, for *illiam* read *William*.

Page 22—Headnote, line 2, for *Evidence* read *Excise*.

Page 108—Line 7 from bottom, for *role* read *roll*.

Page 144—Line 12 from bottom, for *section* read *action*.

Page 339—Line 11, insert the article *a* after *give*.

Page 341—Line 21, for *introduce* read *introduces*.

Pages 496 to 500—Top of each page, for *Weerasooriya, J.* read *Sansoni, J.*

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PAGE:

Administration of Estates—

Administration of estates—"Legal personal representative"—Ordinary meaning of the expression—Thesavalamai—Gratuity paid to public servant—Thediathetam.

A sum of Rs. 4,464 was paid to the credit of the present case by the Government of Malaya. It represented a gratuity which was payable by the Government of Malaya under Rule 19 of the Malayan Pensions Ordinance. Rule 19 reads :—

"Where an officer holding a pensionable office, who is not serving on probation or agreement, dies while in the service of the Federated Malay States, it shall be lawful for the High Commissioner to grant his legal personal representative a gratuity of an amount not exceeding one year's pensionable emoluments."

Held, that when Rule 19 provided that a gratuity was payable to an officer's "legal personal representative", it made the sum payable to the executor or administrator of the officer's estate, and it became part of the assets of the estate to be paid out to his heirs at law only. The widow, therefore, who was not an heir of the deceased, was not entitled to any part of the money for her own use and benefit, even if she was administratrix of the estate of the deceased.

Held further, that a gratuity paid to a public servant on retirement from service is not thediathetam.

KASIPILLAI *v.* THEIVANAPILLAI 187

Advocates—

See COUNSEL.

Agency—

See PRINCIPAL AND AGENT.

Amendment of Pleadings—

See PLEADINGS.

Appeal—

1. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 15—Right of appeal thereunder—Power of Supreme Court to order fresh inquiry* 157

See CITIZENSHIP (2).

2. *Appeal—Abatement—Application for typewritten copies—Failure to furnish the necessary fees along with it—Fatal irregularity—Civil Appellate Rules, 1938, Rules 2 (1) and 4—Payment into Court Order, 1939, Clause 1 (5).*

The provision of Rule 2 (1) of the Civil Appellate Rules, 1938, that an application for typewritten copies "shall be accompanied by the fees prescribed in the schedule hereto" is an imperative, and not merely a directory, provision of law. Failure to comply with it is fatal to the reception of the appeal.

Under Clause 1 (5) of the Payment into Court Order, 1939, the date of the receipt given by an authorised Treasury officer is deemed to be the date of a payment into Court of any money required by any written law to be paid in connection with any action or proceeding.

FERNANDO *v.* ANTHONY 166

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3. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration as citizen—Prima facie case not established—Failure to show cause—Refusal of application—Right of appeal—Service of notice to applicant—Proof—Sections 9 (2), 15, 20* .. 283

See CITIZENSHIP (4).

4. *Appeal—Notice of tendering security—Duty of appellant to have it served at the proper address—Civil Procedure Code, s. 756 (1) and (3).*

Merely furnishing to Court, on the day on which a petition of appeal is lodged, the notice of tendering security is not sufficient where there has been in fact a subsequent failure to serve that notice on the respondent.

As it is the duty of the appellant or his Proctor to see that the precept to the Fiscal is correctly drawn up, no relief can be given to the appellant under section 756 (3) of the Civil Procedure Code in respect of the service of the notice of tender of security at a wrong address.

NORIS APPUHAMY *v.* UDARIS APPU 441

5. *Appeal—Interlocutory order—Right to question its correctness at stage of appeal against final judgment.*

In an appeal against a final judgment it is open to the appellant to question the correctness of an interlocutory order even if it had not been the subject of an immediate interlocutory appeal.

PERERA *v.* BATTAGLIA 447

6. *Appeal—Copy of petition of appeal—Duty of appellant to furnish it in time—Civil Procedure Code, s. 756 (1) and (3).*

Failure to furnish a copy of the petition of appeal in terms of section 756 (1) of the Civil Procedure Code at or before the time the security is accepted and deposit made is fatal to the appeal and is not a matter in respect of which relief may be granted under section 756 (3).

ALICE NONA *v.* EWSOHAMY 453

7. *Contempt of Court—Chapter 65 of Civil Procedure Code—Proper procedure—Right of appeal—Courts Ordinance, s. 57—Criminal Procedure Code, ss. 335, 338—Civil Procedure Code, ss. 796, 797, 798.*

Section 335 of the Criminal Procedure Code does not apply in the case of an appeal under section 798 of the Civil Procedure Code.

ABILIAN *v.* DAVITH SINGHO 566

8. *See also* PRIVY COUNCIL.

Arraignment—

See BRIBERY ACT.

Autrefois Acquit—

See PLEA (2).

Bail—

Bail—Order made by District Judge granting bail—Remedy of Crown.

Where an order admitting an accused to bail is made by a District Judge without objection on the part of the Crown although the Crown is represented, the fact that no objection was taken is relevant to the question whether the Supreme Court would interfere with the order by way of revision and direct the accused to be arrested and committed to custody.

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Where the Crown is dissatisfied with an *ex parte* order for bail made by a District Judge in the absence of the prosecution, its proper remedy is to make an application to the District Judge himself to set aside his order.

THE QUEEN *v.* KOLUGALA 175

Bastardy—

See MAINTENANCE ORDINANCE.

Bills of Exchange—

See NEGOTIABLE INSTRUMENTS.

Bond—

See RECOGNIZANCE.

Boundaries—

Evidence—Actio rei vindicatio—*Boundaries of land in dispute—Deeds tendered in evidence without objection by opposing party—Evidentiary value of statements therein—Civil Procedure Code, s. 154—Evidence Ordinance, ss. 32, 91, 92* 246

See EVIDENCE (7).

Bribery Act—

Bribery Act No. 11 of 1954—Sections 5 and 10—" Arraignment "—Criminal Procedure Code, s. 219.

The word " arraignment " is not a synonym for " indictment ".

The petitioner who was convicted by a Board of Inquiry appointed under the Bribery Act alleged that the Board of Inquiry acted without jurisdiction in holding its inquiry. The allegation was based on the plea that the Attorney-General had not signed the arraignment as required by section 5 of the Bribery Act. In support of this plea there was produced a document entitled Arraignment before a Board of Inquiry and signed by a Crown Counsel for the Attorney-General. The document was nothing more than the concise statement of the particulars of the charge laid against the accused. In an affidavit of the Crown Counsel who had signed the statement it was declared (1) that the Attorney-General was satisfied on the material available to him that there was a prima facie case of bribery made out against the petitioner, and decided to arraign him before a Board of Inquiry on the charges contained in the concise statement, (2) that the statement was signed by Crown Counsel at the instance and on the directions of the Attorney-General.

Held, that the affidavit established that the Attorney-General himself arraigned the petitioner.

SAMARANAYAKE *v.* GRENIER 424

Buddhist Ecclesiastical Law—

Buddhist Ecclesiastical Law—Res judicata—*Applicability of doctrine to incumbency disputes—Abandonment of incumbency—Effect on pupillary succession—Judgment of consent—Effect of* res judicata.

The rule of *res judicata* is applicable to disputes as to who is the lawful Viharadhipathi of a particular Buddhist Temple. A pupil is the privy of his tutor for puposes of *res judicata*.

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The abandonment by a priest of an incumbency results in the forfeiture of the rights of his pupil to inherit the incumbency. Abandonment may take place by means of the priest consenting to a decree of Court disentitling him to the incumbency.

A judgment of consent is as effective by way of estoppel as a judgment whereby the Court exercised its mind in a contested case, and has the full effect of a *res judicata* between the parties.

In action No. 1, A sued B asking for a declaration that A was the controlling Viharadhipathi of Manawala Vihare as against B. After issues were framed the dispute was settled on the following terms : " Of consent plaintiff is declared the controlling Viharadhipathi of the Manawala Vihare but this right will vest in him as from the date of the demise of the defendant who is hereby declared entitled to reside in and officiate as Viharadhipathi of the said temple during his lifetime, without any let or hindrance from the plaintiff. Each party bears his own costs. "

In the present action No. 2, A sued C, who was the pupil of B. He claimed, on the same title as he had set out in action No. 1, that he was the Viharadhipathi of Manawala Vihare.

Held, that the settlement in action No. 1 and the decree entered in accordance with it was *res judicata* between the parties in action No. 2, because C was a privy of B and was therefore bound by that decree.

Held further, that B, by consenting to the settlement in action No. 1, abandoned his rights to the incumbency in favour of A. Therefore C had no incumbency to which he could succeed on B's death.

PODIYA *v.* SUMANGALA THERO 29

Butchers Ordinance—

1. *Butcher—Application for renewal of licence—Refused by " proper authority " on ground of a Regulation prohibiting sale of meat—Validity of such refusal*—Mandamus—*Butchers Ordinance (as amended by Ordinance No. 44 of 1947 and Acts No. 2 of 1951 and No. 48 of 1953), ss. 2, 7, 13A.*

Although, under section 13A of the Butchers Ordinance, the slaughter of animals may be lawfully prohibited for a specified period in any area, the prohibition in that area of the sale of meat of animals that have been lawfully slaughtered in another area is *ultra vires* the " proper authority ". Therefore, *mandamus* would lie against a " proper authority " if, purporting to act under section 7 of the Butchers Ordinance, he refuses to entertain *in limine* a butcher's application for the renewal of his annual licence on the ground that an order has been published in the *Government Gazette* " prohibiting the slaughter of animals and sale of meat ".

ISMAIL *v.* MARASINGHE 38

2. *Butchers Ordinance (Cap. 201)—Charge of slaughtering cattle without a " special licence "—Validity.*

The permit contemplated in section 11 of the Butchers (Amendment) Ordinance No. 44 of 1947 is not the same thing as the special licence referred to in section 16 of the principal Ordinance. A charge, therefore, of slaughtering cattle without a " special licence " is not valid.

THASSIM *v.* KADIGAWA 93

Causing interruption to judicial officer—

See CRIMINAL LAW (2).

Certiorari—

See WRIT OF CERTIORARI.

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Ceylon University Ordinance—

See WRIT OF CERTIORARI (2).

Charge—

See INDICTMENT.

Citizenship—

1. *Application for registration as citizen*—Prima facie *case not established—Failure to show cause—Refusal of application—Right of appeal—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (as amended by Act, No. 37 of 1950), ss. 9 (1) and (2), 15 (1).*

When an applicant fails to show cause against an order *nisi* made under section 9 (1) of the Indian and Pakistani Residents (Citizenship) Act, the Commissioner has no option but to make an order under section 9 (2) refusing registration.

The jurisdiction of the Supreme Court under section 15 (1) is confined, as in the case of any other appellate jurisdiction, to the correction of errors made by the tribunal of first instance.

Quaere, whether an order made under section 9 (2) is of a purely administrative character.

EASIAH *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 37

2. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 15—Right of appeal thereunder—Power of Supreme Court to order fresh inquiry—Application for registration—Evidential value of investigation officer's report.*

The appellate jurisdiction that is conferred on the Supreme Court by section 15 of the Indian and Pakistani Residents (Citizenship) Act necessarily involves a power to set aside the order that is appealed from ; and such a power in turn implies a power to order the Commissioner to take any consequential steps which it may be necessary for him to take so that he may dispose of the application for registration.

Where, in an application for registration under the Indian and Pakistani Residents (Citizenship) Act, the rejection of the applicant's testimony that he was resident on a certain Estate was based entirely upon an allegation in an investigation officer's report which was not disclosed to the applicant and which he was given no opportunity of meeting—

Held, that it was not open to the Commissioner to reject the applicant's evidence upon such a ground.

SOLAMUTHU *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 157

3. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for citizenship—Evidence of residence of children.*

There is no warrant to take judicial notice that, among Indian estate labourers, children are taken to India by grand-parents or relatives and kept in India for long periods.

ADDAICKALAM *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 233

4. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration as citizen—Prima facie case not established—Failure to show cause—Refusal of application—Right of appeal—Service of notice to applicant—Proof—Sections 9 (2), 15, 20.*

(i) Appeal lies against an order made under Section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act.

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Sivan Pillai v. Commissioner for Registration of Indian and Pakistani Residents (1953) 54 N. L. R. 310, not followed.

(ii) It is provided by Section 20 of the Indian and Pakistani Residents (Citizenship) Act that a notice which is required to be served on an applicant " shall, where it is not served personally on him, be deemed to have been duly served if it has been sent to him by post in a registered letter addressed to his last known place of residence or of business ".

Held, that there should be clear and unambiguous evidence to prove the facts necessary to raise the presumption of law for which provision is made by the Section. Evidence furnished by the presence of two documents in the Commissioner's file, namely, the notice itself and an envelope addressed to the applicant, which bears certain post marks and endorsements, is not sufficient to prove that the notice was sent to the applicant by post in a registered letter, which was eventually returned undelivered.

SOCKALINGAM CHETTIAR *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 283

5. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration—Order of refusal—Procedure that must be followed —Power of Supreme Court to order fresh inquiry—Sections 9, 10, 11, 12, 13, 14 (6) and (7), 15.*

An order refusing an application for registration under the Indian and Pakistani Residents (Citizenship) Act will not be valid if it is made only after holding an inquiry in purported pursuance of section 13 and without compliance with the procedure prescribed in section 9. In such a case the Supreme Court can, by virtue of the appellate jurisdiction conferred by section 15, order that the proper steps be taken.

Obiter : The power to hold an inquiry under section 13 cannot be exercised at any stage after the publication of a statutory notice under section 10.

ANNAMALAI *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 354

6. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration thereunder—Piecemeal inquiry not permissible—Sections 9 (3) (a), 14 (7).*

Where the Commissioner holds an inquiry under section 9 (3) (*a*) of the Indian and Pakistani Residents (Citizenship) Act pursuant to a notice issued under section 9 (1) calling upon the applicant to satisfy him in regard to certain issues, it is his duty to adjudicate upon those matters all at the same time and not by piecemeal investigation. It is not open to him to hold against the applicant on one issue and not deal with the other issues on the ground that it is not necessary to answer them in view of his finding on the issue which he has already considered. Section 14 (7) of the Act contemplates one order, either allowing or refusing the application.

MURUGIAH *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 391

7. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration thereunder—Scope of inquiry—Sections 7 (1) (b), 9 (3) (a).*

A Commissioner holding an inquiry under section 9 (3) (*a*) of the Indian and Pakistani Residents (Citizenship) Act has no jurisdiction to inquire into matters outside the scope of that inquiry. He cannot, therefore, reject an application for registration under the Act on the ground that it is not in conformity with the requirements of section 7 (1) (*b*).

MARIANTHONY *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 431

8. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Sections 6 (2) (i) and 14 (4)—" Suitable employment ".*

An applicant can, in the absence of special circumstances which might indicate the contrary, be assumed to have a suitable employment to support himself and his dependants (irrespective of their number) within the

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meaning of section 6 (2) (*i*) of the Indian and Pakistani Residents (Citizenship) Act if he has an employment which is reasonably likely to be regular and permanent and which is of a common and recognized type.

In the context of the statute, Cages 13 and 14 of the Form of application must be regarded as nothing more than a means of eliciting information as to the employment and income of the applicant and his dependants.

PANDARAM *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 443

9. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Notice under sections 9 (1) and 20—Procedure for service.*

Where a notice issued under section 9 (1) of the Indian and Pakistani Residents (Citizenship) Act is returned unserved and the Commissioner subsequently becomes aware, within three months from the date of the notice, that the applicant has changed his address, the applicant should be informed of the fact that notice under section 9 (1) had been sent to him and had been returned unserved.

MUTTIAH *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 502

10. *See also* WRIT OF HABEAS CORPUS.

Civil Procedure—

1. *Execution of decree—Fiscal's sale—"Irregularity"—Civil Procedure Code, ss. 273, 282 (2)* 1

See EXECUTION OF DECREES (1).

2. Res judicata—"*247 action*"—*Attachment of property—Previous litigation as to title between judgment-debtor and claimant—Rights of judgment-creditor—Execution purchaser is "privy" of judgment-debtor—Civil Procedure Code, s. 247.*

When property attached by a judgment-creditor is the subject of a claim in a "247 action", an earlier judgment upholding the claimant's title to it as against the judgment-debtor would operate as *res judicata* in favour of the claimant.

Kuda Banda v. Dingiri Banda (1911) 14 N. L. R. 145 and *Sandrasegara v. Coomaraswamy* (1917) 4 C. W. R. 378, overruled.

RAMAN *v.* MANICKAM 75

3. *Postponement—Refusal by Court—Withdrawal of Counsel from proceedings—Propriety—Civil Procedure Code, s. 82.* 89

See COUNSEL.

4. *Minor—Power of curator to sell minor's property—Civil Procedure Code, ss. 582 et seq.* 78

See MINORS.

5. *Discovery and Inspection of Documents—Scope and procedure—Objection to inspection on ground that documents do not support opponent's case—Form of affidavit—Civil Procedure Code, ss. 50, 51, 102, 103, 104, 105, 106, 109* 97

See DISCOVERY AND INSPECTION OF DOCUMENTS.

6. *Execution of decree—Writ issued without jurisdiction—Seizure of goods thereunder—Liability for damages—Proof of malice—Quantum of damages—Civil Procedure Code, s. 763* 298

See EXECUTION OF DECREES (3).

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7. *Execution of decree to pay money—Judgment debtor an employee in a shop or office—Liability of his salary and allowances to be seized in execution—Civil Procedure Code, s. 218(m)—Amending Act No. 20 of 1954 has no retrospective effect—Interpretation Ordinance, s. 6 (3) (b and c)* .. 140

See EXECUTION OF DECREES (2).

8. *Civil Procedure Code—Section 84—Non-appearance of plaintiff—Decree nisi—Proper Form.*

Where a decree nisi for non-appearance of plaintiff recited that the action was dismissed " unless sufficient cause be shown to the contrary within *one month* from the date hereof to Court "—

Held, that the decree nisi was not in conformity with Form No. 21 in the First Schedule to the Civil Procedure Code.

RATNAM PILLAI *v.* ABDUL LATIFF 372

9. *Costs—Courts Ordinance (Cap. 6), s. 72—Civil Procedure Code, s. 211* .. 560

See COSTS.

10. *Contempt of Court—Chapter 65 of Civil Procedure Code—Proper procedure—Right of appeal—Courts Ordinance, s. 57—Criminal Procedure Code, ss. 335, 338—Civil Procedure Code, ss. 796, 797, 798—Partition Act, No. 16 of 1951, s. 53* 566

See CONTEMPT OF COURT.

11. *Compromise of suit—Mode of proving it—Civil Procedure Code, s. 408* .. 568

See COMPROMISE OF ACTION.

12. *Summons on defendant—Personal service necessary—Civil Procedure Code, s. 59* 575

See SUMMONS (2).

13. *Execution—Decree for possession of immovable property—Procedure in event of resistance or obstruction to execution of writ—Right of appeal—Civil Procedure Code, ss. 324–327* 542

See EXECUTION OF DECREES (4).

14. *See also* APPEAL ; CIVIL PROCEDURE CODE.

Civil Procedure Code—

Sections 5, 6 193
Sections 50, 51 97
Section 59 575
Section 82 89
Section 84 372
Sections 102–106, 109 97
Section 109 97
Section 154 246
Section 211 560
Section 218 (*m*) 140
Section 247 75
Sections 273, 282 (2) 1
Section 282 (2) 1
Sections 324–327 542
Section 408 568

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Sections 582 *et seq.* 78
Section 756 (1) and (3) 441, 453
Section 763 298
Sections 796, 797, 798 566

See also APPEAL ; CIVIL PROCEDURE.

Compounding of Offences—

Compounding of offences—Scope of Magistrate's jurisdiction—Criminal Procedure Code, s. 290.

A Magistrate, in granting his consent under section 290 of the Criminal Procedure Code to the compounding of an offence, has no jurisdiction to lay down any terms binding the parties.

BENJAMIN *v.* GUNAWARDENA 109

Compromise of Action—

Compromise of suit—Mode of proving it—Civil Procedure Code, s. 408.

Once an action has been instituted, the Court will not take cognizance of a compromise of it unless it is proved by way of an application made under section 408 of the Civil Procedure Code; it cannot be proved by way of issues framed at the hearing of the action.

EASTERN HARDWARE STORES *v.* FERNANDO 568

Conditional release of offenders—

See SENTENCE (4).

Confessions—

Confession—Criminal Procedure Code—Section 134 (3)—" Voluntarily "—Evidence Ordinance, s. 24.

A confession is made " voluntarily " within the meaning of section 134 (3) of the Criminal Procedure Code if it is made in circumstances that do not render it inadmissible by reason of the provisions of section 24 of the Evidence Ordinance.

THE QUEEN *v.* CICILIN 472

Constitutional Law—

Constitution Order in Council, s. 29 (2) 571

See IMMIGRANTS AND EMIGRANTS ACT (2).

Construction of Deeds and Statutes—

1. *Construction of Deeds—Paramount importance of the words used—Intention of parties not material.*

In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used.

FERNANDO *v.* JOSSIE 114

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2. *Execution of decree to pay money—Judgment debtor an employee in a shop or office—Liability of his salary and allowances to be seized in execution—Civil Procedure Code, s. 218 (m)—Amending Act, No. 20 of 1954, has no retrospective effect—Interpretation Ordinance (Cap. 2), s. 6 (3) (b and c).*

The amendment of section 218 (*m*) of the Civil Procedure Code by Act No. 20 of 1954, exempting from seizure in execution of a decree to pay money the salary and allowances of an employee in a shop or office, if such salary and allowances do not exceed Rs. 500 per mensem, does not have any retrospective operation so as to deprive a judgment-creditor, who had obtained a decree in his favour before the date on which the amending Act came into force (viz., March 17, 1954), of his right to seize the salary and allowances payable to his judgment-debtor even after the date of the amendment.

SUPPRAMANIAM CHETTIAR *v.* WAHID 140

3. *Interpretation Ordinance (Cap. 2), s. 6 (3) (b)—" Right acquired "* .. 571

See IMMIGRANTS AND EMIGRANTS ACT (2).

4. *Deed—Sale by two or more persons of their shares of a land—Failure of one of them to sign the deed—Binding effect of deed.*

A, B and C purported to sell to D by the same deed an undivided 8/32 share of a land. The 8/32 share consisted of the 6/32, 1/32 and 1/32 shares of A, B and C respectively. Although the deed of sale (P1) recited C as one of the parties to it, his interest did not actually pass as he either omitted or declined to sign it. Subsequently A transferred the entirety of the land to E. In the present action instituted by D claiming 7/32 share as against E—

Held, that the failure of C, one of the intended executants, to sign the deed P1 did not have the effect of not binding the other parties who executed it.

SABARATNAM *v.* KANDAVANAM 537

Contempt of Court—

1. *Contempt of Court—Chapter 65 of Civil Procedure Code—Proper procedure—Right of appeal—Courts Ordinance, s. 57—Criminal Procedure Code, ss. 335, 338—Civil Procedure Code, ss. 796, 797, 798—Partition Act, No. 16 of 1951, s. 52.*

In an appeal from a conviction for contempt of Court under section 53 of the Partition Act—

Held, (i) that section 335 of the Criminal Procedure Code does not apply in the case of an appeal under section 798 of the Civil Procedure Code.

(ii) that a person cannot be convicted of contempt of Court under the provisions of Chapter 65 of the Civil Procedure Code on the basis of the answers given by him in the course of an interrogation by the Judge.

ABILIAN *v.* DAVITH SINGHO 566

2. *Causing interruption to judicial officer—Must be intentional—Penal Code, s. 223* 116

See CRIMINAL LAW (2).

Contracts—

1. *Tender of money before due date—Quantum of evidence* .. 303

See VENDOR AND PURCHASER (2).

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2. *Tender—Elements necessary.*

Tender of money does not mean mere expression of readiness to pay the money. To constitute tender the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt. Therefore, mere willingness by a tenant to pay the rent due to his landlord does not discharge his obligation to pay the rent.

RAZIK *v.* ESUFALLY 469

3. *Contract—Informal agreement to sell immovable property—Time limit fixed for execution of deed of sale—Deposit of part of purchase price—Forfeiture clause—Failure of purchaser to pay balance sum within stipulated period—Right to claim refund of deposit—Unjust enrichment—Money had and received—Prevention of Frauds Ordinance, s. 2.*

Where, under a non-notarial agreement to sell immovable property, a sum of money is paid in advance by the purchaser, but the sale subsequently falls through, the subsidiary agreement as to the destination of the money paid in advance is severable from the agreement for the sale of the immovable property and is valid.

By a non-notarial agreement the defendant agreed to convey to the plaintiff certain immovable property for Rs. 45,000. The plaintiff paid Rs. 5,000 in advance and it was stipulated in the agreement that, upon payment of the balance sum of Rs. 40,000, the conveyance was to be executed on or before November 8, 1949, i.e., within fifteen days from the date of the agreement. It was also agreed that should the plaintiff not pay the balance consideration within the fixed period, he was to forfeit the deposit of Rs. 5,000 and that should the defendant fail to fulfil his part of the agreement he should pay Rs. 10,000 as compensation to the plaintiff.

The balance sum of Rs. 40,000 was not paid by the plaintiff within the period of 15 days specified in the agreement. In the present action instituted by the plaintiff for the refund of the deposit of Rs. 5,000, the trial Judge found that the failure was due to the fact that essential steps relating to the investigations of the title to the property could not be completed within those 15 days because the defendant could not make available to the plaintiff the title deeds relating to the property ; the defendant therefore agreed to an extension of time, but subsequently on November 18, 1949, he repudiated the contract.

It was also decided by the trial Judge that it was not intended by the parties that time should be of the essence of the contract and that, in law therefore, the condition for the forfeiture of the deposit of Rs. 5,000 meant only that the purchase should be completed on or before November 8, 1949, or within a reasonable time thereafter.

Held, per GUNASEKARA, J., PULLE, J., and SANSONI, J. (BASNAYAKE, C.J., and DE SILVA, J., dissenting), that the plaintiff was entitled to the return of his deposit of Rs. 5,000. Although the informal agreement relating to the sale of immovable property was void by virtue of the provisions of section 2 of the Prevention of Frauds Ordinance, the subsidiary agreement, in the same contract, as to the destination of the deposit of Rs. 5,000 was severable and effect could be given to its terms according to law.

PERERA *v.* ABEYSEKERA 505

Co-operative Societies Ordinance—

1. *Co-operative Societies Ordinance—Rule 29—Dispute between society and employee—Arbitration—Crucial date is date of reference—Second reference to arbitration—Validity—Section 45 (4).*

A second reference to arbitration of the same dispute between a co-operative society and an employee is illegal as long as the first award has not been declared to be invalid by a Court of law.

Where on the date a dispute is referred to arbitration the employee concerned is still in the employ of the society, the reference is regular.

UKKU BANDA *v.* THE RAHATUNGODA CO-OPERATIVE STORES SOCIETY LTD. 683

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2. *Co-operative Societies Ordinance (Cap. 107)—Section 45—Rule 38 (14)—"Legal practitioner".*

Rule 38 (14) of the Co-operative Rules of 1950 provides : "In proceedings before the Registrar or an arbitrator or arbitrators no party shall be represented by a legal practitioner."

Held, that an Advocate who has ceased to practice as a lawyer for such a long period as eighteen years cannot be regarded as a legal practitioner within the meaning of the Rule. The fact that he is entitled to practice as a lawyer at any time does not affect the position.

Obiter : There is no valid objection to a legal practitioner who is a member of the Committee or an office-bearer of a Co-operative Society representing that Society in his capacity as a member of the Committee or an office-bearer.

THE CEYLON COCONUT PRODUCERS CO-OPERATIVE SOCIETIES UNION LTD. *v.* WEERAMANTRY 107

3. *Co-operative Societies Ordinance, as amended by Act No. 21 of 1949—Criminal breach of trust by officer—Section 50B—"Books of accounts"* .. 333

See COURT OF CRIMINAL APPEAL DECISIONS (6).

Co-owners—

1. *Co-owners—Prescription—Transfer of entire land by a co-owner—Transferee's right to prescribe against the other co-owners—Ouster.*

When a co-owner conveys the entire land held in common to a stranger and the latter is aware, at the time he obtains the conveyance, that his vendor is only a co-owner and not the sole owner of the land, prescription will begin to run in the purchaser's favour against the the other co-owners only if there has been an ouster or its equivalent.

KANAPATHIPILLAI *v.* MEERASAIBO 41

2. *Co-owner—Plantation made by him—Acquiescence of other co-owners—Right to possession—Right to order of ejectment.*

A co-owner who makes a plantation on the common property with the acquiescence of his co-owners is entitled to possess the entirety of that plantation as against the other co-owners until the common ownership is terminated by a partition action. It makes no difference if two or more co-owners make the particular improvement and only some of them sue to enforce their rights of possession against a co-owner or any outsider who has no right to enjoy such improvement. The exact share of the person suing in such a case is irrelevant so long as he establishes that the person sued has no right to enjoy the improvement.

Although the co-owner who made the plantation is entitled to an order of ejectment against a person who obtained a lease of the plantation from a co-owner who had no right to enjoy the improvement, an order of ejectment will not be made against the lessor himself, as he is a co-owner of the land.

GUNASEKARA *v.* SILVA 83

3. *Co-owners—Prescriptive possession as between them.*

A person who buys a share of a land and enters into possession of that share as a co-owner, and thereafter purports to buy shares totalling to unity, cannot, by forming a secret intention as to the character of his possession, acquire prescriptive title to the entire land by possessing the whole land.

JAMES *v.* MEDDUMA KUMARIHAMY 560

4. *Co-owners—Transfer of entire property by a co-owner—Transferee's rights—Prescription—Ouster.*

Where a person who is in possession of property as a co-owner transfers the entirety of the common property to a stranger but continues to

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be solely on the land, his continued possession, though covertly on behalf of the transferee, is not adverse to the other co-owners in the absence of evidence of ouster by him of the other co-owners.

SABARATNAM *v.* KANDAVANAM 537

5. *See also* PARTITION ACTIONS.

Costs—

Costs—Courts Ordinance (Cap. 6), s. 72—Civil Procedure Code, s. 211.

The plaintiff brought this action in the District Court claiming a declaration of title to 4/5 share of a land. He was in fact entitled to 1/25 share only, which could have been recovered in the Court of Requests. The defendant, however, denied that the plaintiff had any share at all in the land.

Held, that in the circumstances the provisions of section 72 of the Courts Ordinance, read with section 211 of the Civil Procedure Code, did not disentitle the Court from awarding costs to the plaintiff in the lowest class in the District Court scale.

JAMES *v.* MEDDUMA KUMARIHAMY 560

Counsel—

1. *Postponement—Refusal by Court—Withdrawal of Counsel from proceedings—Propriety—Civil Procedure Code, s. 82.*

When an application for a postponement is refused it is the duty of the Counsel, who made the application, to continue to appear for his client and to conduct the case which has been entrusted to him. The only instance where a withdrawal by him from the proceedings is permissible, and then too only with the leave of Court, is where he has been retained only for the limited purpose of making the application for postponement and such application is refused by the Court.

SYADU VARUSAI *v.* WEERASEKERAM 89

2. *Co-operative Societies Ordinance (Cap. 107)—Section 45—Rule 38 (14)—"Legal practitioner".*

Rule 38 (14) of the Co-operative Rules of 1950 provides: "In proceedings before the Registrar or an arbitrator or arbitrators no party shall be represented by a legal practitioner."

Held, that an Advocate who has ceased to practise as a lawyer for such a long period as eighteen years cannot be regarded as a legal practitioner within the meaning of the Rule. The fact that he is entitled to practise as a lawyer at any time does not affect the position.

Obiter: There is no valid objection to a legal practitioner who is a member of the Committee or an office-bearer of a Co-operative Society representing that Society in his capacity as a member of the Committee or an office-bearer.

THE CEYLON COCONUT PRODUCERS CO-OPERATIVE SOCIETIES UNION, LTD. *v.* WEERAMANTRY 107

Court of Criminal Appeal Decisions—

1. *Rape—Prosecutrix's evidence—Corroboration—Evidence Ordinance, s. 134—Summing-up—Erroneous statement as to evidence—Duty of Counsel to invite Court's attention thereto.*

In a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated.

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Obiter : Where in a summing-up the Judge makes an erroneous statement as to the evidence, he should be invited by Counsel to correct it immediately. Otherwise, an appeal based on such error will not be encouraged.

R. *v.* DHARMASENA 15

2. *Charge of murder—Plea of guilty to a lesser offence—Stage at which it may be taken—Criminal Procedure Code, ss. 6, 221.*

The appellants were indicted on a charge of murder. After two of the eye witnesses had been examined the Court permitted the accused, in the presence of the Jury, to plead guilty to the lesser offence of culpable homicide not amounting to murder. The Court then briefly summarised the evidence already led and asked the Jury whether they wished to accept the plea tendered by the appellants. The Jury, however, were unwilling to accept the plea. The trial then continued and at its conclusion the Jury returned a verdict of murder against the appellants.

It was contended in appeal that the appellants should not have been asked to plead until the Jury had first been asked whether they were willing to accept the plea and signified their willingness.

Held, that the procedure adopted by the trial Judge was not illegal.

Per Curiam :—" It has been the practice for a considerable length of time to accept a plea of guilty to a lesser offence when tendered in the course of a trial even after the accused has been placed in charge of the Jury, the procedure adopted being that prescribed in section 221 (2) with modifications to suit a trial by Jury. Our practice is the same as the English practice and section 6 of our Criminal Procedure Code affords sufficient authority for the adoption of that practice which is not in conflict or inconsistent with the provisions of our Code."

R. *v.* DIAS APPUHAMY 49

3. *Court of Criminal Appeal—Sentence—Grounds for reduction.*

The Court of Criminal Appeal will reduce a sentence when it is excessive, if the sentence does not give effect to the jury's verdict or if the accused has not been given the benefit of any doubt as to the view of the facts upon which the jury have based their verdict.

R. *v.* WEERASINGHE 177

4. *Evidence—Indictment containing two counts—Acquitted on one count—Effect on verdict on the other count—Sentence—Penal Code, s. 478 D.*

Acquittal of an accused person on one count owing to the rejection of the evidence of a particular witness for the prosecution is not necessarily a bar to his being convicted at the same trial on a second count for a similar offence on separate and independent evidence.

Sentence reduced on the ground that it had been imposed on an erroneous basis.

R. *v.* MUNIDASA 180

5. *Court of Criminal Appeal—Sentence—Application for leave to appeal—Formalities necessary—Enhancement of sentence—Court of Criminal Appeal Rules, 1940, Rule 4.*

An application for leave to appeal against the sentence passed on a conviction must be expressly made and must be in conformity with Rule 4 of the Court of Criminal Appeal Rules, 1940. In the absence of such an application the Court of Criminal Appeal has no power to increase the sentence.

R. *v.* HARAMANIS 228

6. *Co-operative Societies Ordinance, as amended by Act No. 21 of 1949—Criminal breach of trust by officer—Section 50B—" Books of accounts ".*

Held (by the majority of the Court), that a conviction for criminal breach of trust under section 50B of the Co-operative Societies Ordinance

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may be based on evidence furnished by not only the account books kept by the accused person but also by reference to documents other than those books.

R. *v.* GUNEWARDENE 333

7. *Charge of murder—Verdict of attempt to commit culpable homicide not amounting to murder—Legality—Criminal Procedure Code, ss. 183 (1), 183A—Penal Code, ss. 294, 300, 301, 490.*

A person charged with murder can, if the evidence warrants it, be convicted of attempt to commit murder or of attempt to commit culpable homicide not amounting to murder within the meaning of section 300 or section 301 respectively of the Penal Code although he was not charged with such offences.

R. *v.* PERIYASAMY 433

8. *Evidence Ordinance—Section 120—Married woman—Marriage subsequently annulled—Competency to testify against former husband.*

In criminal proceedings for violence inflicted on a person other than the accused's wife, a witness who was the wife of the accused at the time of the non-summary inquiry is competent to give evidence for the prosecution at the trial if, prior to the date of the trial, she obtained an order of nullity in respect of her marriage with the accused.

R. *v.* MOHIDEEN 548

Court of Requests—

See JURISDICTION.

Courts Ordinance—

1. *Costs—Courts Ordinance (Cap. 6), s. 72—Civil Procedure Code, s. 211..* 560

See COSTS.

2. *Contempt of Court—Courts Ordinance, s. 57* 566

See CONTEMPT OF COURT.

3. *Minor—Power of curator to sell minor's property—Courts Ordinance, s. 69 (1)—Civil Procedure Code, ss. 582 et seq.* 78

See MINORS.

4. *Writ of Habeas Corpus—Courts Ordinance, s. 45* 85

See WRIT OF HABEAS CORPUS (1).

5. *Privy Council—Conditional leave to appeal—Certiorari—"Civil suit or action"—Courts Ordinance, s. 42—Civil Procedure Code, ss. 5, 6—Appeals (Privy Council) Ordinance, s. 3* 193

See PRIVY COUNCIL (2).

Criminal Law—

1. *Rape—Prosecutrix's evidence—Corroboration—Evidence Ordinance, s. 134.* 15

See COURT OF CRIMINAL APPEAL DECISIONS (1).

2. *Causing interruption to judicial officer—Must be intentional—Penal Code, s. 223.*

In a prosecution under section 223 of the Penal Code for causing interruption to a public servant while such public servant is sitting in

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any stage of a judicial proceeding, the Court has to be satisfied that the act of the accused was intentional.

DEWASURENDRA *v.* ALAHAKOON 116

3. *Criminal Law—Non-disclosure of defence to Police—Inference of guilt.*

The failure or refusal of an accused person to disclose his defence to the Police does not justify an inference of guilt, although it may, in any particular case, affect the weight of the evidence which is led in support of it.

JAYASINGHE *v.* THE LINDULA POLICE 137

4. *Criminal trespass—Misconduct of estate labourer—Refusal to quit estate after dismissal—Estate Labour (Indian) Ordinance (Cap. 112), ss. 2, 4, 5—Service Contracts Ordinance (Cap. 59), ss. 3, 4—Penal Code, s. 433.*

The provisions of section 5 of the Estate Labour (Indian) Ordinance set out below :—

" and every such contract shall be deemed and taken in law to be so renewed (from month to month) unless one month's previous notice be given by either party to the other of his intention to determine the same at the expiry of one month from the day of giving such notice."

are not inconsistent or in conflict with the provisions of section 4 of the Service Contracts Ordinance relating to the determination of a contract on the ground of misconduct. There is nothing " otherwise expressly provided " in the Estate Labour (Indian) Ordinance which could make the provisions of section 4 of the Service Contracts Ordinance inapplicable to the case of an Indian estate labourer.

When an estate labourer who has been dismissed for misconduct remains on the estate contumaciously in circumstances which cannot but annoy the Superintendent, he would be guilty of criminal trespass.

ANGAMUTTU *v.* THE SUPERINTENDENT OF TANGAKELE ESTATE .. 190

5. *Charge of murder—Verdict of attempt to commit capable homicide not amounting to murder—Legality—Criminal Procedure Code, ss. 183 (1), 183A—Penal Code, ss. 294, 300, 301, 490* 433

See COURT OF CRIMINAL APPEAL DECISIONS (7).

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

Criminal Procedure—

1. *Information Book—Statements of persons recorded therein—Their evidentiary value in civil proceedings—Right of a litigant to obtain copies of them —" Public documents "—" Right to inspect "—Proof of Public Documents Ordinance, s. 3—Evidence Ordinance, ss. 74, 76, 100—Criminal Procedure Code, ss. 121 (1), 122*—Mandamus 8

See INFORMATION BOOK.

2. *Charge of murder—Plea of guilty to a lesser offence—Stage at which it may be taken—Criminal Procedure Code, ss. 6, 221* 49

See COURT OF CRIMINAL APPEAL DECISIONS (2).

3. *Evidence—Government Analyst's report—Admissibility—Criminal Procedure Code, s. 406 (3) (4)* 103

See GOVERNMENT ANALYST.

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4. *Compounding of offences—Scope of Magistrate's jurisdiction—Criminal Procedure Code, s. 290* 109

See COMPOUNDING OF OFFENCES.

5. *Indictment containing two counts—Acquittal on one count—Effect on verdict on the other count* 180

See COURT OF CRIMINAL APPEAL DECISIONS (4).

6. *Summons to produce a document or thing—Duty of Court to hear evidence first—Criminal Procedure Code, s. 66 (1)* 236

See SUMMONS.

7. *Conditional release of offenders—Recognizance—Proper Form—Criminal Procedure Code, ss. 80, 82, 325, 327 (4)* 308

See SENTENCE (4).

8. Autrefois acquit—"*Discharge*"—"*Acquittal*"—*Criminal Procedure Code, ss. 190, 191, 330* 406

See PLEA (2).

9. *Charge of murder—Verdict of attempt to commit culpable homicide not amounting to murder—Legality—Criminal Procedure Code, ss. 183 (1), 183A—Penal Code, ss. 294, 300, 301, 490* 433

See COURT OF CRIMINAL APPEAL DECISIONS (7).

10. *Confession—Criminal Procedure Code—Section 134 (3)—"Voluntarily"—Evidence Ordinance, s. 24* 472

See CONFESSIONS.

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

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Sections 190, 191, 330	406
Section 219	424
Section 221	49
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See also COURT OF CRIMINAL APPEAL DECISIONS; CRIMINAL PROCEDURE.

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Criminal Trespass—

See CRIMINAL LAW (4).

Damages—

See DELICTS.

Decree—

See EXECUTION OF DECREES.

Deeds—

See CONSTRUCTION OF DEEDS AND STATUTES.

Defamation—

1. *Defamation—Newspaper report—Privilege*—Animus injuriandi.

In an action for defamation against a newspaper in respect of a report of certain remarks made by a Magistrate concerning the plaintiff in the course of an inquiry into a petition for a mandate in the nature of a writ of *habeas corpus* that had been presented to the Supreme Court, it was shown that the report was fair and substantially accurate and that it was published shortly after the remarks were made in open court.

Held, that the circumstances negatived *animus injuriandi* and that the report was privileged.

DAWITH APPUHAMY *v.* THE ASSOCIATED NEWSPAPERS OF CEYLON, LTD. 241

2. *Defamation—Privilege—Should it be specially pleaded ?*

The defendant in a libel action is entitled to raise the issue of privilege if he has in effect, though not in express words, set up that plea in his answer.

PERERA *v.* BATTAGLIA 447

Delicts—

1. *Execution—Writ issued without jurisdiction—Seizure of goods thereunder—Liability for damages—Proof of malice—Quantum of damages—Civil Procedure Code, s. 763.*

A seizure of goods on a writ issued without jurisdiction renders the party, at whose instance the seizure was effected, liable in damages without proof of malice.

Under the provisions of section 763 of the Civil Procedure Code it is imperative that, in an application for execution of a decree which has been appealed against, the judgment-debtor should be made respondent. A writ which fails to comply with this requirement of section 763 falls into the category of a writ issued without jurisdiction.

It is the duty of a party who is entitled to claim damages to take all reasonable steps to minimise the damages.

WIMALASEKERA *v.* PARAKRAMA SAMUDRA CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD. .. 298

2. *Delict—Master and servant—"Course of employment".*

A master is not responsible for the negligence of his servant where the latter is about his own business with the permission but not at the

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request of or on the direction or order of the master. Therefore, if A permits B, who is a car driver in A's employment, to drive A's car for B's own purposes, A is not liable in damages for B's negligence in doing so.

ELLIS *v.* PARANAVITANE 373

3. *Fraud—Burden of proof—Misdirection—Concealed fraud—Can agent's knowledge be imputed to the principal ?—Prescription* 481

See PRIVY COUNCIL DECISIONS (6).

4. *See also* DEFAMATION.

Deportation Orders—

See WRIT OF HABEAS CORPUS.

Discharge—

Autrefois acquit—" Discharge "—" Acquittal "—Criminal Procedure Code, ss. 190, 191, 330 406

See PLEA (2).

Discovery and Inspection of Documents—

Discovery and Inspection of Documents—Scope and procedure—Objection to inspection on ground that documents do not support opponent's case—Form of affidavit—Civil Procedure Code, ss. 50, 51, 102, 103, 104, 105, 106, 109.

An order for discovery of documents need not be made as a matter of course, but is discretionary and may be resisted by a claim of privilege although no express provision in this behalf is to be found in section 102 of the Civil Procedure Code.

Although section 106 of the Civil Procedure Code does not on its face authorise the Court to refuse inspection of documents, the obligation to produce documents for inspection is much more restricted than the obligation to disclose their existence. One of the main grounds of protection is that the documents relate solely to the case of the party giving the discovery.

Where objection is taken to the inspection of any documents on the ground that they relate solely to the case of the party giving the discovery, the following is the proper procedure :—the party must declare by affidavit that the documents in question support or relate exclusively to his own case and that they contain nothing supporting or tending to support the adversary's case. An assertion in these terms is conclusive " unless the Court is reasonably satisfied or reasonably certain from particular sources that the nature of the document has been erroneously misconceived or that the documents are of such a character that the party cannot properly make such an assertion or the case has been misconceived ". In view of the conclusive effect which an affidavit made in the proper terms may have, a very serious responsibility is imposed on the legal advisers to peruse carefully all the documents and to refrain from advising their client to swear the affidavit unless the documents in question do not even *tend to support* the opponent's case.

Where the party noticed fails to make the appropriate averments in the affidavit, the Court will usually not reject the affidavit without giving the party a further opportunity to make a further affidavit.

NANDAWATHIE DE SILVA *v.* YASAWATHIE DE SILVA .. 97

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Donations—

1. *Donation—Acceptance by unauthorised agent—Validity—Reservation of life-interest in donor—Acceptance after donor's death—Validity.*

Acceptance on behalf of a donee, but without the donee's authority, renders a deed of gift inoperative.

Quaere, whether a deed of gift reserving a life-interest in the donor can be accepted by the donee after the death of the donor.

CAFFOOR *v.* HAMZA 33

2. *Donation by parents to minor child—Acceptance* 313

See PRIVY COUNCIL DECISIONS (3).

3. *Donation—Clause therein conferring benefit on a third party—Acceptance—Applicability of law relating to a contract creating a stipulation in favour of a third party.*

A gift of immovable property by A to B subject to the life interests of A and C is, so far as C is concerned, a contract creating a stipulation in favour of a third party (C). The benefit of the stipulation (life interest) in C's favour may be accepted by C after the death of A.

AHAYANI UMMA *v.* KAMALDEEN 438

4. *See also* FIDEICOMMISSA.

Election Petitions—

See PARLIAMENTARY ELECTIONS.

Emigrants and Immigrants—

See IMMIGRANTS AND EMIGRANTS ORDINANCE.

Entail and Settlement Ordinance—

Exchange of fideicommissary property 313

See PRIVY COUNCIL DECISIONS (3).

Estate Labour (Indian) Ordinance—

See CRIMINAL LAW (4).

Estoppel—

See EVIDENCE (11), (12).

Evidence—

1. *Rape—Prosecutrix's evidence—Corroboration—Evidence Ordinance, s. 134* 15

See COURT OF CRIMINAL APPEAL DECISIONS (1).

2. *Claim against a dead man's estate—Standard of proof required* .. 25

See PRIVY COUNCIL DECISIONS (1).

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3. *Communication made to public officer in official confidence—Privilege—Applicability of English law—Evidence Ordinance, ss. 100, 123, 124, 125, 162 (2).*

Sections 123 and 124 of the Evidence Ordinance do not correspond with the English law on the same subject, and the general principle by which the English Courts are guided is not applicable to cases falling under section 124.

When a public officer objects to the production of a document on the ground that it is a communication made in official confidence, the Court has jurisdiction under section 124, read with section 162 (2), of the Evidence Ordinance to inspect the document and admit it in evidence if it is of opinion that the communication was not made in official confidence. The expression " communication made in official confidence " would include not merely inter-official correspondence but also correspondence by members of the public with public officials. The mere mark " confidential " placed on a document by the individual who writes it does not convert the document into a communication made in official confidence.

Obiter : If a Court agrees that the communication was made in official confidence, it can determine by inspection whether the production of the communication would or would not be prejudicial to the public interest.

KEERTHIRATNE *v.* GUNAWARDENE 62

4. *Government Analyst's report—Admissibility—Criminal Procedure Code, s. 406 (3) (4)* 103

5. *Evidence Ordinance—Section 90—Document thirty years old—" Proper custody "—Will executed in 1850—Proof thereof—Frauds and Perjuries Ordinance, No. 7 of 1840, s. 15* 126

See WILLS.

6. *Criminal Law—Non-disclosure of defence to Police—Inference of guilt.*

The failure or refusal of an accused person to disclose his defence to the Police does not justify an inference of guilt, although it may, in any particular case, affect the weight of the evidence which is led in support of it.

JAYASINGHE *v.* THE LINDULA POLICE 137

7. *Evidence*—Actio rei vindicatio—*Boundaries of land in dispute—Deeds tendered in evidence without objection by opposing party—Evidentiary value of statements therein—Civil Procedure Code, s. 154—Evidence Ordinance, ss. 32, 91, 92.*

To identify the premises in dispute in an action of declaration of title to immovable property, the Court may take into consideration statements of boundaries in title deeds of adjoining lands belonging to persons who are strangers to the action and who have not been called to give evidence. The evidence of such title deeds may become inadmissible only if objection to their production is taken in the court of first instance ; they cannot be objected to for the first time in appeal.

Peeris v. Savunhamy (1951) 54 N. L. R. 207 and *Solomon v. William Singho* (1952) 54 N. L. R. 512, not followed.

SEYED MOHAMED *v.* PERERA 246

8. *Evidence—Expert—Must he always give reasons for his opinion ?—Evidence Ordinance s. 51—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 22, 76.*

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In a prosecution for unlawful possession of parts of a hemp plant, an Excise Inspector who was specially trained to identify parts of hemp plants expressed the view that a parcel which was in the possession of the accused contained parts of the hemp plant botanically called *canabis sativa*. No objection was taken to the evidence of the expert.

Held, that the evidence of the expert could not be rejected merely because he did not state the grounds upon which he based his opinion.

VALLIAMMAI *v.* WEBER 383

9. *Evidence Ordinance, ss. 91, 92 (proviso 2)* 457

See PRIVY COUNCIL DECISIONS (5).

10. *Confession—Criminal Procedure Code—Section 134 (3)—"Voluntarily"—Evidence Ordinance, s. 24* 472

See CONFESSIONS.

11. *Estoppel—Sale of mortgaged property—Bids made by mortgagee—Mortgagee's right to enforce bond subsequently—Partition Ordinance, s. 12—Evidence Ordinance, s. 115.*

Where a mortgaged land was put up for sale under a partition decree and the mortgagee, who was not a party to the action, made bids at the sale—

Held, that the making of bids by the mortgagee did not constitute an unequivocal representation by him that the land was not subject to a mortgage. The mortgagee, therefore, was not estopped by section 115 of the Evidence Ordinance from enforcing his mortgage bond subsequently.

SALISHAMY *v.* SALISHAMY 489

12. *Evidence—Estoppel—Principles applicable.*

In order to create a valid estoppel there must be not only action by one party on the faith of the declaration or act of the other party but also such action must be to his detriment. Performance, therefore, of what is a legal obligation cannot create an estoppel. Further, there must be a direct connection between the action taken by the party prejudiced and the false impression created by the representation (or conduct) of the other party.

EASTERN HARDWARE STORES *v.* FERNANDO 568

13. *Evidence Ordinance—Section 120—Married woman—Marriage subsequently annulled—Competency to testify against former husband.*

In criminal proceedings for violence inflicted on a person other than the accused's wife, a witness who was the wife of the accused at the time of the non-summary inquiry is competent to give evidence for the prosecution at the trial if, prior to the date of the trial, she obtained an order of nullity in respect of her marriage with the accused.

THE QUEEN *v.* MOHIDEEN 548

14. *See also* EVIDENCE ORDINANCE.

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Section 162 (2) 62

See also EVIDENCE

Exceptio rei venditae et traditae—

See VENDOR AND PURCHASER (6).

Excise Ordinance—

1. *Excise Ordinance—Section 44—Charge of possession of unlawfully manufactured liquor—Quantum of evidence.*

In a prosecution for possession of unlawfully manufactured liquor in breach of section 44 of the Evidence Ordinance, the sole evidence relied on by the complainant was a report of the Government Analyst that the liquor in question did not fall within the categories of (1) approved brands of imported liquors, and (2) liquors manufactured under licences issued under the Excise Ordinance.

Held, that the Government Analyst's report was not sufficient to prove beyond reasonable doubt that the liquor in question was unlawfully manufactured.

FERNANDO *v.* GOONEWARDENA 22

2. *Excise Ordinance—Section 44—Charge of possession of unlawfully manufactured arrack—Quantum of evidence—Manufacture of arrack—Is it a Government monopoly ?*

In a prosecution for possession of unlawfully manufactured arrack in breach of section 44 of the Excise Ordinance, the Court will not take judicial notice that any arrack that is not what is called Government arrack is unlawfully manufactured arrack.

PEIRIS *v.* THAMOTHERAM 94

3. *Excise Ordinance (Cap. 42)—Section 55—Ayurvedic physician—Is he a "medical practitioner" ?—Medical Ordinance, No. 2 of 1905—Indigenous Medical Ordinance, No. 17 of 1941.*

A qualified ayurvedic physician duly registered as a general practitioner in the Register kept by the Board of Indigenous Medicine is a medical practitioner within the meaning of section 55 of the Excise Ordinance.

WADOOD *v.* COORAY 234

4. *Excise Ordinance (Cap. 42)—Section 55—Ayurvedic physician—Is he a "medical practitioner" ?—Indigenous Medicine Ordinance, No. 17 of 1941, s. 9—Medical Ordinance (Cap. 90), s. 32, 35–40, 68.*

A practitioner of indigenous medicine registered under section 8 of the Indigenous Medicine Ordinance is not a medical practitioner within the meaning of that term as used in section 55 of the Excise Ordinance.

KONE *v.* ILLUKUMBURA 377

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5. *Excise Ordinance—Section 44—Charge of possessing unlawfully manufactured liquor ("Cider")—Quantum of evidence.*

Where a liquid in a pot was found to contain 6·2% of alcohol within a fairly short interval of time after it was discovered—

Held, that it could be reasonably presumed that at the time of the detection itself there could have been no appreciable difference in the percentage of alcohol in the liquid.

Held further, that where the evidence establishes that the liquor is not an approved brand of imported liquor but is tea cider, no reasonable doubt can arise as to whether it is liquor manufactured in Ceylon.

DISSANAYAKE *v.* SURAWEERA 429

6. *Excise Ordinance (Cap. 42)—Section 51 (2)—Order of confiscation thereunder—Quantum of evidence to justify such order.*

A vehicle in which an excisable article was transported is liable to be confiscated under section 51 (2) of the Excise Ordinance if there is evidence of circumstances showing that the owner was aware of the purpose for which the car was being used and acquiesced in its use for that purpose. The failure of the owner to give evidence explaining such circumstances would raise a very strong presumption of guilt against him.

VERONICA *v.* PERERA 549

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

Execution of Decrees—

1. *Execution of decree—Fiscal's sale—"Irregularity"—Civil Procedure Code, ss. 273, 282 (2).*

The expression "irregularity" in section 282 (2) of the Civil Procedure Code includes an illegality.

Certain immovable property was sold by the Fiscal in execution of a decree. The property consisted of three blocks of land, and, admittedly, the sale was held at a place which, although the Fiscal's officer honestly believed it to be part of the property he was selling, was actually 636 feet away from the nearest of the blocks. Clearly the sale did not take place on any of the blocks which were advertised for sale.

Held, that the failure to conduct the sale "on the spot" as required by section 273 of the Civil Procedure Code was an irregularity within the meaning of section 282 (2). Accordingly, the sale could not be set aside on that ground as the applicant had not proved to the satisfaction of the Court that he had sustained substantial injury by reason of the irregularity. Furthermore, the failure of the applicant to make his application within the prescribed time limit was a fatal omission.

USOOF *v.* NADARAJAH CHETTIAR 1

2. *Execution of decree to pay money—Judgment debtor an employee in a shop or office—Liability of his salary and allowances to be seized in execution—Civil Procedure Code, s. 218 (m)—Amending Act No. 20 of 1954 has no retrospective effect—Interpretation Ordinance (Cap. 2), s. 6 (3) (b and c).*

The amendment of section 218 (*m*) of the Civil Procedure Code by Act No. 20 of 1954 exempting from seizure in execution of a decree to pay money the salary and allowances of an employee in a shop or office, if such salary and allowances do not exceed Rs. 500 per mensem, does not have any retrospective operation so as to deprive a judgment-creditor, who had obtained a decree in his favour before the date on which the amending Act came into force (viz., March 17, 1954), of his right to seize the salary and allowances payable to his judgment-debtor even after the date of the amendment.

SUPPRAMANIAM CHETTIAR *v.* WAHID 140

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3. *Execution—Writ issued without jurisdiction—Seizure of goods thereunder—Liability for damages—Proof of malice—Quantum of damages—Civil Procedure Code, s. 763.*

A seizure of goods on a writ issued without jurisdiction renders the party, at whose instance the seizure was effected, liable in damages without proof of malice.

Under the provisions of section 763 of the Civil Procedure Code it is imperative that, in an application for execution of a decree which has been appealed against, the judgment-debtor should be made respondent. A writ which fails to comply with this requirement of section 763 falls into the category of a writ issued without jurisdiction.

It is the duty of a party who is entitled to claim damages to take all reasonable steps to minimise the damages.

WIMALASEKERA *v.* PARAKRAMA SAMUDRA CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD. .. 298

4. *Execution—Decree for possession of immovable property—Procedure in event of resistance or obstruction to execution of writ—Right of appeal—Civil Procedure Code, ss. 324-327.*

In every case of resistance or obstruction to execution of a decree for the possession of immovable property, application for relief is first made under section 325 of the Civil Procedure Code, and the three succeeding sections (including the new section 327A added in 1949) provide for alternative orders which may be made upon such an application.

Where the complaint is one of hindrance subsequent to delivery of constructive possession, the application under section 325 should be made within one month of the date of the hindrance.

Where the Court purports to act summarily under section 327A (after the inquiry under section 377 (*b*)) upon the ground of frivolousness or vexatiousness set out in section 327A , the order is not appealable.

GUNARATNE *v.* DE SILVA 542

Executors and Administrators—

See ADMINISTRATION OF ESTATES.

Fideicommissa—

1. *Minor—Power of curator to sell minor's property—Fideicommissum—Unborn potential fideicommissaries—Right of an existing fideicommissary to sell his* spes*—Courts Ordinance (Cap. 6), s. 69 (1)—Civil Procedure Code, ss. 582* et seq.

Sale of a minor's property by his curator without the proper sanction of the Court is *ipso jure* void. If the minor subsequently seeks to vindicate title to that property, the burden is on the alienee to show that the Court's sanction for the sale was validly obtained.

A person donated certain property to his son, A, subject to a fideicommissum in favour of such children of A as would be alive at the time of A's death. Before the class of potential fideicommissaries was yet capable of ascertainment and when A had three sons, one of whom was a minor, application was made to Court by a person to be appointed curator of the estate of the minor under Chapter 40 of the Civil Procedure Code " for the purpose of selling the rights of the said minor's one-third share " of the property. The application was allowed after a perfunctory inquiry, and in April 1925 the curator purported to convey to X " all the right, title, interest, claim and demand whatsoever " of the minor in the property. The fiduciary, A, did not die until 25 years later, in 1950.

Held, that the burden of proving that the Court had interposed its consent to the purported sale of the minor's interests in the property was not discharged. In the first place, the minor was not at that time vested with the undivided one-third share which alone had been authorised to be

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sold. Secondly, authority to sell a minor's property cannot validly be granted without reference to a specified consideration. Finally, the person appointed as curator had not obtained the sanction of the Court to dispose of the mere *spes* which was all that the minor did enjoy in 1925 ; the authority to sell the future contingent interest of a ward of the Court cannot validly be granted unless " the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries ". For these reasons the sale to X was of no force or avail against the minor.

CASSALY *v.* BUHARY 78

2. *Fideicommissum—Gift to bride and bridegroom and the children of the bride's womb for ever—Construction—Prohibition against alienation out of the family.*

When A was about to marry B, A's father donated certain lands to them " by way of dowry " and the deed further provided that they shall " take charge of their properties and their rights and they and their children by her (A's) womb shall enjoy the possession of these properties according to their wish for ever. "

Held, that the deed did not create a fideicommissum in favour of the children of A and B. There was no implied prohibition against alienation out of the family.

KRISHNAPILLAI *v.* MANICAM 185

3. *Prescription—Claim against fideicommissaries—Burden of proof—Evidence Ordinance, s. 106—Prescription Ordinance, ss. 3, 13* .. 217

See PRIVY COUNCIL DECISIONS (2). .. ..

4. *Donation by parents to minor child—Acceptance—Fideicommissum in favour of family—May be " single " or " recurring (multiplex) "—Acceptance of such gifts—Revocability—Entail and Settlement Ordinance (Cap. 54), ss. 4, 5, 7, 8—Exchange of fideicommissary property thereunder—Effect thereof on rights of fiduciaries and fideicommissaries—Bona fide purchaser from fiduciary—His position as against the fideicommissary—Partition of fideicommissary property by the fiduciaries—Binding effect on the fideicommissaries* 313

See PRIVY COUNCIL DECISIONS (3).

5. Fideicommissum *by last will—No personal benefit conferred on* fiduciarius *—Validity—Trusts Ordinance (Cap. 72), s. 3 (a).*

There can be a *fideicommissum* without any conferment of rights on the *fiduciarius* to enjoy the fruits and profits of the fideicommissary property.

A testatrix left a will dated 21st May 1902 appointing A—, one of her brothers, as " executor " to look after her five lands and " to collect the income derived from them and to hand them over " to her child, who was 5 days old when the will was made. The will proceeded :—" And so my brother A—shall accept these properties and the child from this day until she becomes a major, and in the meantime to take the income and to spend same for the use of the said child according to his own wish reasonably, and to preserve the balance income and the properties and when the child becomes major to give these as dowry to the child and the bridegroom . . . . And if the child happens to die before this, the said A—shall give away these properties to my brothers or their heirs ". The testatrix died in 1902 and her child died in 1904.

Held, that the will created a valid *fideicommissum*. According to the will, the executor was the *fiduciarius*, and the *fideicommissarius* was the daughter of the testatrix ; in the event of the daughter's death before she attained majority, the brothers of the testatrix became *fideicommissarii*.

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Fiscal's Sale—

See EXECUTION OF DECREES.

Fraud—

1. *Fraud—Burden of proof—Misdirection—Concealed fraud—Can agent's knowledge be imputed to the principal ?—Prescription* 481

See PRIVY COUNCIL DECISIONS (6).

2. *Fraudulent alienation.*

See PAULIAN ACTIONS.

3. *See also* PREVENTION OF FRAUDS ORDINANCE.

Gifts—

See DONATIONS.

Government Analyst—

Evidence—Government Analyst's report—Admissibility—Criminal Procedure Code s. 406 (3) and (4).

The whole of a report issued by a Government Analyst under section 406 (3) of the Criminal Procedure Code is admissible in evidence.

SELVAN *v.* SENARATNE 103

Habeas Corpus—

See WRIT OF HABEAS CORPUS.

Hiring Car—

See MOTOR VEHICLES.

Housing and Town Improvement Ordinance—

Housing and Town Improvement Ordinance (Cap. 199)—Refusal by Chairman to approve building plans—Scope of right of appeal—By-laws—Sections 5, 7, 16, 86.

By-laws 3 and 4 enacted under the enabling powers conferred by section 28 of the Housing and Town Improvement Ordinance provide :—

"3. . . . . no person shall within a residential area, ... except with the written permission of the Chairman erect a building for the purpose of being used as . . . . a shop . . . .

4. Permission to erect a new building for any purpose set out in by-law 3 shall be refused by the Chairman unless the following conditions are fulfilled :— . . . . "

Held : (i) There is no right of appeal to the Tribunal of Appeal against the refusal of the Chairman to grant written permission under by-law 3.

(ii) Where application is made for the approval of plans for the erection in a residential area of any building referred to in by-law 3, the Chairman is bound under section 7 of the Housing and Town Improvement Ordinance

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to refuse approval of the plans, unless written permission for the erection of that building has already been or is simultaneously granted in terms of the by-laws.

(iii) Every refusal to approve plans is appealable to the Tribunal of Appeal; but where the proposed building is one for the erection of which written permission under the by-laws is required, the appeal must necessarily fail if such permission has not in fact been granted.

KARUNARATNE *v.* FERNANDO 257

Immigrants and Emigrants Act—

1. *Immigrants and Emigrants Act, No. 20 of 1948—Section 45 (1) (c), as amended by s. 20 (1) of Act No. 16 of 1955— Difference between "transports" and "causes to be transported."*

A person would be guilty of "transporting" an illegal immigrant within the meaning of section 45 (1) (*c*) of the Immigrants and Emigrants Act if, with guilty knowledge, he personally takes an illegal immigrant in a car, although the car is a borrowed one and the driver's services have been hired.

SUBRAMANIAM *v.* ARIYA PERERA.. 238

2. *Immigrants and Emigrants Act, No. 20 of 1948—Sections 10 and 14 (3) (b)—Effect thereon of Amending Act No. 16 of 1955, ss. 7, 26 (1)—Constitution Order in Council, 1946, s. 29 (2)—Interpretation Ordinance (Cap. 2), s. 6 (3) (b).*

A non-citizen holding a temporary residence permit issued under the Immigrants and Emigrants Act No. 20 of 1948 is precluded by section 10 of that Act, as amended by Act No. 16 of 1955, from having it renewed or extended, although, prior to the date of the Amending Act, he would have been entitled to the renewal or extension of the permit under section 14 (3) (*b*) of the principal Act. The amended section 10 of the Immigrants and Emigrants Act is not *ultra vires* of the Legislature as being in conflict with the provisions of section 29 (2) of the Constitution Order in Council.

The right conferred by the former section 14 (3) (*b*) of the principal Act cannot properly be deemed to be a "right acquired" within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance.

MEERA *v.* DIAS 571

3. *Deportation Order—Power of Court to inquire into its reasonableness—Effect of words "deems it to be conducive to the public interest"—Power of Minister to elect between Deportation Order and Removal Order—Immigrants and Emigrants Act, ss. 28, 31, 45—Amending Act, No. 16 of 1955* 85

See WRIT OF HABEAS CORPUS.

Income Tax—

1. *Income tax—Death of person carrying on a business—Computation of statutory income—"Ceases to carry on a business"—Income Tax Ordinance (Cap. 188), ss. 5 (1), 11 (1), 11 (6), 11 (9), 11 (10).*

When a person who carries on a business dies, it cannot be said that, upon his death, he ceases to carry on or exercise a trade, business, profession or vocation in Ceylon within the meaning of section 11 (6) of the Income Tax Ordinance. Therefore, paragraph (*b*) of section 11 (6) does not apply for the purposes of computing the statutory income of the deceased for the year of assessment preceding that in which he died.

COMMISSIONER OF INCOME TAX *v.* PEIRIS 4

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2. *Income Tax Ordinance (Cap. 188)—" Trade "—" Business "—Requirement of repetition of activity—Sections 2, 6 (1) (a), 6 (1) (h).*

An isolated transaction does not amount to carrying on or exercising a trade or business within the meaning of section 6 (1) (*a*) of the Income Tax Ordinance so as to render the profits of the transaction liable to taxation.

A land owned by the assessee's wife was requisitioned during the war, and the Admiralty erected ten hangars thereon. After the war, availing himself of the concession granted by the Admiralty to owners of requisitioned land of purchasing the buildings erected thereon, the assessee bought nine of the hangars and made a profit by re-selling them.

Held, that the purchase and re-sale of the hangars did not come within the expression "trade" or "business" in section 6 (1) (*a*) of the Income Tax Ordinance. The sum, therefore, earned by the assessee was not liable to tax as being profits within the meaning of section 6 (1) (*a*).

COMMISSIONER OF INCOME TAX *v.* DE ZOYSA 121

3. *Income tax—Profits Tax Act, No. 5 of 1948—Section 9—" Capital employed in the business "*.

Where a limited company engaged in producing tea retained in the form of cash the equivalent of the amounts that were likely to be needed for the payment of (*a*) the income tax that would shortly fall due, and (*b*) dividends that would shortly be declared—

Held, that the sum of money so retained was " capital employed in the business " within the meaning of section 9 of the Profits Tax Act, No. 5 of 1948.

COMMISSIONER OF INCOME TAX *v.* THE GLASGOW ESTATE CO., LTD. 289

Indian and Pakistani Residents (Citizenship) Act—

See CITIZENSHIP.

Indictment—

Indictment containing two counts—Acquittal on one count—Effect on verdict on the other count 180

See COURT OF CRIMINAL APPEAL DECISIONS (4).

Indigenous Medical Ordinance—

See EXCISE ORDINANCE (3).

Infants—

See MINORS.

Information Book—

Information Book—Statements of persons recorded therein—Their evidentiary value in civil proceedings—Right of a litigant to obtain copies of them—" Public documents "—" Right to inspect "—Proof of Public Documents Ordinance, s. 3—Evidence Ordinance, ss. 74, 76, 100—Criminal Procedure Code, ss. 121 (1), 122—Mandamus.

A party to an action is not entitled to resort to section 3 of the Proof of Public Documents Ordinance in order to obtain certified copies of statements taken down in an Information Book in terms of sections 121 (1)

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and 122 (1) of the Criminal Procedure Code unless he can show that at the trial of the action it will be necessary for him to adduce proof of the contents of those statements.

A statement reduced into writing by a police officer in terms of section 122 (1) of the Criminal Procedure Code is not a statement of the witness, a record of which it purports to be, but is the statement of the police officer as to what the witness told him. Therefore, a certified copy of such a statement cannot be used in civil proceedings either to corroborate or to contradict the witness whose statement it purports to be.

A first information recorded in terms of section 121 (1) of the Criminal Procedure Code is of little or no value if the informant, after having access to the statement and becoming aware of its contents, seeks to use it to corroborate his own evidence.

Semble : In the absence of specific statutory provision, a person is not entitled to inspect a public document and to be furnished with a certified copy of it. The documents which a person "has a right to inspect" within the meaning of section 76 of the Evidence Ordinance are only those in respect of which the right of inspection is expressly conferred by enactment.

The Attorney-General v. Geetin Singho (1956) 57 N. L. R. 289, dissented from.

BUDDHADASA *v.* MAHENDRAN 8

Interpretation of Statutes—

See CONSTRUCTION OF DEEDS AND STATUTES.

Interpretation Ordinance—

See CONSTRUCTION OF DEEDS AND STATUTES.

Irrigation Ordinance—

Irrigation Ordinance (Cap. 312)—Certificate of sale in favour of Crown—Nature of Crown's title—Sections 2 (1) (4), 66 (2), 68—Registration of Documents Ordinance (Cap. 101), s. 7 (1).

Where land sold under the Irrigation Ordinance for non-payment of irrigation rates due in respect of it is purchased by the Crown and a certificate is thereafter issued vesting title in the Crown, all previous titles to the land must, by virtue of sections 2 and 66 (2) of the Ordinance, be regarded as wholly extinguished, or suspended, by operation of law, and a new title is created in the Crown which is good against all persons. Accordingly, a subsequent transferee from the original owner of the land cannot claim title to it by priority of registration as against the Crown.

VELLAITHAMBY *v.* THE ATTORNEY-GENERAL 486

Jurisdiction—

Landlord and tenant—Trespasser who claims to be tenant—Suit against him by landlord—Jurisdiction of Court of Requests to hear case.

Where an owner of premises sues a trespasser for ejectment and damages and the defendant, without disputing the plaintiff's title to the property, contends that he is the lawful tenant of the plaintiff, the jurisdiction of the Court to try the case does not depend on the value of the premises.

PERERA *v.* LIYANAGAMA 454

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Kandyan Law—

1. *Kandyan Law—Adoption—Inference from facts and circumstances—Oral public declaration not essential—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, s. 7.*

Evidence of a public declaration by the adoptive parent on a formal occasion that a particular child was adopted for the purpose of inheriting his estate is not necessary in order to prove the fact of adoption of an heir under the Kandyan Law (prior to the commencement of the Kandyan Law Declaration and Amendment Ordinance). All that is needed is reliable, clear and unmistakable evidence in whatever form of the adoptive parent's intention to make the foster child his heir.

Tikiri Banda v. Loku Banda (1905) 2 Bal. R. 144 and *Tikiri Kumarihamy v. Punchi Banda* (1901) 2 Browne 299, not followed.

DAYANGANIE *v.* SOMAWATHIE 337

2. *Kandyan Law—Diga marriage—Is marriage certificate sufficient proof?—Burden of proof—Forfeiture of paternal inheritance—Evidence Ordinance (Cap. 11), s. 114—Amended Kandyan Marriage Ordinance, No. 3 of 1870.*

In cases governed by the Amended Kandyan Marriage Ordinance of 1870 the production of a diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance ; the burden thereafter shifts to her, or to those claiming through her, to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place.

JAMES *v.* MEDDUMA KUMARIHAMY 560

Land Acquisition—

Land acquisition—Decision of Land Commissioner to acquire a land under Land Redemption Ordinance—Jurisdiction of District Court to question its validity—Land Redemption Ordinance, No. 61 of 1942, s. 3 (1) (4) (5)—Land Acquisition Act, No. 9 of 1950, ss. 5, 10.

Having regard to the limited and special jurisdiction of a District Court in land acquisition proceedings under the Land Acquisition Act, a District Court is not the proper forum to adjudicate on the validity of a determination made by the Land Commissioner that a particular land which is sought to be acquired by him is of the description contained in section 3 (1) of the Land Redemption Ordinance.

SIVANATHAN *v.* VANDERPOORTEN.. 553

Land Redemption Ordinance—

Land acquisition—Decision of Land Commissioner to acquire a land under Land Redemption Ordinance—Jurisdiction of District Court to question its validity—Land Redemption Ordinance, No. 61 of 1942, s. 3 (1) (4) (5)—Land Acquisition Act, No. 9 of 1950, ss. 5, 10 553

See LAND ACQUISITION.

Land Registration—

See REGISTRATION OF DOCUMENTS.

Landlord and Tenant—

1. *Rent Restriction Act—Meaning of term "premises"—How far it includes land on which a building stands.*

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Where a property consisting of a house and garden is let as one unit, the landlord cannot subsequently claim that the standard rent should be calculated on the basis that the premises let consists of two parts and that only the portion where the house stands is subject to the provisions of the Rest Restriction Act, to the exclusion of the remaining bare land.

Where a house has been let together with land, what one has to ascertain is whether the house is an adjunct of the land or the land an adjunct of the house. It is a pure question of fact. If the land is considered to be an adjunct of the house, the Rent Restriction Act will apply, but if the converse is the case the Act will not apply.

NALLATHAMBY *v.* LEITAN 56

2. *Landlord and tenant—Advance rent received by landlord—Right of tenant to set off unpaid rent—" Receipts " of money—Rent Restriction Act, No. 29 of 1948, ss. 8, 13 (1).*

Where a landlord accepts from his tenant a sum of money in advance to be accounted as and for rent, the tenant is entitled to set off unpaid rent against the sum so held by the landlord.

David Appuhamy v. Subramaniam (1953) 55 N. L. R. 397, distinguished.

A settlement in account may be equivalent to a receipt of a sum of money although no money may pass.

MEERA *v.* JAYAWARDENE 159

3. *Pleadings—Amendment of plaint—Lessor and lessee—Action against overholding lessee—Plea of prescriptive title raised by defendant—Right of plaintiff to amend plaint so as to alter action into one of* rei vindicatio*—Distinction between tenancy action and vindicatory action.* .. 169

See PLEADINGS.

4. *Rent Restriction Act, No. 29 of 1948—Section 13—" Arrear of rent "—Informal written agreement between landlord and tenant—Deposit of sum to cover last two months' rental—Should it be set off against any unpaid rent ?—Prevention of Frauds Ordinance.*

A tenant would be in arrear of rent within the meaning of section 13 of the Rent Restriction Act even if a small portion only of the rent due remains unpaid.

An informal written contract of monthly tenancy contained a recital that the tenant had deposited a certain sum of money to be taken as rent for the last two months " on the determination of the tenancy by consent or by process of law ".

Held, that the landlord was not bound, even without a request of the tenant in that behalf, to apply the deposited sum in satisfaction of unpaid rent for any two months. It could not be contended that the provision in the agreement regarding the deposit of two months' rent was unlawful as being in breach of the Prevention of Frauds Ordinance in that it purported to have the effect of creating a tenancy for a period longer than one month.

MACKEEN *v.* SALLIEH 231

5. *Landlord and tenant—Informal lease bond—Its effect as contract of monthly tenancy—Sale of leased premises—Right of purchaser to sue tenant for rent—Attornment.*

When a person is in occupation of land as lessee under an informal document which does not comply with the provisions of section 2 of the Prevention of Frauds Ordinance, the lease must be regarded as from month to month and not for any longer period stated in the document.

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When leased premises have been sold by the landlord, the tenant who receives notice of the purchaser's election to recognise him as tenant is not entitled to deny his attornment to the purchaser if he continues to be in occupation without informing the purchaser that he does not elect to attorn to him.

SABAPATHIPILLAI *v.* RAMUPILLAI 367

6. *Rent Restriction Act—Purpose for which landlord requires premises—Difference between averment in plaint and issue raised at trial—Effect on* bona fides *of landlord's claim—Alternative accommodation—Should sub-tenants' needs be considered ?*

The fact that the plaintiff stated at the trial that he required the premises as a place of residence and proceeded to trial upon that footing without objection, though in his plaint he had stated that he required them as a place of business, is not a circumstance that negatives the *bona fides* of the plaintiff's claim.

The premises were occupied by the 1st defendant as tenant, who had sub-let portions of them to the 2nd and 3rd defendants. No attempt was made by the tenant to get alternative accommodation for himself alone, but it was said that alternative accommodation for him and his sub-tenants was not available.

Held, that in determining the reasonable needs of the plaintiff as against the tenant, the needs of the sub-tenants should not be taken into consideration.

NOORBHOY *v.* SELLAPPA CHETTIAR 389

7. *Landlord and tenant—Monthly tenancy—Death of tenant—Effect on contract of tenancy—Rent Restriction Act, s. 18.*

On the death of a monthly tenant the contract of tenancy terminates at the end of the month in which the tenant dies, and the heirs or executors of the deceased tenant are not entitled to occupy the premises thereafter except upon a fresh contract with the landlord or unless they can avail themselves of section 18 of the Rent Restriction Act.

ABDUL HAFEEL *v.* MUTTU BATHOOL 409

8. *Rent Restriction Act—" Alternative accommodation "—Burden of proof.*

Where a landlord seeks ejectment of his tenant on the ground that the premises let are reasonably required for occupation by him, the tenant need not prove that he tried to look for alternative accommodation for himself if there is already sufficient proof that the landlord has at nis disposal suitable premises which he can without difficulty appropriate for his own use.

SARIS SILVA *v.* SUMATHIPALA 427

9. *Rent Restriction Act—Section 13—Arrears of rent—Tender of rent—Elements necessary to constitute tender—Overholding lessee—Liability to pay rent.*

Tender of money does not mean mere expression of readiness to pay the money. To constitute tender the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt. Therefore, mere willingness by a tenant to pay the rent due to his landlord does not discharge his obligation to pay the rent.

Under the Rest Restriction Act an overholding tenant under a notarial lease is liable to be ejected if he fails to pay rent for one month after it has become due.

RAZIK *v.* ESUFALLY 469

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10. *Landlord and tenant—Partnership—Can it be a tenant?—Trespasser who claims to be tenant—Suit against him by landlord—Jurisdiction of Court of Requests to hear case.*

If a landlord is aware, before he lets his premises to a tenant, that a partnership business is to be carried on in the premises by the tenant and certain other persons, no contract of tenancy arises between the landlord and the partners unless it is agreed between the landlord and the partners that the latter are to be the tenants. Although the partners in their individual capacity can enter into a contract of tenancy, a partnership as such cannot do so.

Where an owner of premises sues a trespasser for ejectment and damages and the defendant, without disputing the plaintiff's title to the property, contends that he is the lawful tenant of the plaintiff, the jurisdiction of the Court to try the case does not depend on the value of the premises.

PERERA *v.* LIYANAGAMA 454

11. *Rent Restriction Act, No. 29 of 1948—Sub-letting—Sale of premises—Right of purchaser to evict tenant and sub-tenant—Sections 9 (1) and (2), 27.*

Where the tenant of any premises sub-lets them in contravention of section 9 (1) of the Rent Restriction Act and the premises are thereafter sold by the landlord to a third party, the purcheser is entitled to maintain an action under section 9 (2) for the ejectment of the tenant and the sub-tenant.

RATNASINGHAM *v.* CATHERASWAMY 476

12. *Rent Restriction Act, No. 29 of 1948—Section 13 (a)—"Arrears of rent".*

Where it has been the practice for the landlord to accept rent not in the month for which rent is payable but once in several months, the question whether the tenant is in arrears of rent within the meaning of section 13 (*a*) of the Rent Restriction Act must be considered in terms of that practice.

SUPPIAH *v.* KANDIAH 479

13. *Landlord and tenant—Notice to quit—Waiver—Acceptance of rent "without prejudice"—Effect on pending suit—Rent Restriction Act, s. 13 (1) (a).*

Acceptance of rent for a period subsequent to notice to quit does not revive a tenancy if the money is taken by the landlord without prejudice to a pending action instituted by him to eject the tenant.

EASTERN HARDWARE STORES *v.* FERNANDO 568

Last Will—

See WILLS.

Legal Practitioner—

See COUNSEL (2).

Lessor and Lessee—

See LANDLORD AND TENANT.

Libel and Slander—

See DEFAMATION.

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Limitation of Actions—

See PRESCRIPTION.

Local Authorities—

1. *Urban Councils Ordinance, No. 61 of 1939—Special meeting of Council—Duty of Chairman to convene one—Sections 38 (2) and 166—By-laws—* Mandamus—*Effect thereon of alternative remedy.*

A writ of *mandamus* lies against the Chairman of an Urban Council if he refuses to convene a special meeting of the Council when required to do so under section 38 (2) of the Urban Councils Ordinance. In view of the provisions of section 166, a Rule in terms of Rule 9 (*c*) of the By-laws of the Urban Council of Matara must give way to section 38 (2).

An alternative remedy provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot operate as a bar to the application for *mandamus*.

SAMARAWEERA *v.* BALASURIYA 118

2. *Housing and Town Improvement Ordinance (Cap. 199)—Refusal by Chairman to approve building plans—Scope of right of appeal—By-laws—Sections 5, 7, 16, 86.* 257

See HOUSING AND TOWN IMPROVEMENT ORDINANCE.

3. *Municipal Council—Summoning of meetings which are to be presided over by the Commissioner—Procedure—Municipal Councils Ordinance, No. 29 of 1947, as amended by Act No. 7 of 1954, ss. 19 (2) (a) (b) (c), 20 (2), 21—Mandamus.*

Where a second Special Meeting of a Municipal Council is summoned by the Commissioner in terms of sections 19 (2) (*b*) and 20 (2) of the Municipal Councils Ordinance to consider whether or not a resolution which was passed at a previous Special Meeting should be confirmed, there is no obligation in law to set out the specific motion which is to be moved at the second meeting, provided that it is clear from the notice convening the meeting that the members are required to attend a meeting at which the matter for consideration is whether or not the resolution referred to in the notice should be confirmed. If the notice convening the meeting satisfies the requirements of section 20 (2), the Commissioner is, by virtue of section 19 (2) (*c*), under a duty to permit the meeting to transact the business for which it has been convened.

MOHAMED *v.* GOPALLAWA 418

4. *Town Council—Sued for breach of contract—Notice of action not necessary—Town Councils Ordinance, No. 3 of 1949, s. 231 (1).*

The notice contemplated in section 231 of the Town Councils Ordinance, which provides that no action shall be instituted against a Town Council for anything done or intended to be done under the powers of that Ordinance until the expiration of one month after written notice is given to the Council stating with reasonable certainty the cause of action, etc., is required to be given only in cases where the cause of action is based on tort and not on contract.

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Local Government—

See LOCAL AUTHORITIES.

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Lorry—

See MOTOR VEHICLES.

Maintenance Ordinance—

Maintenance—Illegitimate child—False statements made by defendant—Corroborative evidence.

In an application for maintenance in respect of an illegitimate child, evidence of mere opportunity for intimacy between the mother and the defendant does not amount to corroboration, but a false statement made by the defendant denying such opportunity may remove a doubt that may exist on the question of corroborative evidence.

WARAWITA *v.* JANE NONA 111

Mandamus—

See WRIT OF MANDAMUS.

Master and Servant—

See DELICTS (2) ; CRIMINAL LAW (4).

Maxims—

See WORDS, PHRASES AND MAXIMS.

Medical Ordinance—

See EXCISE ORDINANCE (3), (4).

Minors—

Minor—Power of curator to sell minor's property—Fideicommissum—Unborn potential fideicommissaries—Right of an existing fideicommissary to sell his spes*—Courts Ordinance (Cap. 6), s. 69 (1)—Civil Procedure Code, ss. 582* et seq.

Sale of minor's property by his curator without the proper sanction of the Court is *ipso jure* void. If the minor subsequently seeks to vindicate title to that property, the burden is on the alienee to show that the Court's sanction for the sale was validly obtained.

A person donated certain property to his son, A, subject to a fideicommissum in favour of such children of A as would be alive at the time of A's death. Before the class of potential fideicommissaries was yet capable of ascertainment and when A had three sons, one of whom was a minor, application was made to Court by a person to be appointed curator of the estate of the minor under Chapter 40 of the Civil Procedure Code " for the purpose of selling the rights of the said minor's one-third share " of the property. The application was allowed after a perfunctory inquiry, and in April 1925 the curator purported to convey to X " all the right, title, interest, claim and demand whatsoever " of the minor in the property. The fiduciary, A, did not die until 25 years later, in 1950.

Held, that the burden of proving that the Court had interposed its consent to the purported sale of the minor's interests in the property was not discharged. In the first place, the minor was not at that time vested with the undivided one-third share which alone had been authorised to be sold. Secondly, authority to sell a minor's property cannot validly be granted without reference to a specified consideration. Finally, the person appointed as curator had not obtained the sanction of the Court to dispose of the mere *spes* which was all that the minor did enjoy

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in 1925 ; the authority to sell the future contingent interest of a ward of the Court cannot validly be granted unless " the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries ". For these reasons the sale to X was of no force or avail against the minor.

CASSALY *v.* BUHARY 78

Mortgage—

1. *Sale of immovable property—Conveyance coupled with clause for reconveyance—Oral evidence of mortgage—Admissibility* .. 303

See VENDOR AND PURCHASER (2).

2. *Sale of immovable property—Option of repurchase—Importance of time limit—No room for application of principle " once a mortgage, always a mortgage "* 387

See VENDOR AND PURCHASER (4).

Motor Vehicles—

1. *Hiring car—Carrying too many passengers—Suspension of driver's driving licence—Legality—" Offence committed in connection with the driving of a motor vehicle"—Motor Traffic Act, No. 14 of 1951, ss. 138 (1), 181 (1), 226.*

When a person is convicted of driving a hiring car carrying therein passengers in excess of the permitted number, the offence is one committed in connection with the driving of a motor vehicle within the meaning of section 138 (1) of the Motor Traffic Act. Therefore, an order of suspension of his driving licence is not illegal.

ISMAIL *v.* PERERA 46

2. *Lorry—Use of it outside area of operation specified in licence—Elements of offence—Motor Traffic Act, No. 14 of 1951, ss. 86 (3), 186.*

When a licence is issued to use within a specified area a lorry that will usually be kept at a place outside that area, driving the lorry unladen between the place where it is usually kept and the area of operation, for the purposes of its authorised use in that area, is not an offence within the meaning of section 186 of the Motor Traffic Act.

JOHN *v.* POLICE SERGEANT, GALEWELA 105

Municipal Councils—

See LOCAL AUTHORITIES (3).

Murder—

See COURT OF CRIMINAL APPEAL DECISIONS.

Negotiable Instruments—

1. *Bill of exchange—Restrictive indorsement—Right of drawer to sue on bill thereafter—Bills of Exchange Ordinance, ss. 21 (3), 31 (1), 35 (2).*

When a bill of exchange restrictively indorsed for collection is dishonoured on presentation for payment on maturity, the drawer to whom it is returned bearing an indorsement in blank by the indorsee is not entitled to sue upon it.

PATERNOTT *v.* MONIMPEX HUNGARIAN FOREIGN TRADING CO. .. 44

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2. *Promissory note.—"Valuable consideration"—Bills of Exchange Ordinance, ss. 27, 90—Prevention of Frauds Ordinance, s. 2.*

In an action on a promissory note the evidence showed that the defendant had given the promissory note to the plaintiff in exchange for the purported surrender by the plaintiff of his "rights" to purchase a land under an agreement which was, in fact, null and void for the reason that it was oral and did not satisfy the requirements of section 2 of the Prevention of Frauds Ordinance.

Held, that the promissory note was unenforceable as there was no "valuable consideration" in the sense in which that expression is used in section 27 of the Bills of Exchange Ordinance.

IBRAHIM *v.* ADUME 73

3. *Promissory note.—Discharge by merger or novation—Quantum of evidence—Bills of Exchange Ordinance (Cap. 68), ss. 36 (1), 59 (1), 62 (1), 63 (1), 90 (1) and (2)—Evidence Ordinance (Cap. 11), ss. 91, 92 (proviso (2)* .. 457

See PRIVY COUNCIL DECISIONS (5).

Parliamentary Elections—

1. *Election petition—Who may present petition—Mistake in entry of petitioner's name in register of voters—Effect thereof—Illegal practice—Effect of conviction prior to year 1956—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 (1) (c and f), 68A, 68B, 70, 72, 77, 79.*

(i) In this election petition presented by a voter under section 79 of the Ceylon (Parliamentary Elections) Order in Council, 1946, the petitioner's name as appearing in the register of voters was in every respect identical with his name as given in the caption to the election petition except for the last two letters of the last word of the name which consisted of six words. There was no doubt, however, on the evidence led at the inquiry, that the entry in question in the register of voters related to the petitioner and to no other person.

Held, that the election petition could not be rejected on the ground of a preliminary objection taken on behalf of the respondent that the petitioner was not a person who had a right to vote at the election.

(ii) By Section 16 of the Ceylon Parliamentary Elections (Amendment) Act, No. 16 of 1956—

> Where a person is at the commencement of this Act subject to the incapacity . . . . of being elected . . . . as a Member of Parliament by reason of his conviction of a corrupt practice under paragraph (*c*) or paragraph (*f*) of sub-section (1) of section 58 of the Order in Council prior to its amendment by section 15 of this Act . . . . , such incapacity shall cease on the date of the commencement of this Act notwithstanding anything to the contrary in the Order in Council.

Held, that the Section was intended to apply to those persons only whose incapacity proceeded from their having been found guilty of a corrupt practice. The Section, therefore, was not applicable to a person whose incapacity, on the date of the commencement of the amending Act, proceeded from a conviction for an illegal practice within the meaning of sections 70 and 72 of the principal Act of 1946.

PUNCHI BANDA *v.* RAJARATNE 150

2. *Election petition—Miscount of ballot papers alleged by unsuccessful candidate—Validity of such ground—Discretion of Court—Multiple member electoral district—Necessary parties—Amendment of petition by supplementary affidavits—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 48 (7) (8), 49 (1) (5), 80 (b) (c), 83, 86 (2)—Parliamentary Election Petition Rules, 1946, rules 4 (1) (b), 5.*

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Miscount of ballot papers is a valid ground on which an election judge may grant relief under section 80 (*b*) and (*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946. The provisions of sub-sections 1 and 5 of section 49 and of sub-sections 7 and 8 of section 48 do not necessarily point to the non-existence of a jurisdiction to order a recount of ballot papers.

Where an unsuccessful candidate presents an election petition against a successful candidate on the ground that as between them there was a misconduct of votes, the other candidates who were returned at the same time to the same electoral district and who received a greater number of votes than the respondent need not be made parties to the petition. In such a case, the averment in the petition that " there has been a miscount of the votes cast at the said election " cannot be said to be vague and entirely devoid of content when the petitioner seeks relief under section 80 (*b*) and (*c*) of the Parliamentary Elections Order in Council.

It is not requisite to a valid election petition based on a miscount of votes that it should set out how and why such miscount occurred. The word " miscount " in the context of an election petition presented by a candidate on the ground that he had a majority of votes and should be declared to be duly elected bears a restricted meaning.

Where a candidate or his election agent failed to make an application to the returning officer for a recount of the ballot papers under the proviso to sub-section 7 of section 48 of the Order in Council, it would, generally speaking, be undesirable for an election court in its discretion to order a recount.

Obiter : If an election petition is bad on the date it is presented it cannot be retrospectively made good by any affidavit filed after the time limit prescribed by section 83 of the Order in Council

KALEEL *v.* THEMIS 396

Partition Actions—

1. *Partition action—Interlocutory decree—Its binding effect on the parties—Title as to building erected by a co-owner*—Res judicata.

By an interlocutory decree entered in an action for the partition of a land, A was declared entitled as against B to a garage which had been put up by a co-owner on the land and transferred by him to A. The decree was silent as to any rights of B in the land sought to be partitioned. Subsequently A sued B in the present action for the recovery of mesne profits in respect of the garage from the date of its purchase by A.

Held, that the interlocutory decree entered in the partition action was binding on B and operated as *res judicata* in regard to the title of the parties to the garage in the present action.

FERNANDO *v.* PERERA 133

2. *Partition action—Decree for sale—Fraudulent collusion between the parties—Effect on conclusive nature of decree—Investigation of title by Court—Effect of defective investigation—Partition Ordinance, No. 10 of 1863 (Cap. 56), ss. 2, 4, 8, 9* 217

See PRIVY COUNCIL DECISIONS (2).

3. *Fideicommissum—Partition of fideicommissary property by the fiduciaries—Binding effect on the fideicommissaries* 313

See PRIVY COUNCIL DECISIONS (3).

4. *Partition action—Deposit of preliminary survey fees—Power of Court to alter date fixed for such deposit—Partition Act, No. 16 of 1951, ss. 8, 10 (1).*

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Where, in a partition action, a date is fixed for preliminary survey fees to be deposited by the plaintiff, section 10 (1) of the Partition Act does not preclude the Court, in an appropriate case, from subsequently allowing a longer period for the deposit, provided that the alteration of the date is made prior to the expiration of the time originally fixed.

SUBRAMANIAM *v.* THANGAVADIVELU 416

5. *Estoppel—Sale of mortgaged property—Bids made by mortgagee—Mortgagee's right to enforce bond subsequently—Partition Ordinance, s. 12—Evidence Ordinance, s. 115.*

Where a mortgaged land was put up for sale under a partition decree and the mortgagee, who was not a party to the action, made bids at the sale—

Held, that the making of bids by the mortgagee did not constitute an unequivocal representation by him that the land was not subject to a mortgage. The mortgagee, therefore, was not estopped by section 115 of the Evidence Ordinance from enforcing his mortgage bond subsequently.

SALISHAMY *v.* SALISHAMY 489

6. *Partition action—Property not forming subject matter of action—Jurisdiction of Court to come to a finding on title thereto—Power of Court to order that any share shall remain unallotted—Partition Act, No. 16 of 1951, ss. 25, 26 (2) (f).*

Upon a temporary division of property owned in common by three sisters, each entered into possession of separate properties and possessed them for fifteen years. Thereafter one of them instituted the present action to partition a property which had been allotted to her at the temporary division and which she had possessed upon that basis exclusively.

The appellant, who was one of the defendants, filed answer claiming that the division was a permanent one and also that she had acquired a title by prescription to the properties she had possessed exclusively, and prayed for a dismissal of the plaintiff's action. She participated in the trial and raised issues in support of her contentions. There were also pending actions in other courts filed by the plaintiff against the same defendants to partition some of the very properties which were claimed exclusively by the appellant.

Held, that it was not competent to the appellant in appeal to contend that it was outside the jurisdiction of the trial Court to come to a finding on title to properties not forming the subject matter of the present action inasmuch as she had invited the Court to adjudicate on the issues.

Held further, that, notwithstanding the provisions of section 26 (2) (*f*) of the Partition Act, No. 16 of 1951, it was not competent to the Court to leave a third share unallotted pending decisions in the connected cases.

RATNAYAKE *v.* AMARASEKERE 462

7. *Contempt of Court—Partition Act, No. 16 of 1951, s. 53* .. 566

See CONTEMPT OF COURT.

8. *See also* CO-OWNERS.

Paulian Actions—

1. *Paulian action—Decree setting aside alienation in fraud of creditors—How far it extinguishes title of transferee.*

The setting aside of a deed of transfer in consequence of a decree entered in a Paulian action does not revest the property, which was the subject of the transfer, in the transferor. The fraudulent deed is not

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annulled but is only declared void so far as it is necessary to make the property available for execution. The title to so much of the property as is not required to be sold in execution remains in the transferee.

ABDUL CADER *v.* MUNASINGHE 162

2. *See also* TRUSTS (1).

Penal Code—

Section 223 116
Section 294 433
Sections 300,301, 490 433
Section 433 190
Section 478D 180
Section 490 433

See also COURT OF CRIMINAL APPEAL DECISIONS : CRIMINAL LAW.

Plea—

1. *Charge of murder—Plea of guilty to a lesser offence—Stage at which it may be taken—Criminal Procedure Code, ss. 6,221* 49

See COURT OF CRIMINAL APPEAL DECISIONS (2).

2. Autrefois acquit—"*Discharge*"—"*Acquittal*"—*Criminal Procedure Code, ss. 190, 191, 330.*

In case No. 72,835 the accused was charged with certain offences. On the last date of hearing the prosecuting Inspector applied for a postponement and, when it was refused, asked for a warrant on an absent witness. The accused was thereupon "discharged". He was subsequently charged in the present case in respect of the same offences.

Held, that the order of discharge in case No. 72,835 must be regarded as an order made under section 190 of the Criminal Procedure Code and one which amounted to an order of acquittal. The accused was therefore entitled to plead "*autrefois acquit*" in the present case.

DAHANAYAKE *v.* RATNAYAKE 406

Pleadings—

Pleadings—Amendment of plaint—Lessor and lessee—Action against over-holding lessee—Plea of prescriptive title raised by defendant—Right of plaintiff to amend plaint so as to alter action into one of rei vindicatio*—Distinction between tenancy action and vindicatory action.*

A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action *rei vindicatio* if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title.

Plaintiff sued the defendant on the basis that the defendant was an over-holding lessee by attornment. Defendant admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land in question. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment upon the footing that his rights of ownership had been violated.

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Held, that the plaintiff was not entitled to amend the plaint if the amendment would cause prejudice to the defendant's plea of prescriptive possession by him.

PATHIRANA *v.* JAYASUNDARA 169

Poisons, Opium and Dangerous Drugs Ordinance—

1. "*Ganja*"—*Not a plant—Poisons, Opium and Dangerous Drugs Ordinance* (*Cap. 172*), *ss. 26, 28, 76* (*5*).

"Ganja" is not a plant. Possession, therefore, of an article which is described by the prosecution as "ganja, the parts of a hemp plant known as *cannabis sativa*" is not punishable under section 28, read with section 76 (5), of the Poisons, Opium and Dangerous Drugs Ordinance.

KULASEGARAM *v.* CHARLY SINGHO 70

2. *Evidence—Expert—Must he always give reasons for his opinion?—Evidence Ordinance s. 51—Poisons, Opium and Dangerous Drugs Ordinance* (*Cap. 172*), *ss. 22, 76.*

In a prosecution for unlawful possession of parts of a hemp plant, an Excise Inspector who was specially trained to identify parts of hemp plants expressed the view that a parcel which was in the possession of the accused contained parts of the hemp plant botanically called *cannabis sativa*. No objection was taken to the evidence of the expert.

Held, that the evidence of the expert could not be rejected merely because he did not state the grounds upon which he based his opinion.

VALLIAMMAI *v.* WEBER 383

3. *See also* EXCISE ORDINANCE.

Postponements—

Postponement—Refusal by Court—Withdrawal of Counsel from proceedings—Propriety—Civil Procedure Code, s. 82.

When an application for a postponement is refused it is the duty of the Counsel, who made the application, to continue to appear for his client and to conduct the case which has been entrusted to him. The only instance where a withdrawal by him from the proceedings is permissible, and then too only with the leave of Court, is where he has been retained only for the limited purpose of making the application for postponement and such application is refused by the Court.

SYADU VARUSAI *v.* WEERASEKERAM 89

Prescription—

1. *Co-owners—Prescription—Transfer of entire land by a co-owner—Transferee's right to prescribe against the other co-owners—Ouster* .. 41

See CO-OWNERS (1).

2. *Pleadings—Amendment of plaint—Lessor and lessee—Action against overholding lessee—Plea of prescriptive title raised by defendant—Right of plaintiff to amend plaint so as to alter action into one of* rei vindicatio*—Distinction between tenancy action and vindicatory action* .. 169

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3. *Prescription—Immovable property—Claim against* fideicommissarii—*Burden of proof—Evidence Ordinance, s. 106—Prescription Ordinance, ss. 3, 13* 217

See PRIVY COUNCIL DECISIONS (2).

4. *Fraud—Burden of proof—Concealed fraud—Prescription* .. 481

See PRIVY COUNCIL DECISIONS (6).

5. *Co-owners—Prescriptive possession as between them* 560

See CO-OWNERS (3).

6. *Co-owners—Transfer of entire property by a co-owner—Transferee's rights—Prescription—Ouster* 537

See CO-OWNERS (4).

Prevention of Frauds Ordinance—

1. *Contract—Informal agreement to sell immovable property—Time limit fixed for execution of deed of sale—Deposit of part of purchase price—Forfeiture clause—Failure of purchaser to pay balance sum within stipulated period—Right to claim refund of deposit—Unjust enrichment—Money had and received—Prevention of Frauds Ordinance, s. 2* .. 505

See CONTRACTS (3).

2. *Deed—Sale by two or more persons of their shares of a land—Failure of one of them to sign the deed—Binding effect of deed* 537

See CONSTRUCTION OF DEEDS AND STATUTES (4).

3. *Promissory note—" Valuable consideration "—Bills of Exchange Ordinance, ss. 27, 90.*

In an action on a promissory note the evidence showed that the defendant had given the promissory note to the plaintiff in exchange for the purported surrender by the plaintiff of his " rights " to purchase a land under an agreement which was, in fact, null and void for the reason that it was oral and did not satisfy the requirements of section 2 of the Prevention of Frauds Ordinance.

Held, that the promissory note was unenforceable as there was no " valuable consideration " in the sense in which that expression is used in section 27 of the Bills of Exchange Ordinance.

IBRAHIM *v.* ADUME 73

Principal and Agent—

Fraud—Burden of proof—Concealed fraud—Can agent's knowledge be imputed to the principal ? 481

See PRIVY COUNCIL DECISIONS (4).

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Privy Council—

1. *Privy Council—Application for conditional leave to appeal—Respondent a Company—Mode of service of notice of application—Companies Ordinance, s. 351—Appeals (Privy Council) Ordinance, Schedule, Rule 2.*

When a limited liability company is the respondent to an application for conditional leave to appeal to the Privy Council, notice as required by Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance can only be given to the Company in the manner prescribed by section 351 of the Companies Ordinance, i.e., by being left at or sent by post to the registered office of the Company. Notice left at or sent by post to an address which is given in the pleadings as the place where the business of the Company is carried on, but which is not the registered office of the Company, is not sufficient.

HEEN BANDA *v.* W. H. BUS CO., LTD. 165

2. *Privy Council—Conditional leave to appeal*—Certiorari—"*Civil suit or action*"—*Courts Ordinance, s. 42—Civil Procedure Code, ss. 5, 6—Appeals (Privy Council) Ordinance, s. 3.*

Held (SANSONI, J., dissenting), that an appeal to the Privy Council does not lie from a decision of the Supreme Court in an application for a writ of *certiorari*. Such an application does not fall within the ambit of the expression "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance, even when the application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction.

The words "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings.

In re Goonesinha (1942) 44 N. L. R. 75 and *Kodakan Pillai v. Mudanayake* (1951) 54 N. L. R. 350, overruled.

SILVERLINE BUS CO., LTD. *v.* KANDY OMNIBUS CO., LTD. .. 193

3. *Privy Council—Grant of final leave to appeal—Delay of appellant thereafter to take necessary steps—Dismissal of appeal for non-prosecution—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 25—Appellate Procedure (Privy Council) Order, 1921, paragraphs 11 and 18.*

A party seeking to appeal to the Privy Council from a judgment of the Supreme Court was granted on November 11, 1955, final leave to appeal. He elected to print the record in Ceylon. On May 4, 1956, he was informed by the Registrar of the Supreme Court that the record was ready for printing, and he was requested to nominate a printer to whom the record was to be entrusted for printing. He failed to respond to this request until August 20, 1956, and the work of printing was not commenced by the printers until about November 1, 1956.

The appellant established no good cause either for his failure to nominate a printer within a reasonable time after he was called on to do so by the Registrar or for his delay in having the work of printing taken in hand. It was only after his delay was brought to his notice by the present application made on October 24, 1956, under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance that he applied for relief and extension of time under paragraph 18 of the Appellate Procedure (Privy Council) Order, 1921.

Held, that the appellant clearly failed to show due diligence for the purpose of procuring the despatch of the record to England and that his appeal should, under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance, be dismissed for non-prosecution.

MENDIS *v.* FERNANDO 296

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4. *Privy Council—Application for conditional leave to appeal—Notice to opposite party—Power of Proctor to give such notice without client's authority—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 2.*

Where a Proctor, whose proxy did not empower him to act for his client for the purpose of taking steps to appeal to the Privy Council, purported, without any other authority from his client, to give notice to the opposite party in terms of Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance—

Held, that the notice was invalid. Nor could such notice be made valid by any subsequent grant of authority after the expiry of the period of fourteen days prescribed under the Rule.

KANDASWAMY *v.* KANDAVANAM 413

5. *Privy Council—Application for conditional leave to appeal—Must be properly stamped—"Final judgment"—Stamp Ordinance (Cap. 189), s. 35—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 1 (a) and 2.*

An application for conditional leave to appeal to the Privy Council which is insufficiently stamped will be rejected even if it is filed in time and the deficiency in stamp duty is subsequently made good by the applicant but after the expiry of the period of thirty days prescribed in Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

A judgment of the Supreme Court dismissing an appeal from an order of a District Court refusing to set aside a sale of property seized in execution of a decree is a "final judgment" within the meaning of Rule 1 (*a*) of the Schedule.

USOOF *v.* NADARAJAH CHETTIAR 436

6. *See also* PRIVY COUNCIL DECISIONS.

Privy Council Decisions—

1. *Evidence—Claim against a dead man's estate—Standard of proof required.*

Plaintiff sued the heirs of a deceased person, L, on a parol contract entered into between V, who acted on behalf of the plaintiff, and L. The only question for decision in the present case was whether L agreed without qualification to pay interest at a particular rate on a certain sum of money. Upon this question the sole basis of the plaintiff's case was the parol testimony of V. V's evidence related to events which took place twenty years before he gave evidence.

Held, that when a claim is brought forward against the estate of a deceased person in a matter in which, if he were alive, he might have answered the claim, the evidence ought to be looked at with great jealousy and care.

MURUGAPPA CHETTIAR *v.* MUTHTHAL ACHY 25

2. *Partition action—Decree for sale—Fraudulent collusion between the parties—Effect on conclusive nature of decree—Investigation of title by Court—Effect of defective investigation—Partition Ordinance No. 10 of 1863 (Cap. 56), ss. 2, 4, 8, 9.*

Prescription—Immovable property—Claim against fidei commissarii—*Burden of proof—Evidence Ordinance, s. 106—Prescription Ordinance, ss. 3, 13.*

(i) A decree entered under section 8 or section 9 of Partition Ordinance No. 10 of 1863 is conclusive against all persons whomsoever, and a person owning an interest in the land partitioned whose title even

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by fraudulent collusion between the parties had been concealed from the court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages (even though the property is still in the sole possession of the parties whose fraud is set up).

(ii) Although a partition decree entered without any investigation of title does not have the conclusive effect provided by section 9 of the Partition Ordinance, a decree entered after a defective or inadequate investigation of title is conclusive, as long as it has not been set aside on an appeal in the same action. Once it appears that the court did hold an investigation into title, although the investigation was not sufficiently exhaustive to prevent the fraud which was perpetrated by the parties in regard to the title of a person who had not been made a party to the action, any defect in the method of investigation would not vitiate the decree. The person so defrauded is not entitled to seek by separate action to set aside the decree or in a separate action to challenge its conclusive effect. The fact that lack of proper investigation of title may be sufficient for an appeal court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 of the Partition Ordinance when the decree is being considered in a separate case.

Obiter : On an appeal in a partition action if it appears to the court of appeal that the investigation of title has been defective it should set aside the decree and make an order for proper investigation. When investigating title the following matters should be attended to by the court in the generality of cases :—

" The Trial Judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Cap. 101). They may reveal registered instruments suggesting the possible existence of title in persons other than the parties before the court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in court or not, the effect of such instruments upon the title set up by the parties before the court should be examined. The Trial Judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony specifying by name the persons actually in possession and satisfy himself that they are some or all of the parties before the court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He should also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given . . . . If it appears to the Supreme Court when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision. "

(iii) The proviso to section 3 of the Prescription Ordinance reads as follows :—

> " Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute. "

Held, that once a party relying upon prescription has brought himself within the body of section 3 the onus rests on persons relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession within the period of ten years. Thus, if a *fideicommissarius* claims the benefit of the proviso as a party defendant the burden is on him to prove not only that he is a *fideicommissarius* but also that his right of possession accrued to him within the period of ten years possession by the plaintiff. *Chelliah v. Wijenathan* (1951) 54 N. L. R. 337, considered.

MOHAMEDALY ADAMJEE *v.* HADAD SADEEN 217

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3. *Donation by parents to minor child—Acceptance—Fideicommissum in favour of family—May be "single" or "recurring (multiplex)"—Acceptance of such gifts—Revocability—Entail and Settlement Ordinance (Cap. 54), ss. 4, 5, 7, 8—Exchange of fideicommissary property thereunder—Effect thereof on rights of fiduciaries and fideicommissaries—Bona fide purchaser from fiduciary—His position as against the fideicommissary—Partition of fideicommissary property by the fiduciaries—Binding effect on the fideicommissaries.*

Where both parents of a minor child jointly gift immovable property to the latter, acceptance on behalf of the donee by his nearest male relatives, other than his father, would be sufficient acceptance of the gift. (In the present case acceptance was by the two brothers and brother-in-law of the donees.)

A deed of gift which creates a fideicommissum in favour of the children not yet born of the fiduciary donee is a fideicommissum in favour of a family. In such a case acceptance by the fiduciary is an acceptance for his children the fideicommissaries, and the gift to the fideicommissaries cannot be subsequently revoked by the donor, even with the consent of the fiduciary, without the consent of the fideicommissaries.

A fideicommissum in favour of a family need not necessarily be a fideicommissum which goes on from generation to generation. A fideicommissum which comes to an end with the first generation of fideicommissaries, i.e., with the fiduciary's children who are free to dispose of the property as they wish, is also a fideicommissum in favour of a family. The presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation. *Carolis v. Alwis* (1944) 45 N. L. R. 156, overruled.

Where the Court authorises an exchange of fideicommissary property on an application made under the provisions of the Entail and Settlement Ordinance, the property becomes free of the fideicommissum, but the terms of the original fideicommissum are preserved and are applicable to the land taken in exchange, even though no reference is expressly made in the Order of the Court that the land is to devolve on the fideicommissaries on the cessation of the fiduciaries' interests. The Court may, however, with the consent of the fiduciaries, modify the terms of the original gift in regard to the powers of the fiduciaries in respect of their own rights and interests in the land. But that cannot affect the rights of the fideicommissaries.

A fiduciary though vested in the dominium of the property gifted has that dominium only during his life and cannot convey more than he enjoyed. On his death, or other event, the fideicommissary becomes the owner of the property with title which must prevail even against a bona fide purchaser from the fiduciary without any notice of a defect in his title.

Where the fiduciaries, or those to whom they transfer their interests, make a partition agreement *inter se* in respect of the fideicommissary property, the partition will be good and binding on the respective fideicommissaries.

Siman and Maria, who were husband and wife, jointly gifted to their daughters Cecilia and Jane a parcel of land known as "the Priory". The gift was subject to a life interest in the donors and also created a fideicommissum by which, after the death of the donees, the title in the premises was to devolve on the children of the donees. As the donees were minors, the gift was accepted on their behalf by their two brothers and their sister's husband. The fideicommissaries had not yet been born at the date of the gift.

By application under the Entail and Settlement Ordinance made on 17th June 1896, in which Siman and Maria were petitioners and Cecilia and Jane were respondents, the petitioners asked the Court to authorise Cecilia and Jane to convey "The Priory" to Siman free from all restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called "Sirinivasa" subject to certain conditions imposed on Cecilia and Jane as against the petitioners. All parties consented to the application which was, accordingly, allowed by the Court. The Order of the Court, however, made on 18th June 1896, did not make any reference that "Sirinivasa" should devolve after the death of Cecilia and Jane on their respective issue.

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Following on the Order of Court two conveyances in respect of " The Priory " and " Sirinivasa " were executed on 23rd June 1896. On the same day Cecilia conveyed to Siman her undivided moiety of " Sirinivasa ", which she had just received from her father, in consideration of the sum of Rs. 45,000. " Sirinivasa " was thus held by Siman and Jane in undivided moieties. On 30th June 1900 they agreed on a partition and Siman conveyed his undivided share in the eastern portion of " Sirinivasa " as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited, On 30th November 1905, Jane conveyed her divided share of " Sirinivasa " to Siman. Siman thereafter, in 1907, conveyed the whole of " Sirinivasa to his son James. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The father of the person who is the defendant in the present action became purchaser of two of these lots. When he bought them he did not look further back in the chain of title than the Order of the Court made in 1896. He subsequently donated them to the defendant. The plaintiffs, who were the children of Jane, claimed title in the present action to these two lots as fideicommissaries under the deed of gift executed in 1883.

Held, (i) that, as regards the gift of 1883, the acceptance of it by the brothers and brother-in-law of the donees who were minors was a valid acceptance on behalf of the donees.

(ii) that the gift created a fideicommissum in favour of a family. Acceptance therefore, by the fiduciary donees was an acceptance for their children the fideicommissaries, and the gift to the fideicommissaries could not be revoked subsequently by the donors, even with the consent of the fiduciaries.

(iii) that the effect of the Order of Court of 18th June 1896 was that " Sirinivasa " when received in exchange for " The Priory " was bound by the terms of the original fideicommissum of 1883. Subject, therefore, to any limitations placed upon the rights of the fiduciaries with their consent the rights of the fideicommissaries in relation to " Sirinivasa " were not affected. The effect of the Entail and Settlement Ordinance was to write the terms of the original fideicommissum into the substituted gift and the consequences of what was done in 1883 must be considered at the date of the present action when the fideicommissaries made their claim and not in 1896 when there was none in existence.

(iv) that the fact that the defendant's father did not look further back in the chain of title than the Order of Court of 1896 and was, therefore, a bona fide purchaser witnout any notice of a defect in his title could not avail the defendant as against the fideicommissaries.

(v) that when the partition of " Sirinivasa " took place between Jane and her father Siman in 1900 the fideicommissum attached to each of the divided portions for the benefit of Jane's issue and Cecilia's issue respectively. Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane.

ABEYAWARDENE *v.* WEST 313

4. *Registration of deeds—Transfer of immovable property—Registration of deed at a time when it passed no interest—Subsequent acquisition of title by grantor—Right of grantee to defeat the provisions of an earlier unregistered deed—Land Registration Ordinance, No. 8 of 1863, ss. 38, 39 (re-enacted as ss. 16 and 17 of the Land Registration Ordinance, No. 14 of 1891)—Registration of Documents Ordinance, 1927 (Cap. 101)—Res judicata.*

(i) The description of instruments contained in section 38 of the Land Registration Ordinance No. 8 of 1863 is wide, and sufficient to cover instruments which though they are ineffective at the time of execution may become effective at a later date. The Registration of Documents Ordinance of 1927 makes no difference to this conclusion.

Thus, when a deed of transfer of immovable property is executed at a time when the grantor has no title to the property, the subsequent acquisition of title by the grantor would not only give the benefit of such title to the instrument already executed but would also give the

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grantee the benefit of priority by the registration of that instrument; if the competing instrument remained unregistered at the time of the acquisition of title, the subsequent instrument, even though it was registered at a time before the grantor acquired his title, would prevail over the unregistered deed.

(ii) One Solomon was originally the owner of certain premises. In 1870, by deed P1 he gifted the premises to his son Lorenzo, reserving a life interest to himself and creating a fideicommissum in favour of Lorenzo's descendants for four generations. During Lorenzo's life time, his son Lawrenti, although he had only a contingent fideicommissary interest in the property, transferred the whole of the premises to one Dias by deed 6D1 executed on December 21, 1895. In case No. 11,739 Lorenzo sued Dias for a declaration of title to and ejectment from the premises in question. The question in controversy in case No. 11,739 was whether deed P1 conveyed an interest directly to Lawrenti or whether it did not, and it was held that deed P1 prevailed over deed 6D1. The question as to what Dias may have received on 6D1 from Lawrenti by reason of inheritance by Lawrenti from Lorenzo was expressly left open by the Court.

In the present case the plaintiff, who was a son of Lawrenti, claimed title to the premises as against the defendant, who was the successor-in-title of Dias. At the time when the case was instituted Solomon and Lorenzo had died intestate. It was shown that deed P1 had never been registered whereas deed 6D1 had been registered on December 31, 1895, when Lorenzo was still alive.

Held, that the decree in case No. 11,739 could not operate as *res judicata* in the present case.

THE COLOMBO APOTHECARIES COMPANY LIMITED *v.* PEIRIS .. 361

5. *Promissory note—Discharge by merger or novation—Quantum of evidence—Bills of Exchange Ordinance (Cap. 68), ss. 36 (1), 59 (1), 62 (1), 63 (1), 90 (1) and (2)—Evidence Ordinance (Cap. 11), ss. 91, 92 (proviso (2)).*

The maker of a promissory note subsequently executed a mortgage bond ("No. 44") as additional security for the payment of the sum due on the note. The promissory note was attached to the bond and continued to remain in the payee's hands (without any indication of "discharge" or "cancellation" on the face of it) and, on the reverse side of it, the following endorsement was made by the notary who attested the mortgage bond :—"The amount due on the promissory note together with interest thereon from the date hereof has been secured by mortgage bond No. 44".

In the present action the plaintiff, to whom the promissory note was indorsed and delivered by the payee after the mortgage bond had been executed, sued both the maker and the payee on the note.

Held, that the promissory note was not discharged by merger or novation upon the execution of the mortgage bond. Therefore, the indorsee of the note was entitled to sue not only the payee but also the maker.

Held further, that section 91 and proviso (2) to section 92 of the Evidence Ordinance precluded parol evidence from being given by the notary to the effect that it was understood by the mortgagor and the mortgagee (neither of whom went into the witness box) that the promissory note was cancelled and discharged by the bond.

MOHAMEDALLY *v.* MISSO 457

6. *Fraud—Burden of proof—Misdirection—Concealed fraud—Can agent's knowledge be imputed to the principal?—Prescription.*

The equitable principle of concealed fraud is part of the law of Ceylon. It is not necessary to establish some independent act of concealment in cases where the tort is itself done furtively so that its commission will be concealed.

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The plaintiff was a money lender resident in India and having a branch of his business in Ceylon. The branch was managed by the defendant, who held a power of attorney from the plaintiff. Two persons, A and B, were debtors of the Ceylon business—the former under a decree which the defendant had obtained against him, and the latter upon a promissory note given by him to the defendant. On January 25, 1933, the defendant assigned the decree and negotiated the promissory note to one Alagappa without receiving any payment for either transfer. Three days later, on January 28, 1933, he left the services of the plaintiff, and one Sinniah was appointed as his substitute. Between 1933 and 1938 Alagappa recovered sums on the decree and the promissory note, but no part of these sums reached the plaintiff or his agent Sinniah. The plaintiff had not heard of these transactions and the recovery of the monies until 1942. He then claimed these monies in the present case on the ground that the assignments were fraudulent and made in order that Alagappa might recover the monies for the defendant in fraud of the plaintiff. The defendant's main answer was that he received express instructions from the plaintiff to assign the decree and endorse and deliver the promissory note to Alagappa. He further pleaded that the causes of action were prescribed. In answer to this plea the plaintiff alleged that the prescriptive period did not begin to run until 1942 as there had been " concealed fraud ".

Held, that the burden of establishing fraud on the evidence as a whole rested plainly on the plaintiff. But once the Court was satisfied that the plaintiff had not given express instructions to assign the decree and negotiate the promissory note, it was for the defendant to establish such express instructions if, otherwise, the only conclusion possible on the evidence on the fraud issue would be adverse to the defendant ; in this limited sense, therefor e, there was no misdirection when the trial Court held that the burden rested on the defendant to prove that he assigned the decree and negotiated the promissory note to Alagappa at th instance of the plaintiff.

Held further, that the defence under the Prescription Ordinance failed because on the facts, in particular the entries or absence of entries in the books, there was ample evidence on which the Court could find " concealed fraud ". The fact that Sinniah, who succeeded the defendant as attorney of the plaintiff, was probably aware of the assignment could not necessarily import knowledge to the plaintiff in the absence of very precise findings of fact and, especially, as no point based on Sinniah's alleged knowledge was taken in the defendant's case.

NAGAMMAI ACHI *v.* LAKSHAMANAN CHETTIAR 481

7. *See also* PRIVY COUNCIL.

Proctors—

See COUNSEL.

Promissory Notes—

See NEGOTIABLE INSTRUMENTS.

Proof of Public Documents Ordinance—

See INFORMATION BOOK.

Public Documents—

See INFORMATION BOOK.

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Public Servants—

1. *Public Servants (Liabilities) Ordinance (Cap. 88)—Section 2 (1) (a)—Protection of Ordinance not available against actions based on unjustified enrichment or for recovery of money paid on a consideration which has failed.*

By an informal writing the defendant, who was a public servant, had agreed to transfer certain immovable property to the plaintiff. The document contained an acknowledgment of the receipt of a sum of Rs. 250 " as advance this day on that account ". When the defendant subsequently failed to transfer the property as agreed upon, the plaintiff instituted the present action for the recovery of the sum of Rs. 250 paid in advance.

Held, that the action did not fall within the class of actions described in section 2 (1) (*a*) of the Public Servants (Liabilities) Ordinance.

APPUHAMY *v.* MENDIS 305

2. *Execution of decree to pay money—Judgment debtor an employee in a shop or office—Liability of his salary and allowances to be seized in execution* .. 140

See EXECUTION OF DECREES (2).

Punishment—

See SENTENCE.

Purchase and Sale—

See VENDOR AND PURCHASER.

Rape—

See COURT OF CRIMINAL APPEAL DECISIONS (1).

Recognizance—

Conditional release of offenders—Recognizance—Proper Form—Criminal Procedure Code, ss. 80, 82, 325, 327 (4) 308

See SENTENCE (4).

Registration of Documents—

1. *Registration of deeds—Transfer of immovable property—Registration of deed at a time when it passed no interest—Subsequent acquisition of title by grantor—Right of grantee to defeat the provisions of an earlier unregistered deed—Land Registration Ordinance, No. 8 of 1863, ss. 38, 39 (re-enacted as ss. 16 and 17 of the Land Registration Ordinance, No. 14 of 1891)—Registration of Documents Ordinance, 1927 (Cap. 101)—Res judicata* 361

See PRIVY COUNCIL DECISIONS (4).

2. *Irrigation Ordinance (Cap. 312)—Certificate of sale in favour of Crown—Nature of Crown's title—Sections 2 (1) (4), 66 (2), 68—Registration of Documents Ordinance (Cap. 101), s. 7 (1).*

Where land sold under the Irrigation Ordinance for non-payment of irrigation rates due in respect of it is purchased by the Crown and a certificate is thereafter issued vesting title in the Crown, all previous titles

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to the land must, by virtue of sections 2 and 66 (2) of the Ordinance, be regarded as wholly extinguished, or suspended, by operation of law, and a new title is created in the Crown which is good against all persons. Accordingly, a subsequent transferee from the original owner of the land cannot claim title to it by priority of registration as against the Crown.

VELLAITHAMBY *v.* THE ATTORNEY-GENERAL 486

Rent Restriction Act—

See LANDLORD AND TENANT.

Res Judicata—

1. *Buddhist Ecclesiastical Law*—Res judicata—*Applicability of doctrine to incumbency disputes—Judgment of consent—Effect of* res judicata.

The rule of *res judicata* is applicable to disputes as to who is the lawful Viharadhipathi of a particular Buddhist Temple. A pupil is the privy of his tutor for purposes of *res judicata.*

A judgment of consent is as effective by way of estoppel as a judgment whereby the Court exercised its mind in a contested case, and has the full effect of a *res judicata* between the parties.

In action No. 1, A sued B asking for a declaration that A was the controlling Viharadhipathi of Manawala Vihare as against B. After issues were framed the dispute was settled on the following terms : " Of consent plaintiff is declared the controlling Viharadhipathi of the Manawala Vihare but this right will vest in him as from the date of the demise of the defendant who is hereby declared entitled to reside in and officiate as Viharadhipathi of the said temple during his lifetime, without any let or hindrance from the plaintiff. Each party bears his own costs."

In the present action No. 2, A sued C, who was the pupil of B. He claimed, on the same title as he had set out in action No. 1, that he was the Viharadhipathi of Manawala Vihare.

Held, that the settlement in action No. 1 and the decree entered in accordance with it was *res judicata* between the parties in action No. 2, because C was a privy of B and was therefore bound by that decree.

Held further, that B, by consenting to the settlement in action No. 1, abandoned his rights to the incumbency in favour of A. Therefore C had no incumbency to which he could succeed on B's death.

PODIYA *v.* SUMANGALA THERO 29

2. Res judicata—"*247 action*"—*Attachment of property—Previous litigation as to title between judgment-debtor and claimant—Rights of judgment-creditor—Execution purchaser is "privy" of judgment-debtor—Civil Procedure Code, s. 247.*

When property attached by a judgment-creditor is the subject of a claim in a " 247 action ", an earlier judgment upholding the claimant's title to it as against the judgment-debtor would operate as *res judicata* in favour of the claimant.

Kuda Banda v. Dingiri Banda (1911) 14 N. L. R. 145 and *Sandrasegara v. Coomaraswamy* (1917) 4 C. W. R. 378, overruled.

RAMAN *v.* MANICKAM 75

3. *Registration of deeds—Transfer of immovable property—Registration of deed at a time when it passed no interest—Subsequent acquisition of title by grantor—Right of grantee to defeat the provisions of an earlier unregistered deed—Land Registration Ordinance, No. 8 of 1863, ss. 38, 39 (re-enacted as ss. 16 and 17 of the Land Registration Ordinance, No. 14 of 1891)—Registration of Documents Ordinance, 1927 (Cap. 101)—Res judicata* 361

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Right of Way—

See SERVITUDES.

Sale of Immovable Property—

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Sentence—

1. *Court of Criminal Appeal—Sentence—Grounds for reduction of sentence* .. 177

See COURT OF CRIMINAL APPEAL DECISIONS (3).

2. *Sentence imposed on an erroneous basis—Reduction* .. 180

See COURT OF CRIMINAL APPEAL DECISIONS (4).

3. *Court of Criminal Appeal—Sentence—Application for leave to appeal—Formalities necessary—Enhancement of sentence—Court of Criminal Appeal Rules, 1940, Rule 4* 228

See COURT OF CRIMINAL APPEAL DECISIONS (5).

4. *Conditional release of offenders—Recognizance—Proper Form—Criminal Procedure Code, ss. 80, 82, 325, 327 (4).*

Before a court can proceed to act under section 327 (4) of the Criminal Procedure Code, the recognizance entered into must be in conformity with the provisions of section 325. The form of bond relating to conditional release of offenders under sections 325 and 326 is prescribed in Subsidiary Legislation of Ceylon, Volume I, Chapter 16, at page 113.

PEMADASA *v.* DAVID 308

Service Contracts Ordinance—

See CRIMINAL LAW (4).

Servitudes—

1. *Servitude—Private right of way—Reasonable user—Obstruction by gates—How far actionable.*

An obstruction of a private right of way is not actionable unless it is substantial.

Plaintiff had a right of way from her residential property along lot C which was a portion and boundary of the defendants' residential property and leading to a public roadway. At the entrance to lot C from the roadway there were two gates which were maintained by the defendants and had been in existence even before the servitude had been acquired by the plaintiff.

Held, that the plaintiff was not entitled to have the gates removed. The defendants were, however, bound to keep the gates open at all times except at night-time when they might remain closed but never locked.

DE LA HARPE *v.* WICKREMARATNE 310

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2. *Servitude—Right of way—Splitting up of a land—Right of each portion to outlet.*

Where a land, one of the boundaries of which is a public lane, is split up into two or more portions, the back portion, which would otherwise be land-locked, must retain its outlet to the public lane over the front portion, even in the absence of an express reservation of a servitude. The splitting of the land cannot impose a servitude upon the neighbours.

NAGALINGAM *v.* KATHIRASIPILLAI 371

3. *Servitude—Right of way—Right of lessee to acquire it by prescription—Way of necessity.*

A servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Therefore, where a land is divided by its owner into two portions and each portion is given on lease to a different person, the lessee of one portion cannot claim from the other lessee a right of way by prescription over the other portion. Nor is he entitled to claim a way of necessity.

VELUPILLAI *v.* SUBASINGHE 385

4. *Servitude—Prescriptive user by licensee—Quantum of evidence necessary.*

When a user of immovable property commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

DE SOYSA *v.* FONSEKA 501

Shops—

1. *Execution of decree to pay money—Judgment debtor an employee in a shop or office—Liability of his salary and allowances to be seized in execution* .. 140

See EXECUTION OF DECREES (2).

2. *Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—Prosecution thereunder—Power of Assistant Commissioner to sanction it—Sections 46, 64, 68—Evidence Ordinance, s. 114 (d)—Criminal Procedure Code, s. 393.*

Where a prosecution under the Shop and Office Employees (Regulation of Employment and Remuneration) Act was sanctioned by an Assistant Commissioner of Labour—

Held, that an Assistant Commissioner was entitled to sanction the prosecution unless the Commissioner gave direction to the contrary. In such a case, it is not necessary for the complainant to prove that no limitation was placed upon the power of the Assistant Commissioner.

KARIYAWASAM *v.* RAFEEK 381

3. *Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—"Serving of customers"—Burden of proof—Sections 43 (1), 51, 68 (g).*

Where there is proof of delivery, after closing time, of goods purchased before the closing time, in contravention of section 43 (1) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act, the prosecution need not prove that the shop was kept open for the purpose of making the delivery.

Sharufdeen v. Sinnadurai (1955) 57 N. L. R. 214 distinguished.

RASARATNAM *v.* PREMATILLEKE 451

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Stamp Ordinance—

Privy Council—Application for conditional leave to appeal—Must be properly stamped—"Final judgment"—Stamp Ordinance (Cap. 189), s. 35—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 1 (a) and 2 436

See PRIVY COUNCIL (5).

Statute of Frauds—

See PREVENTION OF FRAUDS ORDINANCE.

Summons—

1. *Summons to produce a document or thing—Duty of Court to hear evidence first—Criminal Procedure Code, s. 66 (1).*

Where a Magistrate, purporting to act under sectiin 66 (1) of the Criminal Procedure Code, issued summons on an accused person requiring him to produce a particular elephant before the Court—

Held, that before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion tnat it is necessary or desirable that a particular document or thing should be produced before the Court should be on the record. After such material is placed before the Court it should weigh such evidence and make the order.

IN RE JAYAKODY 236

2. *Summons on defendant—Personal service necessary—Civil Procedure Code, s. 59.*

The provisions of section 59 of the Civil Procedure Code regarding service of summons on a defendant are imperative and can be satisfied only if the summons is delivered or tendered to the defendant personally.

BABUN NONA *v.* ARIYASENA 575

Tender—

1. *Tender of money before the due date—Quantum of evidence* .. 303

See VENDOR AND PURCHASER (2)

2. *Tender—Elements necessary* 469

See CONTRACTS (2).

Thesavalamai—

1. *Gratuity paid to public servant—Thediathetam.*

A gratuity paid to a public servant on retirement from service is not thediathetam.

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2. *Thesawalamai Pre-emption Ordinance No. 59 of 1947—Section 2—"Heirs".*

Persons who claim to come within section 2 (1) (*b*) of the Thesawalamai Pre-emption Ordinance, No. 59 of 1947, must first satisfy the condition that they would be heirs of the intending vendor if he should then die intestate : that condition having been satisfied, they must also satisfy the condition that they are descendants, ascendants or collaterals within the third degree of succession.

MARKANDU *v.* RAJADURAI 394

Torts—

See DELICTS.

Town Councils—

See LOCAL AUTHORITIES (4).

Trusts—

1. *Trusts—Transfer of property to defraud creditors—Constructive trust—Elements necessary*—In pari delicto potior est conditio possidentis—*Rule against unjust enrichment—Trusts Ordinance, ss. 82, 83.*

A executed a conveyance of certain lands in favour of B intending to transfer to B not only the legal title to the lands but also the beneficial interest in them so as to put them beyond the reach of his creditors, fully believing that in due time B, in whom A had complete confidence, would effect a re-transfer of the same lands in favour of A.

In the present action A's intestate heirs sued B claiming a reconveyance of the lands to them.

Held, (i) that although the facts might have constituted a ground for a Paulian action at the instance of the creditors of A, no constructive trust within the meaning of sections 82 and 83 of the Trusts Ordinance was created by the conveyance executed by A.

(ii) that, even if a constructive trust was established, the plaintiffs, as heirs of A, would have to rely on the fraud committed by A. The maxim *in pari delicto potior est conditio possidentis* being applicable in the circumstances, the plaintiffs could not maintain the action.

Held further, that, inasmuch as the execution of the conveyance by A actually resulted in his creditors being defrauded and any unjust enrichment accruing to B was at the expense of the defrauded creditors and not of the plaintiffs, the plaintiffs could not avail themselves of the maxim that no person ought to be enriched at the expense of another (*nemo cum damno alterius locupletior fieri debet*).

DE SILVA *v.* SILVA 145

2. *Charitable trust—Beneficiary's right to rents and profits—Enforcement—Trusts Ordinance, ss. 57, 63.*

The 2nd and 3rd defendants, who were appointed as trustees to administer a charitable trust "for the sole use and for the purposes of defraying expenses for the support" of a Vihare, gave an informal lease of a portion of the trust property to the 1st defendant. It was possible to contend that the lease was an improvident one or that it amounted to a breach of trust. The plaintiff, who was the Viharadhipathi of the temple, instituted the present action for a declaration that the lease was null and void and to obtain an injunction restraining the 1st defendant from acting under the lease. He also claimed damages.

Held, that the action was maintainable under section 57, read with section 63, of the Trusts Ordinance.

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3. *Fideicommissum by last will—No personal benefit conferred on* fiduciarius*—Validity—Distinction between* fideicommissa *and trusts—Trusts Ordinance, s. 3 (a)* 494

See FIDEICOMMISSA (5).

University of Ceylon—

University of Ceylon—Right of student to sit for examinations—Misconduct of student— Scope of the powers of the Vice-Chancellor and Board of Discipline to investigate and punish—Remedy when the Vice-Chancellor and Board act in excess of jurisdiction—"Judicial act"—Natural justice—Scope of certiorari *proceedings—Jurisdiction of District Court—Ceylon University Ordinance, No. 20 of 1942, ss. 6 (b), 32—General Act, No. 1, Chapter 8, Part I, ss. 8, 14, 17* 265

See WRIT OF CERTIORARI (2).

Unjust enrichment—

Rule against unjust enrichment 145

See TRUSTS (1).

Urban Councils Ordinance—

See LOCAL AUTHORITIES.

Vendor and Purchaser—

1. *Vendor and purchaser*—Actio venditi—*Issue of non-delivery.*

When immovable property is sold, the *actio venditi* for the purchase price would be available to the vendor only when delivery of the property has been made to the purchaser. The purchaser may, therefore, raise the issue of non-delivery even if it was not pleaded in the answer.

KIRIGERIS APPUHAMY *v.* NAZIR 287

2. *Sale of immovable property—Conveyance coupled with clause for reconveyance—Oral evidence of mortgage—Admissibility—Tender of money—Quantum of evidence.*

In a transfer of immovable property, what purports to be a conveyance coupled with a clause for reconveyance on payment of a certain sum of money within a stipulated period cannot be proved by oral evidence to have been in reality a mortgage.

Quantum of evidence necessary to prove tender of money before the due date considered.

DE SILVA *v.* ZOYSA 303

3. *Registration of deeds—Transfer of immovable property—Registration of deed at a time when it passed no interest—Subsequent acquisition of title by grantor—Right of grantee to defeat the provisions of an earlier unregistered deed—Land Registration Ordinance, No. 8 of 1863, ss. 38, 39 (re-enacted as ss. 16 and 17 of the Land Registration Ordinance, No. 14 of 1891)—Registration of Documents Ordinance, 1927 (Cap. 101)—Res judicata* .. 361

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4. *Sale of immovable property—Option of repurchase—Importance of time limit—No room for application of principle "once a mortgage, always a mortgage."*

Time is of the essence of the contract in a *pactum de retrovendendo*. In such a contract it is not open to the Court to take the view that the transaction was in reality a mortgage and not a sale.

THAMBIPILLAI *v.* MUTHUCUMARASAMY 387

5. *Deed—Sale by two or more persons of their shares of a land—Failure of one of them to sign the deed—Binding effect of deed* 537

See CONSTRUCTION OF DEEDS AND STATUTES (4).

6. *Sale of land—Several vendors—Is there a presumption that each of them owned an equal share?*—Exceptio rei venditae et traditae—*Scope of its applicability.*

Where several vendors join in conveying a land or a portion of a land, it cannot be presumed that the deed of sale was a conveyance by them in equal shares, particularly where the rest of the evidence shows that they were never considered as owning the land in equal shares. Accordingly, if A, B, C and D sell to E a greater portion of a land than they are altogether entitled to and subsequently A alone acquires title to an additional portion of the same land, the doctrine of *exceptio rei venditae et traditae* can operate against A in respect of even the entirety of the additional portion although the total extent of A's share thereby allotted to E amounts to more than one-fourth of the portion of land originally sold to E.

Under the *exceptio rei venditae et traditae* a sale made by a vendor without title may be relied upon as against a purchaser from that vendor after the vendor has acquired title.

PERERA *v.* KIRI HONDA 545

Wills—

Evidence Ordinance—Section 90—Document thirty years old—"Proper custody"—Will executed in 1850—Proof thereof—Frauds and Perjuries Ordinance, No. 7 of 1840, s. 15.

The duplicate of a Will which is over thirty years old and which was duly admitted to probate in a testamentary case the record of which is missing is admissible in evidence under Section 90 of the Evidence Ordinance provided it is produced from the proper custody as contemplated by that Section.

Whether or not a particular custody is proper is a question of fact to be determined according to the circumstances of each case. Proper custody does not necessarily mean legal custody. It is sufficient if the circumstances render it probable that the origin was legitimate.

The duplicate of a Will executed in the year 1850 was transmitted to the District Court by the Notary who attested it. The Notary transmitted it to the District Court because he had some reason to believe, though mistakenly, that such transmission was required by law. The document was later transferred to the Registrar-General, who produced it in the present case after it has been in the custody of the Land Registry for over 100 years.

Held, that the document was produced from proper custody within the meaning of Section 90 of the Evidence Ordinance.

DAVOODBHOY *v.* FAROOK 126

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Arraignment 424

Writ of Certiorari—

1. *Privy Council—Conditional leave to appeal*—Certiorari—"*Civil suit or action*"—*Courts Ordinance, s. 42—Civil Procedure Code, ss. 5, 6—Appeals (Privy Council) Ordinance, s. 3.*

Held (SANSONI, J., dissenting), that an appeal to the Privy Council does not lie from a decision of the Supreme Court in an application for a writ of *certiorari*. Such an application does not fall within the ambit of the expression "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance, even when the application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction.

The words "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings.

In re Goonesinha (1942) 44 N. L. R. 75 and *Kodakan Pillai v. Mudanayake* (1951) 54 N. L. R. 350, overruled.

SILVERLINE BUS CO., LTD. *v.* KANDY OMNIBUS CO., LTD. .. 193

2. *University of Ceylon—Right of student to sit for examinations—Misconduct of student—Scope of the powers of the Vice-Chancellor and Board of Discipline to investigate and punish—Remedy when the Vice-Chancellor and Board act in excess of jurisdiction—"Judicial act"—Natural justice—Scope of* certiorari *proceedings—Jurisdiction of District Court—Ceylon University Ordinance, No. 20 of 1942, ss. 6 (b), 32—General Act No. 1, Chapter 8, Part I, ss. 8, 14, 17.*

When a purely administrative decision is taken against a party on the basis of an invalid report made by a person who has legal authority to determine judicially or quasi-judicially a question affecting a legal right of that party, the party affected by the administrative decision is entitled to claim relief by way of regular action, notwithstanding the absence of a right of appeal.

The plaintiff, who was a candidate at the final examination in science held by the University of Ceylon, instituted this action against the University claiming that the finding of the Vice-Chancellor (assisted by a committee of inquiry) that the plaintiff had acquired knowledge of the nature or substance of one of the Question Papers before the date of the examination, and the decision of the Board of Residence and Discipline suspending the plaintiff indefinitely from all examinations of the University, be declared null and void. The Vice-Chancellor and the Board of Residence and Discipline had purported to act under sections 8 and 14 respectively of Part I of Chapter 8 of the General Act No. 1 passed under the Ceylon University Ordinance, No. 20 of 1942. Section 8 provides that where the Vice-Chancellor is satisfied that any candidate for an examination has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination he may suspend the candidate from the examination or remove his name from the pass list, and shall report the matter to the Board of Residence and Discipline for such further action as the Board may decide to take. Section 14 deals with the powers of the Board on such a report being received. One of them is to suspend the candidate indefinitely from any University examination.

The aforementioned committee of inquiry had been appointed by the Vice-Chancellor in order to assist him in his investigation, and consisted of the Vice-Chancellor himself and two other members. At the chief sitting of the committee, the plaintiff was afforded no opportunity at

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any stage of cross-examining the witnesses who had testified against him, nor was even the gist of their evidence communicated to him. The plaintiff was the last person to be questioned at that sitting. No record of the proceedings was kept by the committee. The plaintiff had not been furnished sufficient particulars of the case he had to meet, nor was he at any time afforded an opportunity of explaining the allegedly suspicious features of a document which was produced at the inquiry.

Held, (i) that the action of the Vice-Chancellor in appointing a committee of inquiry (of which he himself was a member) to assist him in his investigation was not an improper delegation of his function in contravention of sections 8 and 17 of Part I of Chapter 8 of the General Act No. 1.

(ii) that, subject to the powers conferred on the Vice-Chancellor and the Board of Residence and Discipline under section 8 and 14 of Part I of Chapter 8 of the General Act No. 1, a student of the University of Ceylon has a legal right to sit for any examination held by the University provided he satisfies the qualifying conditions prescribed by the Statutes, Acts and Regulations passed under the Ceylon University Ordinance.

(iii) that, inasmuch as the legal rights of the plaintiff were involved and no question of policy or expediency arose, the Vice-Chancellor was under a duty to act judicially when he investigated the allegation against the plaintiff and reported on it to the Board of Residence and Discipline. The words " where the Vice-Chancellor is satisfied . . ." in section 8 of Part I of Chapter 8 of the General Act No. 1 did not detract from the duty of the Vice-Chancellor to act judicially or quasi-judicially when proceeding under that section.

In the absence of specific provision in that behalf, the procedure to be followed by bodies which are not strictly judicial bodies vary with the kind of case which they are called upon to investigate. Where the matter to be investigated is an allegation of a grave nature which, if made out, would have serious consequences affecting the legal rights of the person whose conduct is called into question, a more strict procedure than otherwise is to be insisted on. In the present case, having regard to all the circumstances, the question of the truth or falsity of the allegation against the plaintiff could not fairly be determined except by the application of the judicial process or a form of procedure closely analogous to it.

(iv) that the investigation of the Vice-Chancellor was not made in accordance with the principles of natural justice and was not, therefore, valid for the purposes of any action which the Vice-Chancellor could have taken under section 8 of Part I of Chapter 8 of the General Act No. 1.

(v) that the decision which the Board of Residence and Discipline purported to take under section 14 of Part I of Chapter 8 of the General Act No. 1 did not have any legal effect inasmuch as the report made by the Vice-Chancellor without due inquiry (having regard to the duty imposed on him to act judicially) could not be regarded as a valid report for the purpose of enabling the Board of Residence and Discipline to take action.

(vi) that the proper remedy for the plaintiff against the decision of the Board of Residence and Discipline was not by way of *certiorari* proceedings but by way of an action for a declaration that the decision of the Board was null and void.

FERNANDO *v.* THE UNIVERSITY OF CEYLON 265

Writ of Habeas Corpus—

1. *Deportation Order—Power of Court to inquire into its reasonableness—Effect of words " deems it to be conducive to the public interest "—Power of Minister to elect between Deportation Order and Removal Order—Immigrants and Emigrants Act, No. 20 of 1948, ss. 28, 31, 45—Amending Act, No. 16 of 1955*—Habeas Corpus *Application—Duty of respondent to justify detention.*

When the Minister of Defence and External Affairs makes in good faith a Deportation Order against a person under section 31 of the Immigrants and Emigrants Act on the ground that he deems it to be conducive to the public interest to make such deportation order, it is

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not open to a Court of law to inquire into the reasonableness of the Order and decide that the Order is invalid because the Court does not deem the making of the Order to be conducive to the public interest.

The Minister may make a Deportation Order under section 31 of the Immigrants and Emigrants Act when he deems it to be conducive to the public interest to make it, notwithstanding that a Removal Order can also be made under section 28 of the Act against the person concerned.

Upon an application for a writ of *habeas corpus*, the production by the respondent of an order, warrant of commitment or other document valid in law justifying the detention that has been challenged is a sufficient answer.

JOBU NADAR *v.* GREY 85

2. Habeas corpus—*Custody of child—Contest between father and mother—Scope of fundamental right of father.*

Where a wife sought to obtain from her husband the custody of a child who was a girl of the age of four and a half years—

Held, that a father's fundamental right to the custody of his child during the subsistence of his marriage may be overridden on the ground that if the child is permitted to continue in the custody of the father there would be detriment to the life, health or morals of the child. It would be detrimental to the life and health and even of the morals of a young child if that child is forcefully separated at a very tender age from her mother and compelled to live, not even in the father's custody, but under the care of an elderly relative to whom the child is not bound by any natural ties. So long as the mother is shown to be fit to care for the child, it is a natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously.

FERNANDO *v.* FERNANDO 262

Writ of Mandamus—

1. *Butcher—Application for renewal of licence—Refusal by "proper authority" on ground of a Regulation prohibiting sale of meat—Validity of such refusal*—Mandamus—*Butchers Ordinance (as amended by Ordinance No. 44 of 1947 and Acts No. 2 of 1951 and No. 48 of 1953), ss. 2, 7, 13A* 38

See BUTCHERS ORDINANCE.

2. *Urban Councils Ordinance, No. 61 of 1939—Special meeting of Council—Duty of Chairman to convene one—Sections 38 (2) and 166—By-laws*—Mandamus—*Effect thereon of alternative remedy.*

A writ of *mandamus* lies against the Chairman of an Urban Council if he refuses to convene a special meeting of the Council when required to do so under section 38 (2) of the Urban Councils Ordinance. In view of the provisions of section 166, a Rule in terms of Rule 9 (*c*) of the By-laws of the Urban Council of Matara must give way to section 38 (2).

An alternative remedy provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot operate as a bar to the application for *mandamus*.

SAMARAWEERA *v.* BALASURIYA 118

3. *Municipal Council—Summoning of meetings which are to be presided over by the Commissioner—Procedure—Municipal Councils Ordinance, No. 29 of 1947, as amended by Act No. 7 of 1954, ss. 19 (2) (a), (b), (c), 20 (2), 21*—Mandamus. 418

See LOCAL AUTHORITIES (3).

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THE NEW LAW REPORTS OF CEYLON

VOLUME LVIII

1956 *Present :* **Basnayake, C.J., and K. D. de Silva, J.**

USOOF *et al.*, Appellants, *and* NADARAJAH CHETTIAR *et al.*, Respondents

S. C. 189—D. C. (Inty.) Colombo, 24,958

Execution of decree—Fiscal's sale—" Irregularity "—Civil Procedure Code, ss. 273, 282 (2).

The expression " irregularity " in section 282 (2) of the Civil Procedure Code includes an illegality.

Certain immovable property was sold by the Fiscal in execution of a decree. The property consisted of three blocks of land, and, admittedly, the sale was held at a place which, although the Fiscal's officer honestly believed it to be part of the property he was selling, was actually 636 feet away from the nearest of the blocks. Clearly the sale did not take place on any of the blocks which were advertised for sale.

Held, that the failure to conduct the sale " on the spot " as required by section 273 of the Civil Procedure Code was an irregularity within the meaning of section 282 (2). Accordingly, the sale could not be set aside on that ground as the applicant had not proved to the satisfaction of the Court that he had sustained substantial injury by reason of the irregularity. Furthermore, the failure of the applicant to make his application within the prescribed time limit was a fatal omission.

APPEAL from an order of the District Court, Colombo.

H. V. Perera, Q.C., with *M. Markhani*, for petitioners-appellants.—The estate that was to be sold consisted of 3 blocks which were described in the *Government Gazette*. The sale was, however, held on the factory block which was 636 feet away from the nearest of the blocks advertised for sale. Section 273 of the Civil Procedure Code lays down that sales of immovable properties " shall be conducted on the spot " unless the Court has directed otherwise or parties have consented. In this case neither did the Court direct otherwise nor did the parties consent. This is an imperative provision of law. The failure of the Fiscal to hold the sale " at the spot " advertised renders the sale null and void. The appellants notified to Court certain material irregularities within the 30 days

2——J. N. B 58402—1,593 (9/56)

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specified in Section 282 (2) of the Civil Procedure Code. The fact that the sale did not take place at the premises advertised was brought to the notice of the Court by an amended petition filed after 30 days had lapsed. There is a distinction between irregularities and illegalities. Only material irregularities need be notified to Court within 30 days of the receipt in Court of the Fiscal's report. The failure to hold the sale at the advertised spot was an illegality which need not be notified to Court within 30 days mentioned in Section 282 (2) —See *Jayarama Aiyar v. Vridhagiri* [1], *Akshiya Pillai v. Govindarajulu Chetti* [2], *Pannalal v. Firm Hasan Dada* [3].

N. Kumarasingham, for 1st respondent.

C. Thiagalingam, Q.C., with *N. Kumarasingham* and *T. Parathalingam*, for 2nd respondent.—The provisions of Section 273 Civil Procedure Code are not imperative but directory. The fact that the sale was not held on the spot advertised for sale is an irregularity which should have been notified to Court within 30 days as provided for in Section 282 (2) Civil Procedure Code. "Irregularity" includes an "illegality". See *Tassaduk Rasul Khan v. Ahmed Hussain* [4], *Sheodhyan v. Bholnath* [5], *Firm Tirkha Ram Chuni Lal v. Fakhir Ahmed* [6].

Cur. adv. vult.

May 2, 1956. BASNAYAKE, C.J.—

This is an appeal from an order under section 282 (2) of the Civil Procedure Code refusing to set aside the sale by the Fiscal of an estate known as Arawa Estate in execution of a decree in favour of the respondents.

It would appear that there was a mortgage decree for the sale of two estates, one known as Uva Estate and the other as Arawa Estate. The sale of both estates was advertised on the same day. After the sale of Uva Estate the Fiscal and his officers proceeded to Arawa Estate which was about 4 miles away.

The sale had been fixed for 2 p.m. on August 9th but the Fiscal and his officers appear to have arrived there earlier and held the sale at 1.45 p.m. Although the *Gazette* notice stated that Arawa Estate consisted of three blocks which adjoin each other it is in fact not so. The three blocks are not adjacent, the smallest of them being far away from the other two and the two larger blocks being close to each other but not adjoining.

The only point urged by learned Counsel for the appellants is that the sale was not held at the spot as required by section 273 of the Civil Procedure Code. Admittedly the sale was held at a place known as the Factory Block, which was 636 feet away from the nearest of the blocks advertised for sale, where the rubber factory of the owners stood. The Fiscal's officer was under the impression that the Factory Block was also part of the property he was selling and was under an honest mistake as to the spot on which he was to sell the property. It is clear that the sale did not take place on any of the blocks of land which were advertised for sale.

[1] *1921 A. I. R. Madras 583 at 586.*
[2] *1924 A. I. R. Madras 778.*
[3] *1939 A. I. R. Nagpur 258 at 260.*
[4] *I. L. R. 21 Calcutta 66.*
[5] *I. L. R. 21 Allahabad 311.*
[6] *1939 A. I. R. Lahore 36.*

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The question that we have to decide is whether the sale was conducted in accordance with the provisions of section 273 and if it was not whether the failure to do so is a material irregularity in conducting the sale within the meaning of section 282 (2) of the Civil Procedure Code.

Section 273 reads :—

> " In all cases the sale of immovable property shall be conducted on the spot, unless the court shall otherwise direct, or unless on application in writing to the Fiscal or his Deputy the parties shall consent to its being conducted elsewhere."

Learned Counsel argues that the sale was not conducted on the spot, that " on the spot " means on the very land which is for sale, and that the failure to comply with section 273 of the Civil Procedure Code is an illegality and not an irregularity and that therefore section 282 (2) does not apply to it.

Section 282 (2) enables the decree holder, or any person whose immovable property has been sold or any person establishing to the satisfaction of the court an interest in property sold under a decree, to apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it.

The question is whether the expression " irregularity " in section 282 (2) of the Civil Procedure Code includes an illegality. I am of opinion that it does. " Irregularity " is a wide expression and includes an illegality. An act is said to be irregular when it does not conform to the principles, rules, or law by which it is governed.

It will be sufficient for the purpose of this case to state that the sale conducted on the Factory Block which was owned by the defendants to this action, though in close proximity to two out of the three blocks of land to be sold, was not a sale " conducted on the spot ". But the failure to comply with the provisions of section 273 on the part of the Fiscal is an irregularity within the meaning of section 282 (2) and the Court was right in not setting aside the sale on the ground of that irregularity as the applicant had not proved to its satisfaction that he had sustained substantial injury by reason of that irregularity.

Furthermore under sub-section (2) of section 282 a person who seeks to have a sale set aside on the ground of material irregularity should notify the Court of the irregularity of which he complains within 30 days of the receipt of the Fiscal's report. In the instant case the complaint about the failure to comply with the provisions of section 273 was made after the period of 30 days and is therefore out of time and the Court has no power to act on such a complaint.

The appellant is not entitled to succeed and the appeal is dismissed with costs.

K. D. DE SILVA, J.—I agree.

Appeal dismissed.

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1956 *Present :* **Gratiaen, J., and Gunasekara, J.**

THE COMMISSIONER OF INCOME TAX, Appellant, *and* J. L. D. PEIRIS, Respondent

S. C. 27—Case stated under Section 74 of the Income Tax Ordinance (Cap. 188)

Income tax—Death of person carrying on a business—Computation of statutory income—"Ceases to carry on a business"—Income Tax Ordinance (Cap. 188), ss. 5 (1), 11 (1), 11 (6), 11 (9), 11 (10).

When a person who carries on a business dies, it cannot be said that, upon his death, he ceases to carry on or exercise a trade, business, profession or vocation in Ceylon within the meaning of section 11 (6) of the Income Tax Ordinance. Therefore, paragraph (*b*) of section 11 (6) does not apply for the purposes of computing the statutory income of the deceased for the year of assessment preceding that in which he died.

CASE stated under section 74 of the Income Tax Ordinance.

M. Tiruchelvam, Deputy Solicitor-General, with *A. Mahendrarajah*, Crown Counsel, and *R. S. Wanasundera*, Crown Counsel, for the appellant.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *John de Saram*, for the respondent.

Cur. adv. vult.

March 2, 1956. GRATIAEN, J.—

This is a case stated under the provisions of section 74 of the Income Tax Ordinance (Cap. 188). Mrs. Nancy Charlotte Peiris (hereafter called "the deceased") died on October 23rd 1951. One of her sources of taxable income had been her agricultural business. It was common ground between the taxing authority and her Executor that her statutory income for the year of assessment in which she died should, in respect of all her sources of income, be computed under section 11 (9) of the Ordinance. There was disagreement, however, as to how her statutory income for the preceding year should be ascertained. The Assistant Commissioner decided that the income derived from agricultural business during that year must be computed under paragraph (*b*) of section 11 (6) because she had "ceased", by reason of her death, to carry on this business. Upon appeal, the Commissioner confirmed the assessment on this basis, but the Board of Review ruled in favour of the executor that section 11 (6) (*b*) applied only to "a cessation of business by a living person". It is common ground that the deceased's income from other sources must be computed under section 11 (1).

The questions of law submitted for the opinion of this Court at the instance of the Commissioner are in the following terms :

"On the facts as submitted between the parties, did Mrs. N. C. Peiris, upon her death on 23.10.51, cease to carry on or exercise a trade or business, profession or vocation in Ceylon within the meaning of section

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11 (6) of the Income Tax Ordinance (Cap. 188) ? If so, does paragraph (*b*) of section 11 (6) of the said Ordinance apply for the purposes of computing the statutory income of Mrs. Peiris for the year of assessment preceding that in which she died ? "

The admitted facts which are relevant to our decision are that the deceased had continued to carry on an agricultural " business " within the meaning of the Ordinance until the date of her death. She had also derived income from this and other taxable sources during the year of assessment in which she died, viz. 1951/1952 and also during the preceding year 1950/1951. The amount of tax in dispute is Rs. 175,956·66.

The scheme of taxation laid down by the Ordinance appears in sections 5 (1), 11 (1), 11 (6) and 11 (9). Their provisions are to the following effect :

Section 5 (1) : " Income tax shall, subject to the provisions of this Ordinance . . . . be charged . . . . for each subsequent year of assessment (i.e. after the year commencing on 1st April 1932) in respect of the profits and income of every person for the year preceding the year of assessment . . . . *but without prejudice to any of the provisions of this Ordinance which enact that tax is to be charged in particular cases in respect of the profits and income of a period other than the year preceding the year of assessment.*"

Section 11 (1) : " Save as provided in this section, the statutory income of every person for each year of assessment from each source of his profits and income (the sources of income are enumerated in section 6) . . . . shall be the full amount of the profits and income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income. "

Section 11 (6) : " Where a person resident or non-resident *ceases to carry on or exercise a trade, business, profession, vocation or employment* (these are included in the sources of income enumerated in section 6) in Ceylon or, being resident elsewhere, his statutory income therefrom shall be :

(*a*) as regards the year of assessment in which the cessation occurs, the amounts of the profits of the period beginning on the 1st day of April in that year and ending on the date of cessation ; and

(*b*) as regards the year of assessment preceding that in which the cessation occurs, the amount of the statutory income as computed in accordance with the foregoing sub-sections *or* the amount of the profits of such year, whichever is the greater,

and he shall not be deemed to derive statutory income from such trade, business, vocation or employment for the year following that in which the cessation occurs." (There follows a proviso which has no bearing in the present context.)

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Section 11 (9): " *Where any person dies on a day within a year of assessment*, his statutory income for such year shall be the amount of profits and income of the period beginning on the 1st day of April in the year, and ending on that day."

(Section 11 (10) provides for the ascertainment of the statutory income of the executor of a deceased person as regards the year in which the death occurs and also as regards subsequent years of assessment.)

Section 5 (1) provides that, as a general rule, a tax is imposed for each year of assessment in respect of the profits and income for the preceding year. This general rule is without prejudice to any provisions of the Ordinance which enact that " tax is to be charged in particular cases in respect of the profits and income of a period other than the year preceding the year of assessment. " Section 11 (1), appearing in the chapter dealing with the ascertainment of statutory income for any particular year, is to the same effect. It therefore follows that unless any special exceptions in other parts of section 11 are found to be applicable to the facts of the present case, the deceased's statutory income (including that derived from agriculture) for the year 1951/1952 would be the aggregate of her nett income from these sources during 1950/1951. Similarly, her statutory income from all sources for 1950/1951 would be the aggregate of her nett income during 1949/1950.

Section 11 (6) introduces a limited exception to the general scheme of taxation laid down in sections 5 (1) and 11 (1). When a person has " ceased " to carry on or exercise a trade, profession, vocation or employment, two consequences follow. His statutory income from that particular source for the year of assessment in which the cessation occurred and for the preceding year must be computed as prescribed in section 11 (6). It will be observed, however, that for each of these years the assessee's statutory income from every other source must continue to be computed as prescribed by section 11 (1). Moreover, it is clear that when a cessation occurs, section 11 (6) is intended to be brought into operation simultaneously in respect of both years of assessment : it is therefore not permissible to apply the exception in respect of one year but not of the other. Paragraphs (*a*) and (*b*) of section 11 (6) are therefore interconnected parts of a single proviso, and not separate and distinct exceptions.

Section 11 (9) introduces yet another exception to the general scheme. It enacts that, when any person dies, the whole of his statutory income (i.e. from every taxable source) for that particular year shall not be computed under section 11 (1) but by reference to the actual aggregate of income and profits accruing up to the date of death. The deceased's statutory income for 1951/1952 was therefore properly computed under section 11 (9) and not under either section 11 (1) or paragraph (*a*) of section 11 (6).

No special provision is made in section 11 (9) for the computation of a person's statutory income for the year of assessment preceding the year in which he died. Unless, therefore, section 11 (6) can properly be applied

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partially to such a situation, the assessment must be made in accordance with the general scheme for computation laid down by section 11 (1). This was the view taken by the Board of Review.

The argument in support of the applicability of paragraph (*b*) of section 11 (6) to a case of cessation by reason of death must now be examined. It is contended that, as far as the deceased's agricultural business was concerned, she " ceased " to carry it on by reason of her death. I do not dispute the proposition that a person " cannot vacate an office better than by dying in it ". per Rowlatt J in *Hunter v. Dewhurst* [1]. Nor do I deny that in the context of certain taxing statutes the words " where a person ceases to hold an office " may be sufficiently general to cover cessation by death as well as by resignation or dismissal. *Allan v. Trehearne* [2]. But the problem cannot be solved merely by ascertaining all the possible meanings of particular words appearing in a taxing statute. They must be construed in the context of the entire scheme of taxation prescribed in the enactment.

In my opinion, section 11 (9) provides a comprehensive exception to the general scheme for ascertaining a deceased person's statutory income, and, apart from the special provision in respect of the year of assessment in which the death occurred, the income (from whatsoever source) of all preceding years must be computed under the general section 11 (1). I agree with the Board of Review that section 11 (6) is intended only to deal with cases where an assessee does not cease to be " a person " when he ceases to carry on his trade, business, profession or vocation. Section 11 (6) appears to me to contemplate a person who, at the moment of cessation, continues to have a place of " residence " (either in Ceylon or elsewhere) and continues to be a potential income-earner liable to further taxation under the Ordinance.

Let it be conceded that section 11 (6) *prima facie* covers a case of " cessation " by death. Even on that assumption, section 11 (9) is clearly an exception to paragraph (*a*) of section 11 (6) because it provides for a special computation of the deceased's entire income during that year of assessment, and not merely of his income from one particular source. If, therefore, paragraph (*a*) of section 11 (6) does not apply in respect of the year in which the death occurred, paragraph (*b*) of section 11 (6) must also be ruled out as far as the preceding year is concerned.

The present dispute relates to the assessment for 1950/1951. Under section 5 (1), which is the general charging section, the tax is payable (as the executor contends) " in respect of the deceased's profits and income for the year preceding the year of assessment ", and her statutory income must be computed under section 11 (1) in the absence of any clear provision to the contrary. In my opinion, the questions of law submitted for the opinion of this Court must be answered in favour of the executor, and I would award him the costs of these proceedings.

GUNASEKARA, J.—I agree.

Appeal dismissed.

[1] *(1930) 16 T. C. 615 at 623.*

[2] *(1938) 2 K. B. 464 at 473.*

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1956 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

BUDDHADASA, Petitioner, *and* A. MAHENDRAN (Officer-in-Charge, Police Station, Matara), Respondent

S. C. 315—Application for a Writ of Mandamus

Information Book—Statements of persons recorded therein—Their evidentiary value in civil proceedings—Right of a litigant to obtain copies of them—" Public documents "—" Right to inspect "—Proof of Public Documents Ordinance, s. 3—Evidence Ordinance, ss. 74, 76, 100—Criminal Procedure Code, ss. 121 (1), 122— Mandamus.

A party to an action is not entitled to resort to section 3 of the Proof of Public Documents Ordinance in order to obtain certified copies of statements taken down in an Information Book in terms of sections 121 (1) and 122 (1) of the Criminal Procedure Code unless he can show that at the trial of the action it will be necessary for him to adduce proof of the contents of those statements.

A statement reduced into writing by a police officer in terms of section 122 (1) of the Criminal Procedure Code is not a statement of the witness, a record of which it purports to be, but is the statement of the police officer as to what the witness told him. Therefore, a certified copy of such a statement cannot be used in civil proceedings either to corroborate or to contradict the witness whose statement it purports to be.

A first information recorded in terms of section 121 (1) of the Criminal Procedure Code is of little or no value if the informant, after having access to the statement and becoming aware of its contents, seeks to use it to corroborate his own evidence.

Semble : In the absence of specific statutory provision, a person is not entitled to inspect a public document and to be furnished with a certified copy of it. The documents which a person " has a right to inspect " within the meaning of section 76 of the Evidence Ordinance are only those in respect of which the right of inspection is expressly conferred by enactment.

The Attorney-General v. Geetin Singho (1956) 57 N. L. R. 289, dissented from.

APPLICATION for a Writ of *Mandamus*.

A collision took place between a motor car driven by A and a motor-cycle ridden by B in consequence of which B received injuries. The accident was reported to the police by A on the same day and his statement was recorded by a police constable in terms of section 121 of the Criminal Procedure Code. Thereafter, a police sergeant conducted an investigation into the cause of the accident in the course of which he recorded the statement of B at the hospital and also the statement of a person, C, at the scene of the incident. Subsequently B filed an action suing A in a sum of Rs. 50,000 as damages for the injuries sustained by him. Pending the trial, A made the present application to the Supreme Court praying for a writ of *Mandamus* on the officer in charge of the Police Station requiring him, in terms of section 3 of the Proof of Public Documents Ordinance, to issue to him a copy of the statement made by A at the Police Station and also copies of the statements of B and C as recorded by the Police in the course of their investigation into the accident.

Walter Jayawardene, with *A. S. Vanigasooriyar*, for the petitioner.

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D. St. C. B. Jansze, Q.C., Solicitor-General, with *L. B. T. Premaratne*, Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for the respondent.

Cur. adv. vult.

August 9, 1956. WEERASOORIYA, J.—

On the 7th December, 1953, a collision took place at a junction of two roads within the town limits of Matara between a motor car driven by the petitioner and a motor-cycle ridden by one N. G. A. Samarasekera in consequence of which the latter received injuries. The accident was reported at the Matara Police Station by the petitioner on the same day and his statement was recorded by Police Constable Weeratunge who was on duty at the station. Thereafter Police Sergeant Pathmanathan conducted an investigation into the cause of the accident in the course of which he recorded the statement of Samarasekera at the Matara Civil Hospital and also the statement of one Don Austin Ambepitiya at the scene of the accident. Subsequently the petitioner was charged by the Matara Police with the commission of offences punishable under the Motor Traffic Act, No. 14 of 1951. One of the offences charged was based on the allegation that he drove the car on the highway negligently or without reasonable consideration for other persons using the highway and thereby caused grievous hurt to Samarasekera. After trial the petitioner was acquitted of the charges preferred against him. Samarasekera then filed an action in the District Court of Matara suing the petitioner in a sum of Rs. 50,000 as damages for the injuries sustained by him. The petitioner has filed answer denying liability and the trial is pending.

The petitioner states that for the purpose of his defence in that action it is necessary for him to obtain certified copies of the entries in the Information Book kept at the Matara Police Station relating to the accident. In an attempt to obtain these copies his lawyers wrote a letter to the respondent, who is the officer in charge of the Matara Police Station, requesting that they be furnished with the copies under Section 3 of the Proof of Public Documents Ordinance (Cap. 12) on payment of the prescribed fees. The respondent replied that the copies applied for could not be issued but that on receipt of summons from Court the officer who conducted the investigation and recorded statements would give evidence relating thereto, " subject to the claim of privilege ".

The present application is made by the petitioner to enforce by a writ of mandamus the issue to him of the copies referred to. At the hearing before us Mr. Jayawardene who appeared for the petitioner stated that the only copies required are of the statement made by the petitioner at the Matara Police Station (being the first information received by the Police regarding the accident) and the statements of Samarasekera and Ambepitiya as recorded by the Matara Police in the course of their investigation into the accident. The Acting Solicitor-General appearing for the respondent opposes this application.

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It was held in the case of *The Attorney General v. Geetin Singho* [1] that a first information relating to the commission of a cognizable offence which is recorded in the Information Book is a public document within the meaning of Section 74 (*a*) (iii) of the Evidence Ordinance and that an accused person who is subsequently charged with the commission of an offence disclosed in that information is entitled under Section 76 of the same Ordinance to be furnished with a certified copy of it on payment of the prescribed fees. Section 76 refers to a public document in the custody of a public officer *which a person has a right to inspect*, and the view expressed by the Bench of two Judges of this Court which decided that case was that, adopting the English common law right of inspection of public documents as stated in *Mutter v. Eastern and Midlands Railway Company* [2], the accused concerned had made out a right to inspect the public document in question by reason of the interest which he had in it as the accused in the case. In holding that the first information was a public document the same Bench dissented from what appears to be a contrary view expressed by the majority of the four Judges of the Madras High Court (constituting a Full Bench) who heard the case of *Queen Empress v. Arumugam* [3] where that view was reached on a consideration of certain provisions in the Indian Criminal Procedure Code analogous to the provisions contained in Chapter XII of our Criminal Procedure Code.

It would follow from the ruling in *The Attorney-General v. Geetin Singho* (*supra*) that an accused person is also entitled to be furnished with copies of any statement relating to the matter of the charge against him and recorded by a Magistrate under Chapter XIII of the Criminal Procedure Code even where the statement has been made by the accused himself and amounts to a confession. But it is to be noted that while under Section 165D of the same Code an accused who is committed for trial is entitled to be furnished with a copy of the proceedings of the non-summary inquiry on payment of the prescribed fees, and Section 434 of the Code gives a similar right to any person affected by a judgment or final order of a criminal court of obtaining a copy of the proceedings in which the judgment or order was given, there is no specific provision in the Code for an accused or other person being furnished with copies of statements recorded under Chapter XIII of it. In the case of *Emperor v. Swamiyar* [4] the question that arose was whether an accused person was entitled, before the commencement of the preliminary inquiry against him, to copies of statements of witnesses recorded by a Magistrate under Section 164 of the Indian Criminal Procedure Code, which is the counter-part of Section 134 (in Chapter XIII) of our Code, and it was held that he had no such right. The judgment contains a reference to the English case of *Mutter v. Eastern and Midlands Railway Company* (*supra*) and the view was expressed that the question whether any person has a right to inspect a public document on the ground of interest is one not dealt with by the Indian Evidence Act and is altogether outside its scope. This is a decision of a Bench of two Judges of the Madras High Court, one of whom was Benson, J., who also was a member of the Bench which heard the

[1] *(1956) 57 N. L. R. 289.*
[2] *(1888) 38 Chancery Division 92.*
[3] *(1897) I. L. R. 20 Madras 189.*
[4] *(1907) I. L. R. 30 Madras 466.*

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case of *Queen Empress v. Arumugam* (*supra*) and concurred in the majority decision in that case. But it must also be stated that Chitaley and Annaji Rao in their commentary on the Indian Criminal Procedure Code [1] refer to certain decisions of the Lahore and Allahabad Courts as supporting their opinion that statements recorded under Section 164 " are public documents, being the acts of a judicial officer done under the provisions of the Code and the public servant, in whose custody those documents are, is bound to issue copies thereof and allow inspection of the same by the accused person ". There is, therefore, a difference of judicial opinion in the decisions of the Indian Courts whether, in the absence of specific statutory provision, a person has a right to inspect a public document and to be furnished with a certified copy of it.

The Evidence Ordinance contains no provision giving any right to inspect a public document, but Section 100 provides that whenever in a judicial proceeding *a question of evidence* arises not provided for by that Ordinance or by any other law in force in the Island, such question shall be determined in accordance with the English Law of evidence for the time being. The decision in *The Attorney-General v. Geetin Singho* (*supra*) that the accused person in that case was entitled to inspect the first information appears to have proceeded on the basis that where there is no specific statutory provision conferring a right of inspection of a public document the rule of English common law as stated in *Mutter v. Eastern and Midlands Railway Company* (*supra*) may be invoked under Section 100 of the Evidence Ordinance, but, with all respect, it seems to me that a claim that a person has a right to inspect a public document does not raise a question of evidence and the matter is not one, therefore, which is governed by Section 100 of the Evidence Ordinance. This is the view that was taken in *Emperor v. Swamiyar* (*supra*). Moreover, unlike in our Evidence Ordinance, there is no statutory definition of a public document in English law. But what is meant by a public document under the common law of England was considered by the House of Lords in *Sturla v. Freecia* [2] where Lord Blackburn stated that the very object of such a document must be that it should be made " for the purpose of being kept public, so that the persons concerned in it may have access to it ".

In *Heyne v. Fischel and Company* [3] it was held that documents made by officers of the Post Office showing the times of receipt and delivery of telegrams were not public records as they were kept for administrative purposes and not for the information of the public. Again, in *Pettit v. Lilley* [4] it was held that regimental records were not public documents because neither had the public access to them nor were they kept for the use and information of the public. Goddard, L.C.J., also referred in his judgment in that case to the well-settled rule that public documents are admissible as *prima facie* evidence of the facts stated in them. It would seem, however, that the documents considered in these two cases would fall within the category of public documents as defined in Section 74 of our Evidence Ordinance.

[1] *(1935 ed.) 834.*
[2] *(1880) 5 Appeal Cases 623 at 643.*
[3] *30 T. L. R. 190.*
[4] *(1946) 1 A. E. R. 593.*

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The conception of a public document in English law and our law is, therefore, fundamentally different, and in determining whether under our law a person has a right of inspection of a public document it would, in the absence of statutory provision conferring such a right, be unsafe to adopt the criterion of the English common law, as stated in *Mutter v. Eastern and Midlands Railway Company* (*supra*), that it depends on the interest which the applicant has in what he wants to inspect. Moreover, we have not been referred to any decision of the English Courts setting out the nature and extent of the interest which, under English law, would entitle a person to inspect a public document. In *The King v. Clear* [1], even where a statutory right was conferred on the inhabitants of a parish, who had been assessed for the purposes of payment of poor relief, to inspect at all reasonable times the accounts of the churchwardens and overseers relating to disbursements of poor relief, a writ of mandamus to enable inspection of the documents by an assessee was refused by the Court as no special ground had been made out as to why inspection was required. In *Ex parte Briggs* [2] it was held that a ratepayer had not made out a case for the issue of a writ of mandamus to compel inspection by him of the books of accounts kept by the churchwardens of a parish in the absence of some special and public ground. In both these cases the documents the inspection of which was refused would appear to have been public documents as understood in English law and the persons applying to inspect them had undeniably some interest in them, but such interest as they were shown to have was held not to be sufficient for the issue of the writ.

In the present case too the petitioner would appear to have an interest in the statements in question, but Mr. Jayawardene conceded that such interest alone would not entitle the petitioner to the issue of the certified copies applied for. But he submitted that the respondent, who is the public officer having custody of the Information Book of the Matara Police Station, is under a legal duty, in terms of Section 3 of the Proof of Public Documents Ordinance, to issue to the petitioner certified copies of his statement and the statements of Samarasekera and Ambepitiya appearing in the Information Book on payment of the prescribed fees. It was also conceded by Mr. Jayawardene that Section 3 of that Ordinance does not refer to all books and documents in the custody of a public officer but only to those books and documents the contents of which it shall be necessary for a person to adduce proof of in a Court of Justice or before any person having authority to hear, receive and examine evidence.

The basis of the present application is, therefore, different from that in the case of *The Attorney-General v. Geetin Singho* (*supra*) where the document was sought to be obtained under Section 76 of the Evidence Ordinance. In order to succeed in this application the petitioner has to satisfy the Court that at the trial of the civil action it will be necessary for him to adduce proof of the contents of the statements of himself, Samarasekera and Ambepitiya as appearing in the Information Book.

In *Rex v. Jinadasa* [3] the Court of Criminal Appeal held that Section 122 (3) of the Criminal Procedure Code imposes restrictions on the use

[1] *4 B and C 897.*

[2] *(1859) 28 L. J. Q. B. 272.*

[3] *(1950) 51 N. L. R. 529.*

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of the police officer or inquirer's *record* of the oral statement made to him, but does not govern the admissibility of *oral evidence* of such statement, and that, accordingly, where the law otherwise permits such evidence to be given a police officer or inquirer may give oral evidence of a statement made to him under Section 122 (1) and for that purpose he may refresh his memory by reference to his record of that statement, which record may also be used to contradict him. The effect of that decision (if I have understood it correctly) is that a statement reduced into writing by a police officer or inquirer in terms of Section 122 (1) of the Criminal Procedure Code is not a statement of the witness a record of which it purports to be, but is the statement of the police officer or inquirer himself as to what the witness told him. Although, if I may say so with respect, I find it difficult to appreciate the distinction, that decision is one which is binding on us. It would follow, therefore, from that decision that, quite apart from the restriction imposed by Section 122 (3) of the Criminal Procedure Code on the use of that statement in criminal proceedings, such a statement cannot be used even in civil proceedings either to corroborate or to contradict the witness whose statement it purports to be.

The present application was argued before us by learned counsel appearing for both sides on the footing that the statements in question related to the commission of a cognizable offence. Although the charges laid against the petitioner in the criminal prosecution against him were in respect of offences alleged to have been committed in breach of certain provisions of the Motor Traffic Act, No. 14 of 1951 (which are not cognizable offences), it is possible that on receiving information from the petitioner regarding the accident the Matara Police considered themselves under a duty to investigate whether any offence under Section 328 of the Penal Code (which is a cognizable offence) had been committed.

The ruling in *Rex v. Jinadasa* (*supra*) would, however, not apply to a first information relating to a cognizable offence recorded in terms of Section 121 of the Criminal Procedure Code, and such a statement could be utilised in civil or criminal proceedings either to corroborate or contradict the witness giving that information should he be called to testify in those proceedings. In the letter written by the petitioner's lawyers to the respondent applying for copies of the statements the reason given for the application was that the copies were needed " to contradict the witnesses in case their evidence deviates from their statements made under Section 122 " (of the Criminal Procedure Code). But I do not see how, if the petitioner gives evidence in the civil action, he can utilise his first information to contradict his own evidence. Nor is it likely that it would be utilised by him for such a purpose even if the law permitted it. Mr. Jayawardene contended, however, that it could be used to corroborate his evidence. This contention I am unable to accept since the statement can have little or no corroborative value if prior to the petitioner giving evidence he has had access to the statement and became aware of its contents.

As regards the other two statements, applying the ruling in *Rex v. Jinadasa* (*supra*), they may be made use of in the civil action only for the purpose of contradicting the police officer who reduced them into writing or to refresh his memory, but they cannot be used to contradict

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the evidence of either Samarasekera or Ambepitiya. On reference to the record of the civil action I find that Police Sergeant Pathmanathan, who recorded these statements, has been cited as a witness by the petitioner. But at the present stage of the action the need to contradict this officer if he is called as a witness at the trial can be regarded as only exceedingly remote. Should, however, it become necessary to do so or should the police officer wish to refer to the statements in order to refresh his memory, I do not see that the petitioner will be unduly hampered by not having access to the contents of those statements at present since the respondent has also been cited by the petitioner to produce at the trial the Information Book containing those statements which will, therefore, be available to the petitioner at the proper time for any purpose for which they may legally be used.

It seems to me that the real object of the application is to enable the petitioner to ascertain before the trial commences what statement was made by him to the Police when he reported the accident and also what statements were made by Samarasekera and Ambepitiya in that connection. There is nothing in Section 3 of the Proof of Public Documents Ordinance which confers a right on the petitioner to obtain certified copies of the statements in order to achieve such an object.

If this application is allowed, the knowledge derived by the petitioner of the contents of the statements made by Samarasekera and Ambepitiya (or, at least, of Police Sergeant Pathmanathan's version of what these two persons told him when questioned regarding the accident) would place him at an advantage which normally is not afforded to a party to an action. Samarasekera is the plaintiff in the action and Ambepitiya has been cited as a witness for the plaintiff, and in all probability they will be called at the trial on plaintiff's behalf to testify against the petitioner. In *Rambukwelle v. de Silva* [1] the observation was made by Bertram, C.J., that it is not proper that persons who have been, or are likely to be, sub-poenaed by one side should be got by the other side to make statements or to sign prepared statements. Although that case was a proceeding questioning the validity of an election, the observation is equally applicable to any other civil proceeding.

In my opinion the application is devoid of any merit and must be dismissed. The petitioner will pay to the Crown the costs of these proceedings which are fixed at Rs. 525.

H. N. G. Fernando, J.—

I have had the advantage of reading the judgment of my brother Weerasooriya and am in entire agreement with the conclusion he has reached.

Although the application for certified copies was made in this case in terms of section 3 of the Proof of Public Documents Ordinance, I should myself have seen no objection to directing that the copies should be furnished under section 76 of the Evidence Ordinance if resort could properly have been had to the latter section. In my opinion, however,

[1] *(1924) 26 N. L. R. 231 at 254.*

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the documents which a person " has a right to inspect " are only those in respect of which the right of inspection is expressly conferred by enactment. Having regard to the existence of numerous enactments in which the Legislature has chosen with deliberation to confer such a right, it would be unreasonable to suppose that the Legislature intended by section 76 to add to the list of instances in which such a right could be claimed. If the expression " right to inspect ", occurring in section 76, had had no meaning in our law owing to the lack of statutory provision there might well have been scope for the admission of English Law under section 100 to fill the place of the *casus omissus*. But the existence of ample statutory provision conferring the right to inspect public documents contradicts the view that there is here any question of a *casus omissus*.

I should like to add also that section 3 of the Proof of Public Documents Ordinance is a provision which seems only *incidental* to the purpose of that Ordinance, which is set out in the Long Title and in the Preamble (stated in the original enactment) as follows :—

" An Ordinance to provide for the production in evidence of copies, instead of originals, of public documents ".

" Whereas much inconvenience is experienced from the practice, which is now common, of summoning Public Officers to produce in Evidence, books and documents in their custody : It is hereby enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof, as follows : . . . . "

Having regard to these declarations of the Legislature as to the object of the enactment, there is in my opinion much force in the argument of the learned Solicitor-General that section 3 only requires a public officer, on application made by a party to any legal proceedings, to furnish *to the Court* a copy of a public document, instead of producing the original in evidence. To hold otherwise would be to hold that the Legislature, having elsewhere made specific provision for the right of inspection and for the right to obtain certified copies, intended in section 3 to confer a general right of access to information contained in public records merely because of the pendency of legal proceedings.

Application dismissed.

[In the Court of Criminal Appeal]

1956 *Present :* **Basnayake, C.J. (President), Pulle, J., and Fernando, J.**

REGINA *v.* W. G. DHARMASENA *et al.*

Appeals 115 and 116 of 1955, with Applications 176 and 177

S. C. 28—M. C. Matara, C. 1810

Rape—Prosecutrix's evidence—Corroboration—Evidence Ordinance, s. 134—Summing-up—Erroneous statement as to evidence—Duty of Counsel to invite Court's attention thereto.

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In a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated.

Obiter : Where in a summing-up the Judge makes an erroneous statement as to the evidence, he should be invited by Counsel to correct it immediately. Otherwise, an appeal based on such error will not be encouraged.

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

G. E. Chitty, with *A. B. Perera*, *M. S. M. Nazeem*, and *Daya Perera*, for 1st accused-appellant.

Colvin R. de Silva, with *M. L. de Silva*, for 2nd accused-appellant.

A. C. Alles, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 2, 1956. BASNAYAKE, C.J.—

The first appellant was convicted of the offence of rape and the second appellant of abetment of that offence. The first appellant was the Superintendent of his father's estate in Deniyaya and the second appellant was an English Schoolmaster and a friend of the first. The prosecutrix is the mistress of one Felix Fernando.

The story for the prosecution is that the witness Felix Fernando along with some others was arrested and remanded to the custody of the Fiscal in connexion with a charge of rape. In order to enlist his support for the defence of Felix Fernando, the prosecutrix went to the house of the first appellant accompanied by her younger brother Reuben about 11 a.m. on 3rd September 1954. Apparently moved by her appeal he undertook to spend even a lakh of rupees in the defence of Fernando and said that he would go to Galle where Fernando was on remand to see him, and asked her to come the following day at about 3.30 p.m.

When she went the next day again accompanied by Reuben the second appellant was also there. The appellants were seated on two chairs and were engaged in conversation. The first appellant asked her to sit down. She sat on the step while her brother sat under a tree in the compound. Thereupon the first appellant moved his chair close to her and after telling her not to worry about the case and assuring her that somehow or other he would get Fernando released, he held her hand. The prosecutrix showed her resentment at his action by brushing aside his hand and escaping from his grasp. But he followed her and held her by her jacket which got torn when she struggled to free herself. Failing in her attempt to escape she raised cries but they were of no avail for he lifted her bodily and took her inside the house, placed her on a bed, threatened to kill her if she raised cries, gagged her and tied her chin. He then summoned the second appellant who tied her ankles together. Thereafter the first appellant tied her hands together and placed them against her chest.

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The second appellant then uttered these words of warning : " Kalu Nona, this Pangiriwatte Mahatmaya can spend even a lakh if he wants. He is the only ganankaraya in Deniyaya."

Then the first appellant having attempted to have intercourse with her got off her body and went out and fetched a gun which he showed her and said : " If you struggle I will shoot you with this and kill you." Thereafter he placed the gun against the bed, untied the hands and feet of the prosecutrix and had intercourse with her.

According to Reuben he was on the compound when he saw the first appellant hold his sister's hand. She pushed his hand and jumped out, but he held her by her jacket, which got torn, and she then fell down and raised cries. At this stage Reuben ran away.

The medical evidence of the injuries found on the prosecutrix three days afterwards strongly supported her story that she had been forced to submit to an act of sexual intercourse.

There was sufficient evidence for the jury, upon a proper direction, to hold that the first appellant committed rape. Hence the submission on his behalf that the verdict is unreasonable cannot be sustained.

The principal submission made on behalf of the first appellant was that the learned trial Judge failed to direct the jury that as against him there was in law no corroboration of the evidence of the prosecutrix. We are unable to uphold this submission as in our view the story of the prosecutrix was corroborated in several respects. Our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated although it does provide that in the case of charges of procuration under section 360A no person shall be convicted upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused. Another such provision is to be found in the Maintenance Ordinance. There is no presumption, as in the case of an accomplice, that a prosecutrix in a case of rape is unworthy of credit unless she is corroborated in material particulars. Except where corroboration is expressly required by statute, our rule of evidence [1] is that no particular number of witnesses shall in any case be required for the proof of any fact.

Counsel also complained that the evidence given by Reuben in the Magistrate's Court, which was elicited for the purpose of discrediting that witness, was put to the jury as corroboration of the prosecutrix.

The learned trial Judge rightly directed the Jury that corroboration of the story of the prosecutrix was not in law necessary but that it was not safe to convict upon the uncorroborated testimony of the prosecutrix, and that nevertheless they were free to return a verdict against the prisoner if they were convinced of the truth of the story of the prosecutrix even though she was uncorroborated. Under the English common law too the testimony of a prosecutrix was alone sufficient evidence to support a conviction ; neither a second witness nor corroborating circumstances were necessary [2].

[1] *Evidence Ordinance, Section 134.*
[2] *illiam Crocker, 17 Cr. App. R. 45.*
Thomas James Jones, 19 Cr. App. R. 40.

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The law is thus stated in Hale's Pleas of the Crown, Volume I, page 633 :—

" Touching the evidence in an indictment of rape given to the grand jury or petit jury.

" The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony.

" For instance, if the witness be of good fame, if she presently discovered the offence and made pursuit after the offender, shewed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it, these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself."

Hale's statement of the law is reflected in the pronouncements of the Courts of England and of those American States whose statute law does not require that the evidence of the prosecutrix in a charge of rape should be corroborated. The view of the Courts of England is quoted in our reports and need not be repeated here. The American view can be gathered from the following extracts from the judgments of Parker J. and Brickell, C.J.—

Parker J. in Ellison v. State, 19 N. M. 428, 144 Pac. 10.

" But in the absence of a statute a man may be convicted of rape on the uncorroborated testimony of a strumpet, or he may be convicted on the uncorroborated testimony of a girl below 10 years of age . . .

" It is of course true that in a sense the testimony of a prosecutrix must be corroborated. That is, it must bring together a number of surrounding facts and circumstances which coincide with and tend to establish the truth of her testimony. Without such surrounding facts and circumstances, the bald statement and charge of a woman against a man would be so devoid of testimonial value as to render it unworthy of belief, and to cause it to fail to meet the requirements of the law, namely, evidence of a substantial character. In this sense there must, of course, be corroboration. "

Brickell, C.J. in Boddie v. State, 52 Ala. 395, 398.

" No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinised, and Court and Jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal but immediately discovered the offence, and the offender is known to her ; if the place of its commission was such that if she made outcry it would not probably be heard and bring her assistance and defence,—these and other circumstances should be considered

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by the Jury. The manner in which she testifies, the consistency of her testimony, should also be carefully considered. If, viewed fairly and carefully, the Jury are satisfied of the truth of her evidence, it needs no corroboration from other witnesses to support a conviction."

Objection was also taken to the following passage in the learned trial Judge's summing up. But we are unable to hold that the direction is wrong in law or prejudicial to the prisoners.

"Gentlemen, in charges of sexual offences it is always the duty of the Judge to warn the jury that it is unsafe to act upon the uncorroborated testimony of the woman who makes the accusation. It is not a rule of law but it is a rule of prudence and it is a rule of common sense to take up the view that is so often expressed and to which I have referred to on earlier occasions that these charges are very easy to make and very difficult to disprove. So that you must warn yourselves that it is generally and nearly always quite unsafe to act on the woman's uncorroborated evidence even if you think she is speaking the truth unless there is some independent evidence, that is evidence coming from an independent source which confirms in material detail not only there was intercourse between the parties but also that it took place without her free will and consent.

"Obviously you cannot expect this rule to mean that everything that the woman has said in regard to the crucial matters must be corroborated by independent evidence because then you see it really amounts to this. You may well keep the woman out of the witness-box and you get independent evidence to prove the essential elements of the crime. I can hardly imagine that there would ever be such a situation that there would be independent evidence to prove what happened within a secluded spot.

"The rule of common sense does not go to that extent. You must ask yourselves whether there is some independent evidence which you believe to be true which tends to connect the accused with the crime, which tends to make her allegation which is more probable than not on a material important detail."

Learned counsel also criticised the following directions of the learned trial Judge in regard to the evidence of the boy Reuben :—

"Now, gentlemen, what is the corroborative evidence in the strict sense, namely, independent evidence on material points which tend to implicate the accused and convict him with the crime ? There is the evidence of the boy Reuben. Are you quite satisfied at least when he says that on the 4th September in the afternoon when he went there with Premawathie he saw the 1st accused carrying Premawathie into the house ? If you are convinced that is true that is corroborative evidence to the extent that it shows that the 1st accused was acting in a most suspicious manner in regard to a woman whose husband was away from the village at the time and if you are quite satisfied

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that Reuben is speaking the truth, there was certainly an opportunity afforded to the 1st accused to commit the crime. If you believe the evidence of Reuben, it is certainly a very suspicious piece of evidence against the 1st accused.

" Well, I shall refer to criticism of the evidence of Reuben as a witness in a few minutes."

Later on in the charge he said :—

" Reuben's evidence has been criticised. You saw the boy himself. There was the controversy about the age. He was not quite 15 at the time of the alleged incident. You saw him as he appears 15 months later. He seems to be an extremely unintelligent young man, which I imagine if his intelligence quotient, if tested, would be extremely low which the experts call it. He cannot even sign his name, cannot read a clock, and he apparently had left school 6 or 7 years ago, a strange time to leave school. He is obviously an unsatisfactory witness where matters of recollection are concerned. He first said that he saw the 2nd accused there on both visits and then in answers to questions he was unable to reply at all. One knows these young children are easily tutored, but this was an unsuitable boy for tutoring at all. He could not remember the piece of recitation which apparently he was taught to recite before a jury, but it is for you, realising his lack of intelligence and his youth, to say whether you believe him when he says that he went with his elder sister on the 4th in the afternoon and that he saw her being carried away by the 1st accused. If you are convinced that is true, that is an item of evidence which you will consider as corroboration, for what it is worth, not obviously of the fact of intercourse, but corroboration that there was an opportunity for the commission of the crime, and that is evidence of a piece of conduct which was suspicious in nature because the superintendents and members of estates do not carry women forcibly into their houses on occasions particularly when the gentleman's wife and children were not there at all."

Learned counsel urged that the above direction contained a misdirection of fact on a very vital point. The defence proved through the Clerk of Assize the following passage from Reuben's deposition in the Magistrate's Court :—

" When she fell down the 1st accused lifted her bodily and took her to the room."

But at the trial Reuben did not say that the first appellant lifted the prosecutrix and carried her away. His evidence was as follows :—

" The 1st accused had a little chat with my sister and he held my sister's hand and my sister pushed aside his hand and jumped out. Then the 1st accused held her by the jacket. Then my sister raised the cry ' Budu Amme '. . . . . When he held her by the jacket the jacket got torn and she fell down. At that moment she raised the cry ' Budu Amme ' and I ran away.

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To Court :

1138. Q. At the time you ran away your sister was on the ground ? I did not see him move away from the compound.

Examination continued :

1139. Q. Where did you run ? I ran along the road in the direction of our house.

1140. Q. Did you get to your house ? No.

1141. Q. Why what stopped you ? I waited on the road to see whether my sister would return and after waiting there for some time I went again to see my sister and then I met her near the river.

1142. Q. At that time what was her condition ? Her jacket was torn and there was an injury on her lip and she was crying."

It would appear from the evidence of Reuben quoted above that Reuben corroborated the prosecutrix in the main and that the obvious slip of the trial Judge in stating that she was corroborated in respect of her evidence that she was bodily lifted and taken inside the house, though it be incorrect, is not in view of the other evidence of Reuben such a mistake as would call for interference with the verdict.

But there is, however, the criticism that he failed to direct the jury in regard to the statement of Reuben before the Magistrate which was inconsistent with his evidence in the trial Court.

In the light of the other evidence of Reuben the inconsistency cannot be regarded as one which is so important as to call for specific mention as a statement which seriously affects the value of the boy's evidence, as the learned Judge had in his introductory remarks, sufficiently cautioned the Jury as to the way in which his evidence should be approached.

Strong reliance was placed on the judgment of the Court of Criminal Appeal in *The King v. Atukorale* [1] in which a verdict of rape was set aside on the ground that complaints made by the prosecutrix shortly after the alleged offence were wrongly presented to the jury as being corroboration of her evidence, but in the present case the charge except for the unfortunate slip in dealing with the boy's evidence is not open to objection.

As we have already held, the first appellant was rightly convicted by the jury. His conviction necessarily involved the complete acceptance of the evidence of the prosecutrix as to the circumstances in which she was raped by the first appellant. That evidence clearly implicated the second appellant as well, and having regard to the warning duly administered by the Judge that there was no corroborative evidence as against the second appellant, we are unable to hold that the verdict against him was in any way unreasonable.

[1] *(1948) 50 N. L. R. 256.*

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As the question has arisen in this case we should like to add that it is important that both counsel should follow the Judge's summing up and bring to his notice any erroneous statement as to the evidence. In the instant case the record shows that the learned trial Judge inquired from both the counsel for the prosecution and the counsel for the defence whether there was anything more that he should tell the Jury and both answered in the negative. The slip in question appears to have passed unnoticed by both counsel.

For the guidance of counsel we should like to add that where in a summing up the Judge makes an erroneous statement as to the evidence, he should be invited to correct it immediately. An appeal based on such error will not be encouraged where correction would obviously have been made if the Judge's attention had been drawn to the matter [1].

It has been held both in England and elsewhere that if some irregularity comes to the knowledge of counsel before the verdict is returned he should bring it to the attention of the Court at the earliest possible moment and that it ought not to be held in reserve with a view to taking it before the Court of Criminal Appeal.

Where counsel has failed to bring timeously to the attention of the Court of trial any such irregularity which would undoubtedly be corrected by the trial Judge if his attention were drawn to it, the Court of Criminal Appeal will not allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction [2].

For the reasons given above the appeals are dismissed. The period between the final date of hearing of this appeal, 12th January 1956, and the date of this judgment, should be deducted from the sentence which the prisoners have yet to undergo.

Appeals dismissed.

1956 *Present :* **T. S. Fernando, J.**

M. EBERT FERNANDO, Appellant, *and* E. L. GOONEWARDENA, Respondent

S. C. 1,200—M. C. Colombo South, 65,526

Excise Ordinance—Section 44—Charge of possession of unlawfully manufactured liquor—Quantum of evidence.

In a prosecution for possession of unlawfully manufactured liquor in breach of section 44 of the Evidence Ordinance, the sole evidence relied on by the complainant was a report of the Government Analyst that the liquor in question did not fall within the categories of (1) approved brands of imported liquors and (2) liquors manufactured under licences issued under the Excise Ordinance.

[1] *The King v. Radich (1952) N. Z. L. R. 193.*
[2] *R. v. Neal (1949) 2 All E. R. 438.*

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Held, that the Government Analyst's report was not sufficient to prove beyond reasonable doubt that the liquor in question was unlawfully manufactured.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

S. B. Lekamge, for the accused appellant.

P. Weerasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 21, 1956. T. S. FERNANDO, J.—

The appellant was convicted in the Magistrate's court on a charge of possession of 1½ gallons of unlawfully manufactured liquor in breach of section 44 of the Excise Ordinance. The question of possession is not contested on this appeal, but learned counsel for the appellant argues that there was no proof before the Magistrate's court that the liquor produced there and marked P.2 was unlawfully manufactured. The burden of establishing that the liquor was unlawfully manufactured lay upon the prosecution, and to discharge this burden it relied upon a report of the Government Analyst, the relevant portions of which are reproduced below :—

> " The analytical characteristics of P.2 indicate that P.2 is a fermented liquor but not a distilled spirit.
>
> The characteristics of P.2 are not similar to those of samples of either approved brands of imported liquors or liquor manufactured under licences issued under the Excise Ordinance.
>
> In my opinion P.2 is a liquor which does not fall under the following categories :—
>
> (1) *Approved brands of imported liquors.*
>
> (2) Liquors manufactured under licences issued under the Excise Ordinance."

The prosecution had to exclude the possibility (*a*) that P.2 was a liquor lawfully manufactured in the Island and (*b*) that it was foreign liquor, i.e., liquor manufactured outside the Island and imported here. The Analyst's report excludes possibility (*a*) referred to above, but does it exclude possibility (*b*) ? The report shows that the liquor in question was not of an " approved brand " of imported liquor. What is meant by " approved " is not explained in the Analyst's report or in the oral evidence in the case. It has been suggested in the course of the argument before me that " approved " means approved by Government, and that it is only approved brands of foreign liquor that may lawfully be imported into the Island. It is not fanciful, however, to suggest that there may be in this country imported liquor that is not of an " approved " brand in the sense suggested at the argument. For example, there may certainly be liquor of an unapproved brand smuggled into this country. Such

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liquor would not be unlawfully manufactured liquor as contemplated in the Excise Ordinance. Whatever offence a person may be committing by possessing such liquor he cannot be said to be possessing unlawfully manufactured liquor.

Learned Crown Counsel referred me to the decision of my brother Sansoni in the case of *Fernando v. Goonewardene*[1] where a report of the Government Analyst similar to that produced in this case was the only evidence relied on by the prosecution to establish a charge of possession of unlawfully manufactured liquor. In that case the point that has now been taken was not raised, and my brother was not called upon to consider it.

For the reasons indicated above, I am of opinion that the prosecution failed to discharge the burden that lay upon it to establish beyond a reasonable doubt that the liquor in question was unlawfully manufactured, and I therefore set aside the conviction and sentence and direct that the appellant be acquitted.

Appeal allowed.

[1] *(1955) 57 N. L. R. 17.*

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[IN THE PRIVY COUNCIL]

1956 *Present :* **Viscount Simonds, Lord Oaksey, Lord Tucker, Lord Somervell of Harrow, and Mr. L. M. D. de Silva**

M. R. M. M. M. R. MURUGAPPA CHETTIAR, Appellant, *and* MUTHTHAL ACHY *et al.*, Respondents

PRIVY COUNCIL APPEAL NO. 48 OF 1955

S. C. 153—D. C. Colombo, 20,429

Evidence—Claim against a dead man's estate—Standard of proof required.

Plaintiff sued the heirs of a deceased person, L, on a parol contract entered into between V, who acted on behalf of the plaintiff, and L. The only question for decision in the present case was whether L agreed without qualification to pay interest at a particular rate on a certain sum of money. Upon this question the sole basis of the plaintiff's case was the parol testimony of V. V's evidence related to events which took place twenty years before he gave evidence.

Held, that when a claim is brought forward against the estate of a deceased person in a matter in which, if he were alive, he might have answered the claim, the evidence ought to be looked at with great jealousy and care.

APPEAL from a judgment of the Supreme Court reported in *57 N. L. R. 27.*

D. N. Pritt, Q.C., with *R. K. Handoo*, for the plaintiff appellant.

Dingle Foot, Q.C., with *Sirimevan Amerasinghe*, for the defendants respondents.

Cur. adv. vult.

July 26, 1956. [*Delivered by* Mr. L. M. D. DE SILVA]—

This is an appeal from a judgment of the Supreme Court of Ceylon allowing an appeal from a judgment of the District Court of Colombo whereby, in an action instituted in 1948 by the appellant (hereinafter called the plaintiff), then a minor and suing by his next friend, the respondents (hereinafter called the defendants) were ordered to pay to the plaintiff a sum of Rs. 16,658·17 with legal interest from date of decree.

The parties to the case are Chettiars.

The plaintiff pleaded that one Velasamy (who acted as the next friend of the plaintiff until the latter came of age in the course of the proceedings), acting on behalf of the plaintiff, had "deposited with one K. R. K. N. L. Letchumanan Chettiar a sum of Rs. 18,700 which amount

2——J. N. B 59090—1,593 (10/56)

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the said Letchumanan Chettiar agreed to pay to the plaintiff together with interest thereon at the rate prevailing from time to time among the Chettiar Community the interest being added to the principal from time to time according to the custom prevailing and calculated in the manner customary among the Chettiars in their dealings with each other". The year of the deposit is given in the plaint as 1930 but it appeared after several days of trial from the plaintiff's books that it was 1929. The rates of interest described in the plaint have been referred to in the course of the proceedings by both sides as "*nadappu vatti*" and the rates for different years have been established by the evidence of one Ramasamy Chettiar.

The defendants are the heirs of Letchumanan who died in the year 1945. They admitted that a sum of money had been deposited with Letchumanan but denied the agreement with regard to interest averred in the plaint and raised other defences which are not now persisted in. In the books of Letchumanan Chettiar, which have been produced, the plaintiff has been credited in the months of September, October, November and December, 1929, with various sums amounting in the aggregate to Rs. 18,700, with interest at the *nadappu* rate till March, 1934, and thereafter with interest at the bank rate which was a much lower rate. An amount calculated at these rates (less an amount paid out at the instance of the plaintiff's mother which the plaintiff does not now claim) was deposited to the credit of the plaintiff in curatorship proceedings on the 9th April, 1943, and was drawn by the plaintiff in March, 1947.

The circumstances under which the money came to belong to the plaintiff and to be deposited, discussed in the judgments in the courts below, are not relevant to the questions which have arisen on this appeal.

The case for the plaintiff was based on an oral contract between Velasamy acting on behalf of the plaintiff and Letchumanan. No other ground was pleaded or urged and the only question for decision was (apart from certain questions of law since abandoned), and is, the question of fact whether Letchumanan agreed without qualification to pay interest at the *nadappu* rate during the whole period that the money was held by him.

Upon this question the only witness called by the plaintiff was Velasamy. He said that Letchumanan agreed to pay interest at the *nadappu* rate. His evidence does not qualify the agreement by introducing into it a named period during which *nadappu* interest was payable, or by introducing into it any other condition or circumstance upon which such interest ceased to be payable. If his evidence is accepted the plaintiff's case must succeed, and, equally, if his evidence is not accepted the plaintiff's case must fail as the sole basis of the plaintiff's case is that of a parol contract established by the parol testimony of Velasamy, the onus of proving the contract being on the plaintiff.

The learned trial judge accepted Velasamy's evidence and gave judgment for the plaintiff. The Supreme Court on appeal came to the conclusion that Velasamy's evidence should not be accepted, set aside the judgment

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of the District Judge and dismissed the action. It held that the learned trial judge had failed to apply established principles pertaining to an action against the estate of a deceased person and, itself applying those principles, came to the conclusion that the plaintiff had not proved his case. Their Lordships are of the opinion that this decision should be affirmed.

Adopting a view expressed by Fry, L.J., the Supreme Court (Gratiaen, J.) said it was the duty of the court to approach the case " with great jealousy, because the claim is brought forward against the estate of a deceased person when that person, who was a chief actor in the transaction impugned was dead, " *re Garnett, Gandy v. Macaulay.*[1] In the same case Brett, M.R., said :—

> " The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care ; the evidence ought to be thoroughly sifted and the mind of any judge who hears it ought to be, first of all, in a state of suspicion. "

Their Lordships are of the same opinion.

There are no indications in the judgment of the learned District Judge, whether by way of an express statement or in the manner in which he commented on the evidence, that he had approached the case as he should have done. Their Lordships see no reason to disagree with the conclusion of the Supreme Court that the learned District Judge had failed to approach the case in the correct manner. The Supreme Court proceeded itself to consider whether Velasamy's evidence upon the crucial question could safely be acted upon, and came to the conclusion that it could not be relied on. It is a well established principle that an appellate court should not reverse the findings on the facts of a trial judge unless exceptional circumstances exist but the circumstances of this case were exceptional and fully justified the course of action taken by the appellate court. The conclusion which it arrived at appears to their Lordships to be equally justified.

The learned District Judge thought that Letchumanan's books afforded corroboration of Velasamy's statement that *nadappu* interest was payable because the books showed that *nadappu* interest had been paid till March, 1934. The Supreme Court considered this view fallacious because the question which arose for decision was, not what interest was payable up to March, 1934 (plaintiff had in fact been credited with and drawn out a sum calculated at the *nadappu* rate until March, 1934), but what interest was payable thereafter. Whether or not this evidence could be regarded as capable of amounting to corroboration, their Lordships are of opinion that, in the circumstances of this case, it was of little or no weight. The real point for consideration was the unexplained discontinuance of the *nadappu* rate from March, 1934, and the substitution therefor of a much smaller rate ; but this is just one of those points

[1] *(1885) 31 Ch. 1 at p. 9,*

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which Letchumanan "if he were alive might have answered" (vide observations in *re Garnett* above). The point no doubt has to be borne in mind but it does not possess the same significance as an absence of explanation by Letchumanan during his lifetime would have had. It has also to be borne in mind that no suggestion has been made at any time during these proceedings that Letchumanan was a dishonest man.

Velasamy's evidence related to events which took place twenty years before he gave evidence. Of that evidence the Supreme Court (Fernando, A.J.) observed :—

> "Even if plaintiff's principal witness Velasamy was making an honest attempt to give truthful evidence, his recollection of the circumstances of the alleged transaction with the deceased Letchumanan was at least confused and unreliable. To judge from the instructions he gave to the plaintiff's proctor for the purpose of filing suit, the sum of Rs. 18,700 was according to his recollection paid to Letchumanan in 1930, but his subsequent evidence was that the sum was deposited in instalments in the latter months of 1929. Velasamy's recollection of his meeting with Letchumanan on the occasion of the alleged agreement was also vague. He admitted that Letchumanan was in India at the time of Muttiah's death, but was unable to say when precisely Letchumanan returned to Ceylon and had the alleged conversation concerning the deposit of money. At one stage he even said that he did not see Letchumanan in 1929, but saw him in India in 1930 because he himself was then in India. Again, his statement that he personally handed over money to Letchumanan at the latter's place of business on several occasions is inconsistent with the entries in the book P 12 (kept by Velasamy) according to which the sums were delivered by one Somasundaram (also an employee of the deceased Muttiah).
>
> "In the circumstances of this case, where the evidence as against Letchumanan needs to be tested with more than ordinary care, it was in my opinion unsafe in view of these and other contradictions, to rely completely on Velasamy's account of the precise undertakings to which Letchumanan bound himself by the alleged agreement".

Their Lordships find themselves in agreement with this view. In their opinion, without any reflection on Velasamy's honesty, his evidence, relating as it does to events which took place many years before the evidence was given, is faltering at many points ; in definiteness, accuracy and precision it falls short of the standard which would entitle it to be considered in a claim against the estate of a deceased person.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the respondents' costs of this appeal.

Appeal dismissed.

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1956 *Present :* **K. D. de Silva, J., and Sansoni, J.**

I. PODIYA *et al.*, Appellants, *and* REV. E. SUMANGALA THERO, Respondent

S. C. 89—D.C. (Inty.) Kurunegala, 6,148

Buddhist Ecclesiastical Law—Res judicata—*Applicability of doctrine to incumbency disputes—Abandonment of incumbency—Effect on pupillary succession—Judgment of consent—Effect of* res judicata.

The rule of *res judicata* is applicable to disputes as to who is the lawful Viharadhipathi of a particular Buddhist Temple. A pupil is the privy of his tutor for purposes of *res judicata.*

The abandonment by a priest of an incumbency results in the forfeiture of the rights of his pupil to inherit the incumbency. Abandonment may take place by means of the priest consenting to a decree of Court disentitling him to the incumbency.

A judgment of consent is as effective by way of estoppel as a judgment whereby the Court exercised its mind in a contested case, and has the full effect of a *res judicata* between the parties.

In action No. 1, A sued B asking for a declaration that A was the controlling Viharadhipathi of Manawala Vihare as against B. After issues were framed the dispute was settled on the following terms : " Of consent plaintiff is declared the controlling Viharadhipathi of the Manawala Vihare but this right will vest in him as from the date of the demise of the defendant who is hereby declared entitled to reside in and officiate as Viharadhipathi of the said temple during his lifetime, without any let or hindrance from the plaintiff. Each party bears his own costs. "

In the present action No. 2, A sued C, who was the pupil of B. He claimed, on the same title as he had set out in action No. 1, that he was the Viharadhipathi of Manawala Vihare.

Held, that the settlement in action No. 1 and the decree entered in accordance with it was *res judicata* between the parties in action No. 2, because C was a privy of B and was therefore bound by that decree.

Held further, that B, by consenting to the settlement in action No. 1, abandoned his rights to the incumbency in favour of A. Therefore C had no incumbency to which he could succeed on B's death.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *C. R. Gunaratne*, for the 2nd to 6th defendants appellants.

T. P. P. Goonetilleke, for the plaintiff respondent.

Cur. adv. vult.

May 10, 1956. SANSONI, J.—

The plaintiff brought this action claiming to be declared the controlling Viharadhipathi of the Manawala *alias* Kalegedara Temple and praying that he be restored to possession of the three lands described in the schedule to the plaint, and the six defendants ejected therefrom. The

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plaintiff claimed the office as the pupil of one Attadassi who was the pupil of one Sunnanda. The sixth defendant denied the plaintiff's claim and pleaded that he was the lawful Viharadhipathi of the temple as the pupil of one Rewata, who was himself the pupil of one Aggatissa. The second to fifth defendants filed a separate answer supporting the claim of the sixth defendant ; they pleaded that they were in possession of the lands in dispute under the sixth defendant.

When the case came up for trial the parties admitted that the lands in dispute belonged to the Manawala Temple ; they also admitted that the plaintiff and the sixth defendant were the pupils of Attadassi and Rewata respectively. A preliminary issue of law was then framed in the following terms :

> " Is the judgment and decree in D. C. Kurunegala Case No. 2,651 *res judicata* between the plaintiff and the sixth defendant on the question as to whether the plaintiff is the present lawful Viharadhipathi of the Manawala *alias* Kelegedara temple and entitled to the possession of its temporalities ? "

The relevant pleadings and proceedings of that earlier action were marked in evidence. They showed that the present plaintiff brought that action against the sixth defendant's tutor Rewata, asking for a declaration that he was the controlling Viharadhipathi of this temple. He claimed on the same title as he has set out in this action, and also pleaded that the Malwatte Sangha Sabha had declared him to be the lawful Viharadhipathi as against Rewata. The defendant Rewata in that action claimed the office as the pupil of Aggatissa ; he pleaded that the order of the Sangha Sabha was invalid. After issues were framed the dispute was settled on the following terms :—

> " Of consent plaintiff is declared the controlling Viharadhipathi of the Manawala Vihara but this right will vest in him as from the date of the demise of the defendant who is hereby declared entitled to reside in and officiate as Vihardhipathi of the said temple during his lifetime, without any let or hindrance from the plaintiff. Each party bears his own costs. "

The learned trial judge held on the preliminary issue of law that this settlement and the decree entered in accordance with it was *res judicata* between the present parties, because the sixth defendant is a privy of Rewata and is therefore bound by that decree.

This appeal has been filed against that decision, and Mr. Jayewardene attacked this finding on three grounds :

1. A pupil is not a privy of his tutor, since no question of property but only a question of status is involved when the matter in dispute is the office of Viharadhipathi.
2. The terms of the decree are uncertain and there is no clear adjudication in the decree as to who the lawful Viharadhipathi is.
3. It is not open to a Viharadhipathi to deprive his pupil of such an office by being party to a settlement of a dispute regarding that office.

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In my view all three objections must fail.

In regard to the first objection, it is remarkable that although disputes as to who is the lawful Viharadhipathi of a particular Buddhist Temple have been tried in our Courts for very many years, it does not seem to have been urged before that the rule of *res judicata* does not apply to them. It was only last year that such an action came before this Court and a previous decree was pleaded as *res judicata* between the parties, but no objection was raised by the learned Queen's Counsel, who appeared in that case on either side, to the application of this doctrine. I refer to the case of *Moragolle Sumangala v. Kiribamune Piyadassi* [1]. In his judgment in that case (with which I agreed) Gratiaen, J. expressed the definite opinion that a plea of *res judicata* may properly be raised in such a dispute, although for the reasons given by him in that case the plea was of no avail.

In that case the respective tutors of the plaintiff and the defendant had been parties to an earlier action in which a decree was entered dismissing that action. That decree was relied on as *res judicata* by the defendant in the later action. In dealing with that plea Gratiaen, J. said :

> " This plea of *res judicata* would without doubt have succeeded if a decision that Ratnajoti (the defendant's tutor) was in truth the lawful incumbent of the temple had been implicit in the dismissal of Indajoti's (the plaintiff's tutor) action. In that event the present defendant's claim to have succeeded to the incumbency (by reason of the " privity of estate or interest " which exists under the Sisyanu Sisya Paramparawa between a proved incumbent and his pupil) could not have been challenged by the plaintiff (claiming the office as Indajoti's privy). "

The learned judge then went on to consider whether such a decision was necessarily involved in the dismissal of Indajoti's action, and found that the action was dismissed not because Ratnajoti was the lawful incumbent but because Indajoti had failed to prove that he had any right to the relief he claimed in the action. In other words, there was no determination as to who the lawful incumbent was. In the present action the plaintiff is not faced with any such difficulty. He has obtained a decree of Court which explicitly declared him to be the controlling Viharadhipathi as against the sixth defendant's tutor. It is therefore not open to the sixth defendant now to reagitate that issue. I do not think that it is essential in order to constitute one person the privy of another that there should be a question of ownership of property arising ; there are lesser rights in property which a Viharadhipathi, by virtue of his office, acquires. For instance, he is entitled to the unhampered use of the Vihare for the purpose of maintaining the customary religious rites and ceremonies. He can claim full possession of it even though the title in respect of it and of the other endowments of the

[1] *(1955) 56 N. L. R. 322.*

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Vihare is vested in a trustee. See *Guneratne Nayake Thero v. Punchi Banda Korale* [1]. Again, he is entitled to the control and management of the temple premises and might regulate its occupation and use to the extent that no other priest can select for himself a particular place in the Vihare independently of him against his wishes. A priest who is guilty of contumacy is liable to be ejected by him. See *Piyadasa v. Deevamitta* [2].

I would also refer to the case of *Gunaratne v. Punchi Banda* [3], where Schneider, J. contrasted the relationship which exists between successive high priests of the Dambulla Vihare with that which exists between a tutor and his pupil under the succession called Sisyanu Sisya Paramparawa. The learned judge said :

> " A priest becomes a high priest of the vihare in question not by virtue of any form of succession recognised by the law, but by being appointed to the office by some person or persons. The law has not recognised a continuity of succession to temporal rights as existing between one high priest so appointed and his successor, as it has in recognising the succession called Sisyanu Sisya Paramparawa. "

He impliedly decided that a pupil is the privy of his tutor for purposes of *res judicata*. It therefore seems clear that the sixth defendant could have claimed this incumbency against the plaintiff only if there had been no decision in the earlier action as to who was entitled to the incumbency. But a declaration that the plaintiff was the lawful incumbent was made in that action against the sixth defendant's tutor, and the matter is therefore at an end.

Mr. Goonetilleke also urged that the sixth defendant had no right to claim the incumbency independently of his tutor Rewata, and he submitted that the sixth defendant had no such right in view of the decision in *Punnananda v. Weliwitiya Soratha* [4]. In that case it was held that the abandonment by a priest of an incumbency results in the forfeiture of that to which his pupil's rights of succession are attached, namely, the incumbency itself. In such a case there remain no rights for the pupil to inherit. If that decision is applied to this case the plaintiff's case is all the stronger. In effect, Rewata by consenting to the settlement abandoned his rights to this incumbency in favour of the plaintiff, and such abandonment was made a matter of record in a decree of Court ; the sixth defendant therefore had no incumbency to which he could succeed on Rewata's death.

With regard to the second objection, I think the meaning of the settlement is clear enough. The matter in dispute was whether the plaintiff was entitled to be declared the controlling Viharadhipathi, and this declaration was granted to him. There was added the condition that Rewata was entitled to reside in and officiate as Viharadhipathi during his lifetime. In effect, the plaintiff was declared *de jure* incumbent and Rewata was to be *de facto* incumbent for life. I do not think that this limitation imposed on the plaintiff's title rendered the matter which was

[1] *(1926) 28 N. L. R. 145.*
[2] *(1921) 23 N. L. R. 24*
[3] *(1927) 29 N. L. R. 249.*
[4] *(1950) 51 N. L. R. 372.*

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decided by the decree uncertain. I would say that the very qualification which was introduced in favour of the defendant made it all the clearer as to who was declared by the decree to be lawfully entitled to the office of controlling Viharadhipathi.

With regard to the third objection, I see no reason why we should not apply the ordinary rule that " a judgment of consent is as effective by way of estoppel as a judgment whereby the Court exercised its mind in a contested case, and has the full effect of a *res judicata* between the parties ". *Sinniah v. Eliakutty* [1]. Mr. Jayewardene objected that if the principle of *res judicata*, and particularly that principle in relation to judgments of consent, were applied to incumbency disputes, it would be possible for a tutor deliberately to divert the succession to the incumbency from his pupils to an outsider. He would be enabled to do indirectly what he cannot do directly. This argument seems to deal with another topic—as to whether such a decree may be attacked on such grounds as fraud or negligence. It does not, however, induce me to reject the application of what has been described as " a fundamental concept in the organization of every jural society ", " a rule common to all civilized systems of jurisprudence ", and " a rule which, founded on ancient precedent, is dictated by a wisdom which is for all time. "

For these reasons I would affirm the judgment under appeal and dismiss this appeal with costs.

K. D. DE SILVA, J.—I agree.

Appeal dismissed.

1956 *Present :* **Gratiaen, J., and Sansoni, J.**

FALIL A. CAFFOOR *et al.*, Appellants, *and* M. Y. M. HAMZA *et al.*, Respondents

S. C. 280—D. C. Colombo, 5,761 P

Donation—Acceptance by unauthorised agent—Validity—Reservation of life-interest in donor—Acceptance after donor's death—Validity.

Acceptance on behalf of a donee, but without the donee's authority, renders a deed of gift inoperative.

Quaere, whether a deed of gift reserving a life-interest in the donor can be accepted by the donee after the death of the donor.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. Dissanayake*, for the 9th–14th defendants-appellants.

[1] *(1932) 34 N. L. R. 37.*

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H. W. Jayewardene, Q.C., with *S. Sharvananda*, for the plaintiff-respondent.

No appearance for the 2nd-9th respondents.

Cur. adv. vult.

March 8, 1956. GRATIAEN, J.—

The plaintiff instituted this action on October 10th 1949 for the sale under the provisions of the Partition Ordinance of a narrow strip of land 9¼ perches in extent, depicted in the plan No. 1937 filed of record. The property which is situated in New Moor Street, Colombo, was at that time a "Takkiya" which was regularly attended by Muslims as a place of worship (except on Fridays). There was a shrine room on the site and two Muslim "saints" had been buried there with the permission of the Municipal authorities in 1930 and 1937 respectively. The 8th defendant, who claimed to be the trustee of the Takkiya, intervened in the action. After his death the 15th defendant, his successor in that office, was substituted in his place. The other intervenients are the appellants who claimed to be the legal owners of the property holding it in trust for the congregation.

The property had belonged several years ago to a Muslim lady called Natchi Umma. According to the plaintiff, she donated it (subject to a life-interest in herself and also to a fideicommissum in favour of the donee's children) to her grandson Mohamedo Usoof by P1 of 1891. No specific evidence was led as to when precisely the donor died. Mohamedo Usoof himself died on 23rd April 1945. The plaintiff claims that the property then passed to him as fideicommissary under P1 and to his brother Noor Mahaliya whose interests have since passed to the 1st to 7th defendants. The learned Judge accepted this chain of title and ordered a sale of the property under section 8 of the Partition Ordinance on that basis.

The appellants conceded that the property originally belonged to Natchi Umma, but denied that P1 operated as a valid donation *inter vivos* because it had not been accepted either by Mohamedo Usoof personally or on his behalf by any person authorised by him. Their position was that Natchi Umma continued to be the owner until she died and that the property then passed to her daughter Kando Umma (the mother of Mohamedo Usoof). According to the oral evidence, Kando Umma died in 1898, but her death certificate was produced in this Court and proves that she in fact died on 11th June 1902.

It has been clearly established that Mohamedo Usoof, asserting absolute title to her property, sold it on 1st February 1907 to Omar Lebbe Marikkar, from whom it ultimately passed in 1918 by a succession of transactions to the appellants' father. By that date the property had been dedicated (by one of the purchasers claiming absolute ownership through Mohamedo Usoof) for use as a Takkiya. The Municipal Assessment Register 9D2 proves that it has since 1918 been recognised as a Mosque.

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I agree with the learned Judge's ruling that neither the purported dedication of the property for the purposes of a religious trust nor the fact that two pious Muslims have since been buried there would afford a defence to the action if in truth the legal title to the site including the shrine room and the graves now belongs to the plaintiff and his co-heirs. Indeed, the only ground on which Mr. H. V. Perera invited us to set aside the judgment under appeal was that the donation of the property to Mohamedo Usoof by P1 was inoperative for lack of acceptance. It is therefore unnecessary to discuss certain topics which seem to have excited much interest in the lower Court—for instance the question as to the particular processes by which a pious Muslim may be recognised as having attained the status of a "saint". In short, the case can be decided without causing offence to the religious feelings of the litigants. I therefore return to the point of law raised by Mr. Perera.

Mohamedo Usoof was admittedly of age at the time when the deed P1 was executed in his favour, but the deed of donation P1 purported on the face of the document to have been accepted on his behalf by his aunt Sotha Umma. There is no proof that he had authorised this lady to accept the gift or that he was even aware of the donor's intention to make it. *Prima facie* therefore the purported acceptance by Sotha Umma was insufficient to perfect the gift. *Voet* 39 : 5 : 11 and 12. There is also no direct or convincing circumstantial evidence of any subsequent acceptance of the gift by Mohamedo Usoof on his own account during the life-time of the donor.

As a general rule, acceptance after the donor's death does not operate to perfect the gift. "For the will of the donor and the donee were not at one before the donor's death, and after the death of the donor they could not be united to the prejudice of the heir, who had acquired a real right to the property concerning which the donation had not been affected." *Voet* 39 : 5 : 13. The plaintiff relies, however, on an exception to the general rule, namely, that a gift may be perfected by acceptance after the donor's death "if the execution or fulfilment of the donation has been postponed till after the donor has died." *Voet* (*ibid.*). It was argued that in the present case the donor had reserved to herself a life-interest in the property, so that the "fulfilment" of the donation was in truth postponed. It was suggested in *Lokuhamy v. Juan* [1] that if a donor reserves to himself the right to possess the property till his death, *Voet* 39 : 5 : 13 is authority in support of a valid acceptance after death. But this decision appears to have been principally based on a prior acceptance by the natural guardian of the donees who were minors, and on "other circumstances from which acceptance may fairly and reasonably be implied".

The ruling in *Lokuhamy v. Juan* [1] was followed in *Tissera v. Tissera* [2], but with respect, I think that the question calls for reconsideration in an appropriate case. When A conveys his property to B reserving a life-interest to himself, the title to the property passes immediately to B, and the enjoyment of only one of the rights incidental to full ownership is postponed. I doubt if it can fairly be said that in such a situation

[1] (*1875*) *Ram. Rep. 215.* [2] (*1908*) *2 Weer. 36.*

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there has been a postponement of the "fulfilment" of the donation. The law would therefore seem to require "a present acceptance of the dominium which the deed confers subject to the life-interest." per Wood Renton J. in *Hendrick v. Sudritarana* [1]. I shall assume, however, that it was open to Mohamedo Usoof to perfect the gift in his favour by acceptance after his grandmother died. Even then I take the view that proof of such acceptance has not been satisfactorily established.

The evidence relied on by the plaintiff indicates at best that Mohamedo Usoof first dealt with the property by executing two leases in favour of third parties in 1899 and 1901 (before his mother died) and that he later mortgaged it in 1903 (after her death). The indentures of lease and the mortgage bond have not been produced, and there is no material from which we may infer that he had expressly (or even by necessary implication) acknowledged that his title was derived from, and limited by the terms of, the deed P1. Indeed, P1 had expressly prohibited him, as fiduciary, from mortgaging the property and it would be strange indeed if one were to regard the execution of a mortgage in violation of prohibition as affording proof of acceptance of the gift subject to that very prohibition. Those transactions which took place after Mohamedo Usoof's mother had also died are not inconsistent with the hypothesis that he had leased or mortgaged the property by virtue of some other title asserted by him. Let it then be supposed that the leases executed in 1899 and 1901 took place before the death of Natchi Umma. In that event the transactions would *prima facie* contradict acceptance of the gift subject to the donor's life-interest.

The burden was on the plaintiff to establish a valid acceptance of the gift, and not on the defendant to disprove it. It must be emphasised in this connection that Mohamedo Usoof sold the property in 1907 reciting a title which was quite inconsistent with his suggested acknowledgment of the status of a mere fiduciary. In *Tissera v. Tissera* [2] by way of contrast, the donee, when dealing with the property, had expressly recited that he had acquired title by virtue of the deed of gift, and Grenier J. observed that "if there had been no acceptance of the gift on behalf of the donees or by the donees themselves there would not have been this recital in the bond."

A person seeking to establish a valid acceptance of a gift by circumstantial evidence must furnish proof from which it may fairly be inferred, on a balance of probability, that the donee was aware of the execution of the deed of gift and had accepted it subject to the terms and conditions of the grant. If, at the end of the case, the evidence on this issue is equivocal, the burden of proof is not discharged. I would therefore allow the appeal and dismiss the plaintiff's action with costs in both Courts.

SANSONI, J.—I agree.

Appeal allowed.

[1] *(1912) 3 C. A. C. 80. See also the observations of De Sampayo J. in* Nonai *v.* Appuhamy *(1919) 21 N. L. R. 165 at 169.*
[2] *(1908) 2 Weer. 36.*

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1953 *Present :* **Gratiaen, J.**

K. EASIAH, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. Application 263—In the matter of an appeal under Section 15 of the Indian and Pakistani Residents (Citizenship) Act

Application for registration as citizen—Prima facie *case not established—Failure to show cause—Refusal of application—Right of appeal—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (as amended by Act No. 37 of 1950), ss. 9 (1) and (2), 15 (1).*

When an applicant fails to show cause against an order *nisi* made under section 9 (1) of the Indian and Pakistani Residents (Citizenship) Act, the Commissioner has no option but to make an order under section 9 (2) refusing registration.

The jurisdiction of the Supreme Court under section 15 (1) is confined, as in the case of any other appellate jurisdiction, to the correction of errors made by the tribunal of first instance.

Quaere, whether an order made under section 9 (2) is of a purely administrative character.

APPEAL from an order of the Commissioner for the Registration of Indian and Pakistani Residents.

V. K. Palasuntharam, for the applicant-appellant.

M. Tiruchelvam, Crown Counsel, for the respondent.

Cur. adv. vult.

June 10, 1953. GRATIAEN, J.—

The facts arising on this appeal are substantially the same as those which were recently considered by my brother Swan in *Sivanpillai v. Commissioner for the Registration of Indian and Pakistani Residents* [1].

The appellant had applied to be registered as a citizen of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 as amended by Act No. 37 of 1950. After due consideration of the application and of the statutory report furnished by an investigating officer the Commissioner made an order *nisi* under section 9 (1) intimating to the appellant that, unless he showed cause to the contrary within the period of three months prescribed by the Act, his application for registration would be refused. The appellant did not avail himself of this opportunity but chose instead, after the statutory period fixed by law had expired, to appeal to this Court under section 15 (1) against the Commissioner's refusal to grant him the privilege of registration.

My brother Swan has held in *Sivanpillai's case* (*supra*) that in such circumstances the remedy by way of appeal to this Court was not available. I agree with this conclusion, but, with great respect, I would

[1] *(1953) 54 N. L. R. 310.*

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prefer not to attempt to solve the difficult question whether the order under appeal is of a judicial, a quasi-judicial or a purely administrative character. A person who desires to avail himself of the privilege of citizenship under the Act is required to follow the procedure prescribed by that Act. If he does so, he has a right of appeal to this Court against an order which is adverse to him. If he does not, it necessarily follows that no good grounds exist for interference with the refusal of his application. The jurisdiction of this Court under section 15 (1) is confined, as in the case of any other appellate jurisdiction, to the correction of errors made by the tribunal of first instance. In this case there has been no such error to which the appellant can point. The Commissioner had no option but to make an order under section 9 (2) refusing registration after the appellant had failed to show cause against the order *nisi* within the period of three months prescribed by the Act. I would therefore dismiss the appeal with costs.

Appeal dismissed.

1956 *Present :* **Gratiaen, J., and Gunasekara, J.**

M. M. ISMAIL, Petitioner, *and* D. S. MARASINGHE (Chairman, Village Committee, Hanwella), Respondent

S. C. 611—Application for a Writ of Mandamus *on the Chairman, Village Committee, Hanwella*

Butcher—Application for renewal of licence—Refusal by "proper authority" on ground of a Regulation prohibiting sale of meat—Validity of such refusal— Mandamus—*Butchers Ordinance (as amended by Ordinance No. 44 of 1947 and Acts No. 2 of 1951 and No. 48 of 1953), ss. 2, 7, 13A.*

Although, under section 13A of the Butchers Ordinance, the slaughter of animals may be lawfully prohibited for a specified period in any area, the prohibition in that area of the sale of meat of animals that have been lawfully slaughtered in another area is *ultra vires* the "proper authority". Therefore, *mandamus* would lie against a "proper authority" if, purporting to act under section 7 of the Butchers Ordinance, he refuses to entertain *in limine* a butcher's application for the renewal of his annual licence on the ground that an order has been published in the *Government Gazette* "prohibiting the slaughter of animals and sale of meat".

APPLICATION for a Writ of *Mandamus* on the Chairman, Village Committee, Hanwella.

H. W. Jayewardene, Q.C., with *S. B. Lekamge*, for the Petitioner.

N. E. Weerasooria, Q.C., with *W. Wimalachandra*, for the Respondent.

Cur. adv. vult.

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February 27, 1956. GRATIAEN, J.—

The petitioner had for many years carried on a trade of a licensed butcher in the Village Committee area of which the respondent is at present " the proper authority " within the meaning of section 2 of the Butchers Ordinance (as amended by Ordinance No. 44 of 1947 and Acts No. 2 of 1951 and No. 48 of 1953). He applied to the respondent on 2nd November 1955 for a renewal of his licence for the year 1956, but received a reply dated 19th November 1955 to the effect that the application " could not be entertained " because the respondent, by virtue of the powers vested in him by section 13A of the Ordinance (enacted by section 6 of the amending Act of 1951) had published in the *Ceylon Government Gazette* an order " prohibiting the slaughter of animals and sale of meat " in the area during a specified period which included the whole of the year 1956. The petitioner has now applied to this Court for a mandate in the nature of a Writ of *Mandamus* directing the respondent to entertain his application dated 2nd November 1955 and to deal with it according to law.

The duties of a " proper authority " on receipt of an application for the issue of a licence to carry on the trade of butcher are prescribed by section 7 of the Ordinance (as amended by section 6 of the Ordinance No. 44 of 1947). He *shall* publish a notice in the *Gazette* setting out the particulars of the application and inviting objections to the issue of a licence. The applicant must then be given an opportunity of meeting such objections, if any. It is only at that stage that he is generally empowered to decide whether or not to allow the application. The applicant has a right of appeal to the Minister against an order of refusal.

A preliminary objection was raised before us to the effect that *mandamus* does not lie in the present case, and that the petitioner's only remedy is by way of appeal to the Minister. Mr. Weerasooriya relied on *Don Carolis v. The Chairman, U. C., Gampaha* [1] in support of this objection, but that authority is clearly distinguishable. In the present case, the respondent had refused to entertain the application *in limine* because he formed the view (as explained in paragraph 6 of his counter-affidavit dated 19th January 1956) that he had no power to grant a butcher's licence during a period covered by his purported prohibition of the slaughter of animals and the sale of meat in the area ; in other words, the action taken under section 13A made it impossible for any butcher to carry on his trade lawfully within the Village Committee area during 1956. If this assumption be correct, I agree that *mandamus* would not lie because compliance with the requirements of section 7 before the ultimate and inevitable refusal of his application would obviously be a purposeless formality. If on the other hand, the purported prohibition under section 13A was either wholly or partially *ultra vires* the proper authority, his peremptory refusal to entertain the application (on grounds which were insupportable in law) constituted a breach of his statutory duty to follow the usual procedure before refusing an application which was regular on the face of it.

[1] (*1949*) *51 N. L. R. 227.*

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I do not suggest that the failure of any member of the public to object to the issue of a licence automatically divests the proper authority of his discretion independently to refuse it *bona fide* and on reasonable grounds in the interests of the residents of the locality in order to promote the objects of the Butchers Ordinance. But the right of appeal conferred by section 7 (4) presupposes that the proper authority, having complied with section 7 (2) and also (if applicable) with section 7 (3) (*a*), has made an order under section 7 (3) (*b*). Perhaps the only justification for refusing to entertain an application *in limine* would be that the application under section 7 (1) had not been made in proper form or, of course, that the carrying on of any part of a butcher's trade in the locality during the relevant period has in fact been prohibited by some person vested with power to interfere so drastically with an occupation which is *prima facie* lawful.

There remains the question whether the purported prohibition of the slaughter of animals *and the sale of meat* within the limits of the Village Committee area during the year 1956 was *ultra vires* the proper authority.

Section 13A (1) of the Ordinance, which was introduced by section 6 of the amending Act, No. 2 of 1951, passed into law on 23rd February 1951. It is to the following effect :—

> " The proper authority for any area may from time to time, by order published in the *Gazette*, prohibit the slaughter of animals in that area or any specific part thereof during any specified period."

This new section follows immediately after a group of sections (in the original enactment) which are designed to ensure that the slaughter of cattle in the area with a view to the sale of meat for human consumption is strictly supervised in the interests of public health. I should therefore imagine that the power to prohibit the slaughter of animals " from time to time " was primarily granted to promote the same object, e.g., if an epidemic of cattle disease was temporarily prevalent in the area. No argument was addressed to us, however, on behalf of the petitioner suggesting that the power could not be exercised *bona fide* for other reasons, and I shall therefore assume (without deciding) that the order relied on by the respondent was *intra vires* to this limited extent. But Parliament has certainly not delegated to the " proper authority " the power to prohibit *in toto* the exercise of a butcher's trade in the locality. Mr. Weerasooriya very properly did not seek to justify that part of the order which purported to prohibit the sale of meat in the area during 1956 and I am satisfied that it was *ultra vires* the proper Authority.

In the result, the petitioner has made an application for a licence to carry on the trade of a butcher in 1956 in an area in which the slaughter of animals during the relevant period has (let it be assumed) been lawfully prohibited. But there is nothing to prevent the other activities which form part of a licensed butcher's trade from being carried on in the area. For instance, the Ordinance, in its original or amended form does not make it unlawful for a butcher " to expose for sale " in one

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area the meat of animals that have been lawfully slaughtered in another part of the Island. Accordingly, the petitioner's application for a licence was not of a kind which the respondent could properly have refused to entertain. The respondent should therefore have followed the normal procedure laid down in section 7 before deciding *bona fide* whether or not there were reasonable grounds for granting or refusing a licence to the petitioner. I would issue a *mandamus* directing him to entertain the application dated 2nd November 1955 and to deal with it thereafter as required by the provisions of the Ordinance. The petitioner is entitled to the costs of this application which I would fix at Rs. 315.

GUNASEKARA, J.—I agree.

Application allowed.

1956 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

M. KANAPATHIPILLAI, Appellant, *and*
M. MEERASAIBO *et al.*, Respondents

S. C. 168—D. C. Batticaloa, 753/L

Co-owners—Prescription—Transfer of entire land by a co-owner—Transferee's right to prescribe against the other co-owners—Ouster.

When a co-owner conveys the entire land held in common to a stranger and the latter is aware, at the time he obtains the conveyance, that his vendor is only a co-owner and not the sole owner of the land, prescription will begin to run in the purchaser's favour against the the other co-owners only if there has been an ouster or its equivalent.

APPEAL from a judgment of the District Court, Batticaloa.

C. Ranganathan, with *P. Naguleswaram*, for the plaintiff appellant

G. F. Sethukavalar, for the defendants respondents.

Cur. adv. vult.

February 27, 1956. SANSONI, J.—

The land in dispute in this case formerly belonged to Sinnaver Kanepathi who died about the year 1934. She had two sons Kannappan and Eliathamby. Kannappan pre-deceased his mother and his ½ share devolved on his four children Ponnamma, Purannam, Nagamma and Katpagam, each of whom became entitled to ⅛ share. Katpagam died leaving her husband Arulanantham and two children, the 2nd and 3rd defendants. Arulanantham transferred his share to the 5th defendant who thus became entitled to 1/16th share. Ponnamma, Nagamma and Purannam transferred their interests to the plaintiff who thus became entitled to 6/16th share.

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The other ½ share owner Eliathamby mortgaged his ½ share to one Thambiayah by deed 1D3 of 1938. The mortgagee put the bond in suit, and according to the mortgage decree which was entered in 1940, that ½ share became liable to be sold in default of payment of the debt. In 1941 by deed P5 Eliathamby purported to sell the entire land to Thambiayah for Rs. 100, out of which Rs. 70 was set off against the debt due under the mortgage decree. In 1944 by deed P6 Thambiayah purported to sell the entire land for a sum of Rs. 500 to the 1st defendant.

The 1st defendant claimed the entire land and denied that the plaintiff had any right to bring this partition action.

The learned District Judge held that Eliathamby possessed the entire land exclusively after the death of Kanepathi and that the 1st defendant had acquired a prescriptive title to the entire land as the heirs of Kannappan did not exercise any rights of possession. Seeing that Eliathamby and the heirs of Kannappan were co-heirs in respect of this land, something very much more than mere possession by Eliathamby was necessary to give him a starting point for acquiring a prescriptive title to this land. In any event, he had only seven years possession at the time he transferred the entire land to Thambiayah. But for one circumstance, it might have been argued that since Thambiayah was a stranger who entered into possession of the entire land upon a deed which purported to convey to him the entirety, although his vendor had title only to half-share, Thambiayah's possession of the entire land was adverse to the other co-owners ; and since ten years had elapsed between the date of his purchase and the bringing of this action, the 1st defendant by tacking on Thambiayah's possession to his own acquired a prescriptive title to the entire land. The circumstance which precludes the 1st defendant from relying on the possession of Thambiayah is that Thambiayah was aware, when he bought the entire land in 1941, that he was buying from one who owned only a half-share.

The rule is well settled that when a co-owner conveys the entire land held in common to a stranger, and the latter enters into possession of the entire land under the conveyance, he can, by possession adverse to all the co-owners for ten years, acquire a prescriptive title. But where such a stranger is aware, at the time he obtains the conveyance, that his vendor was only a co-owner and was not the sole owner of the land, ten years possession by him will not give him a prescriptive title. Such a purchaser cannot be said to have entered into possession as sole owner, for he had knowledge that there were others who owned shares in the land, and he will be presumed to have possessed the land as a co-owner. The ordinary rule which applies to possession by co-owners will then apply, viz., that before one can prescribe against the others there must be an ouster or something equivalent to an ouster. Hence prescriptive possession will begin to run in his favour against those others only if there has been an ouster or its equivalent, such as notice to those other co-owners that he was setting up a title adverse to them.

This qualification in the rule which I have earlier referred to has always been referred to in cases where a stranger who purchased the entire land has claimed a prescriptive title. One of the earliest of such cases is *Punchi*

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v. Bandi Menika [1]. In that case one Dissanayake claimed to have purchased and entered into possession of an entire field although his vendor was entitled to only ½ share. Jayatileke, J. held that as Dissanayake had purchased and possessed the field *upon an assumption that his vendor was the sole owner* and that the deed of purchase gave him a sound title to the entirety, he had acquired a prescriptive title to the whole field. Similarly, in *Sellappah v. Sinnedurai* [2], Nagalingam, J. held that where a person purchased the entirety of a land and she and her successors in title possessed the entirety *without any knowledge or belief of the existence of another party entitled to any interest* in the land, a prescriptive title enures to their benefit.

Observations to the same effect are to be found in the decisions in *Kobbekaduwa v. Seneviratne* [3], and *Fernando v. Podi Nona* [4].

The distinction drawn between a stranger who purchases the entire property in the belief that it belongs solely to his vendor, and a stranger who purchases the entire property knowing that his vendor is only a co-owner is based, I think, on the principle that " no man is allowed to take advantage of his wrong : far less of his wrong intention which is not expressed ", as Willes, J. said in *Rumsey v. The North Eastern Railway Co.* [5]. Jessel, M.R., expressed the principle in his judgment in *In re Hallett's Estate* [6], where he said :

> " Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law. "

There is a well-established rule that the law will presume in favour of honesty and against fraud, but the circumstances under which Thambiayah took a mortgage of ½ share from Eliathamby show that he was aware that Eliathamby was entitled to only a ½ share. There is no proof of an ouster or its equivalent. It follows that the 1st defendant's claim to have acquired a prescriptive title to the entire land must fail. He is entitled only to a ½ share and the house which he admittedly built on the land.

[1] *(1942) 43 N. L. R. 547.*
[2] *(1951) 53 N. L. R. 121.*
[3] *(1951) 53 N. L. R. 354, at page 357.*
[4] *(1955) 56 N. L. R. 491, at page 493.*
[5] *(1863) 143 E. R. 596.*
[6] *(1880) 13 Ch. Div. 696.*

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I would therefore set aside the decree appealed against and direct that a decree for partition be entered on the basis of the findings in this judgment. The plaintiff is entitled to his costs of the trial in the District Court and of this appeal against the 1st defendant.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

1956 *Present :* **Gunasekara, J., and Sinnetamby, J.**

H. S. PATERNOTT *et al.*, Appellants, *and* MONIMPEX HUNGARIAN FOREIGN TRADING CO., Respondent

S. C. 542—D. C. Colombo, 17,976/S

Bill of exchange—Restrictive indorsement—Right of drawer to sue on bill thereafter—Bills of Exchange Ordinance, ss. 21 (3), 31 (1), 35 (2).

When a bill of exchange restrictively indorsed for collection is dishonoured on presentation for payment on maturity, the drawer to whom it is returned bearing an indorsement in blank by the indorsee is not entitled to sue upon it.

APPEAL from a judgment of the District Court, Colombo.

S. Sharvananda, for the defendants-appellants.

F. R. Dias, for the plaintiff-respondent.

Cur. adv. vult.

July 30, 1956. SINNETAMBY, J.—

At the conclusion of the arguments in this case we allowed the appeal with costs in both Courts and stated we shall give our reasons later. I now proceed to record my reasons for the decision.

The second and third defendants were sued in this case on a Bill of Exchange drawn on them by the plaintiff company and made payable to the National Bank of Hungary. The Bill which was made payable thirty days after sight was accepted by the defendants but was dishonoured when presented for payment on maturity by Grindlays Bank to whom the Bill had been endorsed. Both the Maker and the Payee are foreign companies and the Acceptor and Indorsee resident in Ceylon.

The Bill itself shows, and there is no contest on this point, that the Payee, viz., The National Bank of Hungary, restrictively endorsed it for collection to Grindlays Bank. The endorsement reads :

" For us to Grindlays Bank, Colombo. "

and is signed by the National Bank of Hungary. The Plaintiff in his plaint accounted for his possession of the Bill by stating that it was

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returned to him. The Bill bears an endorsement in blank by Grindlays Bank. Having regard to these indorsements and to the presumption in regard to delivery created by Section 21 (3) of the Bills of Exchange Ordinance the only reasonable inference is that Grindlays Bank indorsed the Bill in blank and delivered it to the plaintiff company.

The question that immediately arises for consideration is whether the indorsement and delivery by Grindlays Bank to the plaintiff company confers on the latter any title on the Bill to enable them to sue upon it. Obviously it does not. The National Bank of Hungary by its indorsement authorised Grindlays Bank only to receive payment on their behalf. It is a restrictive indorsement and Section 35 (2) declares that such an indorsement gives the indorsee no power to transfer his rights.

Issues 6, 7 and 8 framed at the Trial dealt with this aspect of th e matter and are as follows :—

Issue 6.—Did the plaintiffs by Bill of Exchange marked A request the defendants at 30 days after sight to pay to the order of the National Bank of Hungary, Board of Exchange, a sum of £12 2*s*. 0*d*.

Issue 7.—Was the said Bill of Exchange endorsed and delivered by the National Bank of Hungary to Grindlays Bank Limited, Colombo, for collection.

Issue 8.—If issues 6 and 7 are answered in the affirmative, has the plaintiff any legal right or title to maintain an action on the said bill of exchange.

The learned District Judge answered issue 6 in the negative. Why he did so it is not possible to understand. The submissions on behalf of both plaintiff and defendant and the terms of the Bill itself required this issue to be answered in the affirmative. Issue 7 he answered in the affirmative but proceeded to answer issue 8 also in the affirmative. Presumably the learned Judge answered this issue in this way because of the view he took and expressed in regard to the common law rights of a Principal, who has employed an Agent, to sue in his own name. Obviously the learned Judge has misdirected himself on this question. We are here not concerned with common law rights but with the special rights and obligations created by the Bills of Exchange Ordinance in regard to parties who are signatories to a Bill of Exchange. The action is upon the Bill and no alternative cause of action based on any other contract is either pleaded or covered by the issues.

Learned Counsel for the appellants contended that the true Owner of the Bill was the maker and that the National Bank of Hungary and Grindlays Bank were merely his Agents for collection. He relied on the averments in para 2 of the plaint which defendants have admitted in the answer. The relevant portion of para 2 of the plaint, however, is unintelligible and meaningless. It avers that plaintiff as the maker *indorsed and delivered* the Bill for collection to the National Bank of Hungary. In point of fact no such indorsement appears on the Bill and in law it is not necessary that the maker of a Bill should endorse it in order to give

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effectual delivery. Despite the admission in the answer the issues framed on behalf of the defendants show that they contested these averments in the plaint.

No issue was framed at the Trial on behalf of the plaintiff which in any way suggested that the National Bank of Hungary was also a mere Agent for collection : on the other hand the effect of issues 6, 7 and 8 is to suggest that the said banker was a holder for value and that only Grindlays Bank was an Agent for Collection. Even on the basis that it is possible for " immediate " parties to a Bill to lead evidence which has the effect of varying or contradicting the terms of the document itself in order to establish the true natue of the relationship between them, the burden of establishing any such relationship is on the plaintiff company. In this case, apart from certain admissions, no evidence of any kind was led and in the absence of such evidence the presumption created by Section 31 (1) of the Ordinance would operate. In consequence the National Bank of Hungary must be deemed to have become a party to the Bill for value and not as a mere Agent for collection.

Issues 6 and 7 should in my view have been answered in the affirmative and issue 8 in the negative. I would accordingly set aside the judgment of the learned District Judge and dismiss plaintiff's action with costs both here and in the Court below.

GUNASEKARA, J.—I agree.

Appeal allowed.

1956 *Present :* **T. S. Fernando, J.**

A. L. M. ISMAIL, Appellant, *and* H. L. PERERA (Sub-Inspector of Police, Hatton), Respondent

S. C. 514—M. C. Hatton, 8,387

Hiring car—Carrying too many passengers—Suspension of driver's driving licence—Legality—" Offence committed in connection with the driving of a motor vehicle"—Motor Traffic Act No. 14 of 1951, ss. 138 (1), 181 (1), 226.

When a person is convicted of driving a hiring car carrying therein passengers in excess of the permitted number, the offence is one committed in connection with the driving of a motor vehicle within the meaning of section 138 (1) of the Motor Traffic Act. Therefore, an order of suspension of his driving licence is not illegal.

APPEAL from a judgment of the Magistrate's Court, Hatton.

C. Chellappah, for the accused-appellant.

Ananda G. de Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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August 7, 1956. T. S. FERNANDO, J.—

The appellant was convicted on his own plea on the following charge :—

"That he did on 4th February 1956 at Dickoya, being the driver of hiring car No. CN. 5655 on a highway, to wit, Main Street, Dickoya, carry therein 17 adult persons excluding himself when it was licensed to carry only 7 persons, and thereby carried 10 persons in excess in breach of section 181 of the Motor Traffic Act, No. 14 of 1951, an offence punishable under section 226 of the same Act."

The appellant was sentenced to pay a fine of Rs. 60 and his driving licence was suspended for a period of one year.

Learned counsel appearing for the appellant before me has contended that the order of suspension of the driving licence is illegal and it has become necessary to examine the powers vested in a Court by section 138 (1) of the Motor Traffic Act No. 14 of 1951.

Section 138 (1) is in the following terms :—

"Subject to the provisions of sub-section (2), any court before which a person is convicted of any offence under this Act, or of any offence under any other written law *committed in connection with the driving of a motor vehicle*, may in addition to any other punishment which it may lawfully impose for that offence—

(*a*) if the person convicted is the holder of a driving licence issued or deemed to be issued under this Act, suspend the licence for a specified period not exceeding two years, or cancel the licence ; or

(*b*) if the person convicted is not the holder of a driving licence declare him to be disqualified for obtaining a driving licence for a specified period."

It is not necessary for the purposes of this appeal to consider the provisions of sub-section (2) or any other sub-section of section 138. Learned counsel argues

(*a*) that although the appellant has been convicted of an offence under the Motor Traffic Act it is not an offence *committed in connection with the driving of a motor vehicle ;*

and

(*b*) that the power of the Court to suspend a driving licence of a person convicted is limited to the case of persons convicted of offences *committed in connection with the driving of a motor vehicle.*"

Learned Crown Counsel has argued that in any event it is only in the case of a conviction for an offence under a written law other than the Motor Traffic Act that there is the additional requirement that the offence should be one committed in connection with the driving of a motor vehicle before an order suspending the driving licence of the offender could be made. It is, however, unnecessary for me to consider this argument which depends upon the interpretation to be placed on

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this sub-section as I am satisfied that the offence to which the appellant pleaded guilty was an offence *committed in connection with the driving of a motor vehicle.*

There are several cases decided in the English Courts upon the meaning of the words " in connection with the driving of a motor car " appearing in a similar context in section 4 (1) of the Motor Car Act of 1903.

In *Rex v. Yorkshire (West Riding) Justices, ex parte Shackleton* [1], Lord Alverstone, C. J., stated that the words " any offence in connection with the driving of a motor car " when read in their context in section 4 of the Motor Car Act, 1903, point to offences connected with the handling or manipulation of the car in the process of driving it, that is, to offences in respect of the actual locomotion of the car. In the case of *Brown v. Crossley* [2] decided in the following year a Divisional Court of the King's Bench held that a conviction for failing to have the back plate of a motor car illuminated was a conviction of an offence in connection with the driving of a motor car within the meaning of the same section 4. Then again, in the case of *White v. Jackson* [3], Lord Reading, while holding that the using of powerful lights on a motor car in breach of an Order made under the Defence of the Realm (Consolidation) Regulations of 1914, if the offence was committed by the offender while he was driving the car, was an offence in connection with the driving of a motor car within section 4 (1), also stated that full meaning must be given to the words " in connection with ", and that the test to be applied was whether the offence was committed while the offender was driving. Four years later, in 1919. where a person had been convicted for that in driving a motor car he used petrol for purposes other than those expressly authorised by the Motor Spirit (Consolidation) and Gas Restriction Order, 1918, another Divisional Court of the King's Bench held that the offence was one committed in connection with the driving of a motor car within the meaning of section 4 of the Motor Car Act of 1903, stating that when the offender was driving the motor car with the spirit the whole locomotive power of the car depended upon the spirit.—see *Simmons v. Pond* [4].

What section 181 (1) of the Motor Traffic Act penalises is the driving of a hiring car when there are in it passengers in excess of the number it is licensed to carry. The offence of which the appellant was convicted was that of driving the hiring car carrying in it passengers in excess of the permitted number. In these circumstances, even if one applies the tests suggested in the English decisions above referred to, it will be seen that the offence was committed " while the offender was driving " or " in respect of its actual locomotion ". I entertain no doubt that the offence of the appellant was one *committed in connection with the driving of a motor vehicle*, as contemplated in section 138 (1) of the Motor Traffic Act.

The sentence is therefore legal and the appeal must be dismissed.

Appeal dismissed.

[1] *(1910) 1 K. B. 439 at 441.*
[2] *(1911) 27 Times L. R. 194.*
[3] *(1915) 31 Times L. R. 505.*
[4] *(1919) 35 Times L. R. 187.*

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[In the Court of Criminal Appeal]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Weerasooriya, J.**

REGINA *v.* V. DIAS APPUHAMY *et al.*

Appeals 111–112 of 1955 with Applications 171–172

S. C. 22—M. C. Galle, 16,768

Charge of murder—Plea of guilty to a lesser offence—Stage at which it may be taken—Criminal Procedure Code, ss. 6, 221.

The appellants were indicted on a charge of murder. After two of the eye witnesses had been examined the Court permitted the accused, in the presence of the Jury, to plead guilty to the lesser offence of culpable homicide not amounting to murder. The Court then briefly summarised the evidence already led and asked the Jury whether they wished to accept the plea tendered by the appellants. The Jury, however, were unwilling to accept the plea. The trial then continued and at its conclusion the Jury returned a verdict of murder against the appellants.

It was contended in appeal that the appellants should not have been asked to plead until the Jury had first been asked whether they were willing to accept the plea and signified their willingness.

Held, that the procedure adopted by the trial Judge was not illegal.

Per Curiam :—" It has been the practice for a considerable length of time to accept a plea of guilty to a lesser offence when tendered in the course of a trial even after the accused has been placed in charge of the Jury, the procedure adopted being that prescribed in section 221 (2) with modifications to suit a trial by Jury. Our practice is the same as the English practice and section 6 of our Criminal Procedure Code affords sufficient authority for the adoption of that practice which is not in conflict or inconsistent with the provisions of our Code. "

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *K. Sivasubramaniam* and *K. Charavanamuttu* (Assigned), for the 1st and 2nd accused-appellants.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 13, 1955. Basnayake A.C.J.—

The two appellants and two others (hereinafter referred to as the 3rd and 4th accused) were indicted on a charge of murder of one Jakoris. The evidence against them was to the effect that the 1st appellant

2——J. N. B 59654—1,593 (10/56)

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followed by the 2nd appellant, the 3rd and 4th accused came armed with deadly weapons and attacked the deceased who was seated on the ridge of a paddy field which was being harvested under his supervision. The 1st appellant struck him with a club, the second with a katty, and the 3rd and 4th accused with clubs. The deceased died almost instantaneously, his head being badly battered and cut.

After two of the eye witnesses had been examined the Court at the request of the senior pleader for the appellants and the 3rd and 4th accused asked the Jury to retire. They did so. Thereafter the following proceedings took place according to the record :—

" Mr. Karunaratne states that he is prepared to advise the 1st and 2nd accused to plead guilty to culpable homicide not amounting to murder in the course of a sudden fight. Crown Counsel states that it seems to him on reading the Information Book extracts that there was some incident other than the incident deposed to by the witnesses. He further states that there are certain witnesses who are not called by him who speak to this fact. He states that he feels that there is something more than what the witnesses depose to. One witness leaves out the 4th accused and the other the 3rd accused. Court states it is a matter for the jury to decide at this stage.

Crown Counsel states that if the jury accepts this plea he is prepared to withdraw the indictment against the 3rd and 4th accused.

Jury returns.

1st and 2nd accused plead guilty to culpable homicide not amounting to murder in the course of a sudden fight. His Lordship briefly summarises the evidence already led and asks the jury whether they wish to accept the plea tendered by the 1st and 2nd accused.

Foreman states that they wish to retire and consider the matter. They retire at 11.30 and return at 11.35 a.m.

Foreman to Court : We agree that the 3rd and 4th accused are not guilty but we wish to go on with the case against the 1st and 2nd accused.

Court : I feel you want to hear further evidence as against the 1st and 2nd accused ?

Foreman : Yes.

Court : I think the proper course is to proceed with the case against all the accused although the evidence against the 3rd and 4th accused is not strong.

Foreman : Yes.

Court : I think, in the circumstances, it is better to go on with the case against all four accused. Is that what you feel ?

Foreman : Yes.

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Court to Mr. Karunaratne : Do you wish to put any further questions to the two witnesses ?

Mr. Karunaratne : No.

Court : I think it is better to go on with the case against all four accused ?

Foreman : Yes ".

The trial proceeded as the Jury were unwilling to accept the plea of culpable homicide not amounting to murder tendered by the appellants. At the conclusion of the trial the Jury returned a verdict of murder against the appellants and a verdict of not guilty against the 3rd and 4th accused.

On being asked under section 305 of the Criminal Procedure Code why judgment of death should not be pronounced against them the 1st appellant stated—

" I request that I be convicted of culpable homicide not amounting to murder. That is all ".

The 2nd appellant in a long statement, gave his version of the case. In the course of it he stated that, in the exercise of his right of private defence of person, he struck the deceased two blows with a katty which felled him to the ground.

The appellants were sentenced to death and the 3rd and 4th accused were acquitted.

Thirteen grounds of appeal were taken in the petition of appeal, but learned Counsel confined himself to two of the grounds, namely, that the verdict was unreasonable and that proceedings in which the Jury were invited to accept the verdict of culpable homicide not amounting to murder were illegal. Having regard to the evidence in the case we do not think that the submission that the verdict is unreasonable is entitled to succeed. There is ample evidence from which the Jury could have found a verdict against the appellants on the charge of murder.

Learned Counsel's submission in regard to the taking of the plea was that the 1st and 2nd appellants should not have been asked to plead until the Jury had first been asked whether they were willing to accept the plea and signified their willingness. He submitted that the tendering of a plea by the appellants without first ascertaining whether the Jury were willing to accept the plea caused grave prejudice to the appellants, in that thereafter the Jury were left with the impression that the appellants had caused the death and that they had only to decide whether the offence was murder or culpable homicide.

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It was also submitted that the words of caution addressed to them by the trial Judge in his summing up advising them to erase from their minds the fact that a plea had been tendered, could have had little effect in removing the prejudice created by the incident.

We are unable to uphold this contention. Learned Counsel did not maintain that once a trial commences a plea cannot be accepted from the accused under any circumstances ; but he submitted that the procedure observed in the instant case did not conform with that laid down by this Court in the case of *Sittampalam v. The King* [1] which is as follows :—

" (1) if the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed on the whole indictment ;

(2) if, on the other hand, the Crown intimates its willingness to accept the plea, the presiding Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magistrate, it would be in the interests of justice for the Court to accept the plea ;

(3) if the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment ;

(4) if, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empanelled to try the case, to state whether they would accept the plea ; and the Judge may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him ;

(5) if the jury state that they are willing to return a verdict on that basis, the unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury ; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly ".

Learned Counsel submitted that the trial Judge had omitted to take the fourth and fifth steps outlined above and that that omission caused grave prejudice to the appellants.

We do not think that the procedure adopted by the Judge was illegal, nor do we think that the appellants suffered any prejudice in being permitted to tender their pleas in the presence of the jury before it was ascertained whether they were willing to accept the pleas, especially in view of the fact that both appellants urge in their petition of appeal that the verdict of murder be set aside and that a verdict of guilty of culpable homicide not amounting to murder be substituted therefor.

[1] *(1951) 52 N. L. R. 374.*

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The judgment referred to above does not lay down the precise stage at which the accused should be permitted to tender his plea in the presence of the Jury. There is little difference between informing the Jury that the accused are willing to plead guilty to a lesser offence and actually taking the plea in their presence.

In regard to the procedure outlined in the judgment of this Court the only essential requirement is that, before the Jury are invited to consider whether they are willing to accept a plea of guilty of a lesser offence, the prosecuting Counsel and the presiding Judge should agree that the plea is one that can be accepted.

Our attention was drawn to the case of *Dingiri Banda v. The Queen* [1]. In that case after three witnesses for the prosecution had given evidence and before the case for the Crown had been closed, the following proceedings took place :—

"The Jury retire on the motion of Mr. Nissanka.

Counsel. My Lord, I can take a horse to water but I cannot make it drink. I have shown every possible reason why these three gentlemen, whom the Crown have called, should not be believed *in toto*. In all the circumstances of the case, I would submit that a plea of culpable homicide not amounting to murder be accepted and I would suggest that the matter be put to the jury at this stage.

Crown Counsel : I am not willing to take the responsibility.

Court : I shall put it to the Jury.

The Jury return.

Court to Jury : The accused in this case, gentlemen of the Jury, is willing to tender a plea of guilty to the lesser offence of culpable homicide not amounting to murder on the ground that he killed the deceased under grave and sudden provocation. Crown Counsel is not prepared to accept the plea. Nor am I prepared to commend it to you. But if you are prepared to accept the plea, I will consider it and the man will plead in your presence. It is hardly necessary for me to tell you that once a case is entrusted to the care of the Jury, it is for the Jury to say whether on the material elicited in cross-examination of the prosecution witnesses the picture arises that this was not a premeditated murder but something that happened while the accused had lost his power of self-control by reason of some grave and sudden provocation that transpired at the bagatelle table. If you are willing to accept the plea I shall get the accused to plead. I say nothing. The case is entirely in your hands. I am merely saying that Crown Counsel is not prepared to accept the plea. It is not a question of his accepting the plea or not. If he was I would recommend it. (Here follows directions in regard to the facts.) If anyone of you wants to go on with the case, the case will proceed. If you are prepared to

[1] *(1952) 54 N. L. R. 514*

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accept the plea, it must be unanimous. The responsibility for the verdict is yours and yours alone. I have told that to Juries from the time I became a Commissioner of Assize and thereafter a Judge of the Supreme Court. If I had accepted the plea earlier it would have been my responsibility. (Here follows further directions in regard to the facts.) If anyone of you wants to go on with the case it will proceed.

Foreman : We wish to retire and consider the matter.

(The Jury retire and the Court adjourns for 15 minutes.)

Foreman : We are unanimously of opinion that the case should proceed. "

This Court held that the accused had not been prejudiced by the refusal of the Jury to accept the plea and refused to interfere with the conviction of murder.

Learned Counsel also referred us to the three English cases which are cited in the case of *Sittampalam v. The King* (*supra*). In the first of those cases, *R. v. Hancock* [1], the appellant had been given in charge of the Jury after he had pleaded not guilty to a charge of rape. At a later stage of the proceedings he made a statement which apparently amounted to a confession in the presence and hearing of the Jury, and the confession was acted upon, and the appellant was convicted and sentenced to three years' penal servitude. No verdict was taken and the Jury was discharged. The Lord Chief Justice held that in those circumstances a verdict of the Jury should have been taken.

In the second case, *Dorothy Clara Soanes* [2], the applicant was charged with the murder of her child. When the applicant had been given in charge of the Jury on the charge of murder, her Counsel informed the Judge that she was willing to plead guilty to infanticide, and Counsel for the Crown expressed his willingness to accept that plea. The Presiding Judge, however, refused to allow it to be accepted on the ground that there was no indication in the depositions of the circumstances which must exist before a verdict of infanticide can be returned, and the trial for murder proceeded, and the appellant was found guilty of infanticide and sentenced to three years' penal servitude. In the course of the judgment the Lord Chief Justice stated :

" The Judge's reason for refusing to allow a plea of guilty of infanticide to be accepted was that he could find no indication on the depositions that the circumstances existed which must exist before a verdict of infanticide, as distinct from one of murder, can be returned. While it is impossible to lay down a hard-and-fast rule in any class of case when a plea for a lesser offence should be accepted by Counsel for the Crown—and it must always be in the discretion of the Judge whether he will allow it to be accepted—in the opinon of the Court, where nothing appears on the depositions which can be said to reduce

[1] *(1931) 23 Cr. App. R. 16.* [2] *(1948) 32 Cr. App. R. 136.*

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the crime from the more serious offence charged to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative, to find a verdict of guilty of the lesser offence only. In this case we think that the learned Judge was not only right, but, indeed, bound to insist on the applicant being tried for murder. There was nothing disclosed on the depositions which would have justified a reduction of the charge from murder to infanticide, and, accordingly, this application is refused ".

In the third case of *R. v. Heyes* [1], the appellant was charged on an indictment containing counts for stealing and receiving bicycles. He pleaded not guilty to all the counts, but after he had been given to the charge of the Jury and subsequently granted legal aid, he stated, in the presence of the Jury, that he desired to admit his guilt on the counts for receiving. No verdict was taken, and the prisoner was sentenced by the Recorder to three years' imprisonment.

In the course of his judgment the Lord Chief Justice said :

" The shorthand note rather unfortunately does not contain any indication that the appellant himself was asked to plead, but merely a statement that his counsel said that he wished to plead guilty. Of course, that is not enough ; the prisoner must himself plead. However, we are told by both learned counsel that that in fact happened. Thereupon, the jury having heard the prisoner state that he wished to withdraw his plea and to admit his guilt, the proper proceeding was that they should have been told to return a verdict. Apparently counsel suggested to the learned Recorder that that was the proper course, but the learned Recorder said that it did not matter. It does matter, because once a prisoner is in charge of a jury he can only be either convicted or discharged by the verdict of the jury, and as there was no verdict of the jury here, the trial was a nullity. His admission in the hearing of the jury, without the jury being asked to return a verdict which ought to have been returned, was treated as equivalent to a plea. In the case of a plea of guilty, he never would have been in charge of a jury at all ".

None of these cases assist the appellants. Our Criminal Procedure Code only makes express provision for the acceptance of a plea of guilty to a lesser offence before the Jurors are chosen ; but makes no specific provision for the acceptance of a plea of guilty to a lesser offence, after the Jurors have been sworn. The provisions governing the acceptance of a plea of guilty to a lesser offence read as follows :—

" 221 (1). If the accused does not plead or if he pleads not guilty jurors shall be chosen to try the case as hereinafter provided.

[1] *(1950) 34 Cr. App. R. 161.*

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(2) If the accused pleads not guilty but states that he is willing to plead guilty to a lesser offence for which he might have been convicted on that indictment and the prosecuting counsel is willing to accept such plea, the Judge may if he thinks that the interests of justice will be satisfied by so doing order such plea of guilty to be recorded and may pass judgment thereon accordingly, and thereupon the accused shall be discharged of the offence laid in the indictment and such discharge shall amount to an acquittal. "

It has been the practice for a considerable length of time to accept a plea of guilty to a lesser offence when tendered in the course of a trial even after the accused has been placed in charge of the Jury, the procedure adopted being that prescribed in section 221 (2) with modifications to suit a trial by Jury. Our practice is the same as the English practice and section 6 of our Criminal Procedure Code affords sufficient authority for the adoption of that practice which is not in conflict or inconsistent with the provisions of our Code.

At the close of the arguments in this case, we announced our decision that the appeals were dismissed and that the applications were refused, and stated that our reasons would be given at a later date. We accordingly deliver our reasons.

Appeals dismissed.

1956 *Present :* **Gunasekara, J., and Sinnetamby, J.**

E. NALLATHAMBY, Appellant, *and* MRS. G. M. LEITAN, Respondent

S. C. 156—D. C. Gampaha, 3151/M

Rent Restriction Act—Meaning of term " premises "—How far it includes land on which a building stands.

Where a property consisting of a house and garden is let as one unit, the landlord cannot subsequently claim that the standard rent should be calculated on the basis that the premises let consists of two parts and that only the portion where the house stands is subject to the provisions of the Rent Restriction Act, to the exclusion of the remaining bare land.

Where a house has been let together with land, what one has to ascertain is whether the house is an adjunct of the land or the land an adjunct of the house. It is a pure question of fact. If the land is considered to be an adjunct of the house, the Rent Restriction Act will apply, but if the converse is the case the Act will not apply.

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APPEAL from a judgment of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *M. Somasunderam* and *S. Sharvananda*, for the plaintiff appellant.

Walter Jayawardene, with *Neville Wijeratne*, for the defendant respondent.

Cur. adv. vult.

September 25, 1956. SINNETAMBY, J.—

In this case the plaintiff who was a tenant under Agreement D2 of 30/9/46 of the premises described therein as bearing Assessment No. 245, Sea Street, Negombo, sued his landlord, the defendant, for the recovery of excess rent over and above the standard rent of the premises for the period 1st August, 1949 to 31st December, 1951, aggregating to Rs. 1,544·25. According to the evidence the property let is about 2½ or 3 acres in extent with a dwelling house standing on a site of about one rood in extent. The rest of the land is planted in coconuts. At the commencement of the tenancy the entire premises were let as one unit and bore Assessment No. 245 which in 1948 was changed to No. 156. The premises were described in the Assessment Register P1 as "Tiled house and garden". In December, 1951 the premises were divided by the Municipality at the instance of the defendant into two parts and given two separate assessment numbers. The house described in P1 as "tiled house" was given No. 154 and the garden described in P1 as "garden" was given No. 156 as a separate entity, the Annual Value of Rs. 849 being apportioned between them as follows: Rs. 589 for the tiled house and Rs. 260 for the garden. By agreement of the parties defendant took over possession of the garden bearing Assessment No. 156 and the plaintiff continued in possession of the dwelling house.

The evidence discloses that the annual value in 1941 was Rs. 289 and it is not disputed that on this basis the standard rent would be Rs. 36·75 but the defendant has recovered at the rate of Rs. 90 per mensem: Rs. 53·25 per month represents the excess rent paid. The defendant however contends that the premises let consists of two parts represented now by the two portions bearing the assessment numbers 154 and 156; that there has been an apportionment of the rent between them; and that it is only the portion where the house stands which is subject to the provisions of the Rent Restriction Act and not the other. The argument in the trial Court proceeded on the basis that if the house and its immediate adjuncts are to be considered as a separate unit subject to the provisions of the Rent Restriction Acts and the garden another unit not subject to the Act in respect of which the landlord could recover

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any rent he pleases there would be no overpayment, and it is on this basis that the learned trial judge based his decision. It is against this finding that the present appeal has been preferred.

Ordinance No. 60 of 1942 [1] by which rent restriction was first introduced applied to all " premises " within certain proclaimed areas and the word is repeated in the Act of 1948 [2]. There is no definition given to the word " premises " in either of the enactments and it has been left to the Courts to evolve a definition which would give effect to the intention of the legislature. This Court has held in *Pakiadasan v. Marshall Appu* [3] that the term does not apply to a bare land and for the Act to be applicable there must be a building on the land : the expression used is " a building with the land appurtenant thereto devoted to residential or business purposes". For the purpose of that decision it was only necessary to hold that land without any building on it does not come within the ambit of the Ordinance. The Court was obviously confining its comments to the facts of that particular case. I do not think this decision specifically defines " premises " as something which must be limited to the building *and the land appurtenant thereto*, in the sense that if the property let contains a building and more land than can be regarded as strictly " appurtenant " thereto, it cannot be regarded as " premises ". If so it would raise problems of a difficult nature and it would be contrary to the view taken in the earlier decision of *Nicholas Hamy v. James Appu* [4] by a Bench of two judges reported in 52 N. L. R. 137 where the word is defined as " building " or " building on a land ". This earlier decision was not cited at the subsequent hearing of *Pakiadasan v. Marshall Appu* when the Bench consisted of a single judge sitting alone. In *Nicholas Hamy v. James Appu* the word " premises " was held to include not only the building and the land on which it stands but even the machinery and tools in the building which was being used as a workshop. Each case must be decided on the facts and circumstances established by the evidence given in the course of the trial and comments made in connection with facts established in one case may be wholly inappropriate in another case where the facts are entirely different.

If the definition is to be confined to the " building and land appurtenant thereto " a difficulty with which one is immediately confronted is the difficulty of deciding what extent of land can be regarded as appurtenant to a building. It will become a variable and an uncertain quantity and a fruitful source of much litigation. What one may regard as appurtenant to a building in the countryside will not be so regarded in a busy section of the built up portion of the City, etc. It was suggested that to come within that term the land might be limited to $\frac{1}{3}$rd the area of the actual site on which the building stands in view of the provisions of the Housing and Town Improvements Ordinance, where presumably for health reasons, it is provided that no building should cover more than $\frac{2}{3}$rd the area of the land on which it stands. This is an express

[1] *Rent Restriction Ordinance No. 60 of 1942.*
[2] *Rent Restriction Act No. 29 of 1948.*
[3] *(1951) 52 N. L. R. 335.*
[4] *(1950) 52 N. L. R. 137.*

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provision in that particular Ordinance which cannot be willy nilly imported into another merely because it may provide a satisfactory solution to a difficult question.

No assistance can be derived from a consideration of the English Acts where the word " premises " is not used. The original Act of 1915 was introduced in the United Kingdom immediately after the commencement of the first World War and was applicable to

> " a house or part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling house and a garden or other premises within the curtilage of the dwelling house." (*1950 2 A. E. R. 1082*)

The word " site " has been held to mean the portion of land upon which the four walls of the house stands. " Curtilage " is defined in the Concise Oxford Dictionary to mean " area attached to a dwelling house ". This provision was found to be unsatisfactory and was superseded by the Act of 1920 which provided as follows in Section 12 (2) :

> " For the purpose of this Act any land or premises let with a house shall, if the rateable value of the land or premises let separately would be less than $\frac{1}{4}$ the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house." (*1950 2 A. E. R. 1082*)

It will thus be seen that if the rateable value of the land when let to a hypothetical tenant exceeds $\frac{1}{4}$ the rateable value of the house alone the Acts would not apply : something more definite and more readily ascertainable than the vague term " curtilage " was brought into force. It is important to note that to be treated as part of the house the land should have been let together with the house and in considering whether this was so the English Courts have held that it is important to consider whether the two lettings were treated *by the parties* as one (Megarry, 7th Ed. p. 92) and this far outweighed the circumstance that the house was on a weekly tenancy and the land on a lease (Megarry, 7th Ed. p. 92 where reference is made to decided cases). The Act of 1939 amended these provisions further and provided that

> " any land or premises let together with the dwelling house shall unless the land or premises consist or consists of agricultural land exceeding 2 acres in extent be treated as part of the dwelling house."

It will be seen that the English Acts from time to time extended the scope of the Rent Acts. In 1915 it covered only the site and the curtilage ; the 1920 Act extended the meaning of the term " dwelling house " to include not only the curtilage but also land let with the house provided its rateable value was not more than $\frac{1}{4}$ the rateable value of the house.

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The Act of 1939 widened the protection given to tenants still further and included within the scope of the Acts any land however large let with the dwelling house subject to the condition that if it was agricultural land it did not exceed two acres provided of course the rateable value of the entire unit did not exceed the figures mentioned in the Act : the term " agricultural land " was defined. The learned trial judge was mistaken in regard to the scope and effect of the English Acts when he observed :

> " Even under the English Law where a house is let with land other than the site of the house the letting ceased to be protected by the Rent Act ."

At no stage in the development of the Rent Acts was this the law in England. The learned trial judge was perhaps influenced by this erroneous impression he had of the law prevailing in England under the Rent Acts. He purported to follow *Pakiadasan v. Marshall* in which the observations of the Appeal Judge must be regarded as " obiter ". He did not consider, presumably because it was not brought to his notice, the case of *Nicholas Hamy v. James Appu.*

The Ceylon Ordinance and the subsequent Acts afford no guidance as to what is meant by the term " premises " and no attempts have been made except, as far as I can gather, by the decisions already referred to, to define it. It seems to me that where a house has been let together with land what one has to ascertain is whether the house is an adjunct of the land or the land an adjunct of the house. It is a pure question of fact but this aspect of the matter has not been considered by the learned trial judge. If the land is considered to be an adjunct of the house, in my view, the Rent Restriction Act will apply but if the converse is the case the Act will not apply. In order to decide this it seems to me the simple test to apply is to consider how the parties regarded the transaction. Did they regard it as the letting of a house with a garden attached in which event it will come within the purview of the Rent Restriction Act or did they regard it as a lease of a land in which there happens to be a house or hut in which event the rent paid cannot be regarded as coming within the control of the Rent Restriction Act ? Applying this test it is abundantly clear that the parties regarded the contract in question as a letting of a house with a garden as an adjunct. This is quite manifest on an examination of the contract D2. Para 5 provides that the tenant shall on 30/9/47 deliver peaceful possession of the premises as the landlord *requires the same for his and his family's occupation*—a contingency which did not eventually arise. It is only a house that can be occupied. Para 6 provides that the landlord will not attend to any repairs of the premises during the tenancy, and para 7 provides that if the landlord requires the house before the termination of the said period he will give three months' notice to the tenant. What was uppermost in the minds of the parties was the house and not the garden. " Repairs " is a term used in connection with a building and there are no covenants which one associates with a plantation in this

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agreement. Learned Counsel for the respondent, however, argued, if I understood him aright, that where the value of a house as a house has been increased by the existence of a garden then the Rent Restriction Act would not apply. No doubt, where the land is fairly large in extent and is planted with coconuts, the land apart from the house would have an appreciable income value but I cannot conceive of a case where the value of any building would not appreciate in value at least to the tenant by the existence of a garden, however small in size or in productivity. The test suggested by learned Counsel would be too vague and uncertain.

The mere fact that what was originally one unit has since been separated into two would not in my opinion make any difference. Learned Counsel relied on the case of *Langford Property Co. Ltd. v. Batten*[1] in support of his argument. In that case two separate units which were originally separately let were subsequently let together as one unit and it was held that the premises subsequently let formed an entity different to the house alone which was originally let to the tenant for the purpose of the Rent Restriction Act, and that therefore the standard rent of the new unit was not the standard rent of the house alone. With this statement of the law one cannot possibly disagree, but it does not mean that the converse proposition is necessarily correct, viz., that where land and a house are let as one unit its subsequent division into two will make it legitimate to regard the original letting as divisible into two separate units and that the Rent Act will apply only to that portion on which the house stands, the standard rent being the rent at which it could in 1941 be let to a hypothetical tenant and not to the bare land which can be let at any rent. To subscribe to such a proposition would have the effect of depriving the tenants of the protection which our Rent Act gives them, for an unscrupulous landlord can always subdivide or claim that he can subdivide his property into a portion containing the house and a portion not containing the house and so contend that he can charge what rent he pleases for the bare land. The result would be that the Rent Act cannot be applied to any house which has appurtenant to it a plot of land however small over and above the site on which the house stands. If the house and its surroundings are let as one unit it must remain one unit and neither in common sense nor in law can it be regarded as two units merely because it is capable of being subdivided later into two.

In my view the only rational test to apply is to ascertain whether it was the house that was let with the garden as an adjunct or whether it was the garden that was let with the house as an adjunct. In deciding this question great importance must be attached to the intention of the parties. If the intention is clear and unmistakable there is in my view no need to go beyond it. Applying this test to the facts of the present case the only conclusion possible is that it was the house that was let to the plaintiff. The Rent Act would in consequence apply

[1] *(1950) 2 A. E. R. 1079.*

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to the letting. The plaintiff having paid more than the standard rent is entitled to recover the overpayments. I would accordingly set aside the judgment of the learned District Judge and enter judgment for plaintiff as prayed for with costs in both Courts.

GUNASEKARA, J.—I agree.

Appeal allowed.

1956 *Present :* **K. D. de Silva, J., and H. N. G. Fernando, J.**

N. H. KEERTHIRATNE (Acting Minister of Posts and Broadcasting), Petitioner, *and* M. M. P. GUNAWARDENE *et al.*, Respondents

S. C. 587—Application in Revision in D. C. Colombo, 31,853/M

Evidence—Communication made to public officer in official confidence—Privilege—Applicability of English law—Evidence Ordinance, ss. 100, 123, 124, 125, 162 (2).

Sections 123 and 124 of the Evidence Ordinance do not correspond with the English law on the same subject, and the general principle by which the English Courts are guided is not applicable to cases falling under section 124.

When a public officer objects to the production of a document on the ground that it is a communication made in official confidence, the Court has jurisdiction under section 124, read with section 162 (2), of the Evidence Ordinance to inspect the document and admit it in evidence if it is of opinion that the communication was not made in official confidence. The expression " communication made in official confidence " would include not merely inter-official correspondence but also correspondence by members of the public with public officials. The mere mark " confidential " placed on a document by the individual who writes it does not convert the document into a communication made in official confidence.

Obiter : If a Court agrees that the communication was made in official confidence, it can determine by inspection whether the production of the communication would or would not be prejudicial to the public interest.

APPLICATION for the revision of an order of the District Court Colombo.

In this action for defamation instituted by a former officer of the Posts and Telegraph Department against two persons who had preferred a petition to the Minister of Posts and Broadcasting, the Minister, upon being summoned by Court to produce the original of the petition, took

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objection to the production on the ground that the petition was a statement made to him in official confidence and that the public interest would suffer by the disclosure of its contents.

E. F. N. Gratiaen, Q.C., Attorney-General, with *M. Tiruchelvam*, Deputy Solicitor-General, and *J. W. Subasinghe*, Crown Counsel, for the petitioner.

Walter Jayawardene, with *Neville Wijeratne*, for the plaintiffs-respondents.

Cur. adv. vult.

August 21, 1956. H. N. G. FERNANDO, J.—

This was an application for the revision of an order of the Additional District Judge of Colombo, directing the Ministry of Posts and Broadcasting to produce the original of a petition sent to the Minister by two private individuals. The order in question was made by the learned District Judge in an action for defamation instituted by a former officer of the Posts and Telegraph Department against the two persons who had preferred the petition to the Minister. Upon being summoned to produce the document the Minister filed an affidavit averring that the petition was a statement made to the Minister in official confidence and that the public interest would suffer by the disclosure of its contents ; objection to production was taken on the ground of privilege. The basis upon which this Court is now asked, in revision, to set aside the order of the District Judge is thus set out in the petition in revision :—

" (*a*) The said order is contrary to law.

(*b*) The learned Judge erred in holding that the said petition was not made in official confidence and was not a privileged document. An affidavit from a Minister of the Crown in Ceylon that a particular communication is privileged and cannot therefore be produced as evidence in a Court of Law is conclusive.

(*c*) The learned Judge has misdirected himself in holding that a communication can only be made in official confidence if it is made by one official to another.

(*d*) The Law of Ceylon on this matter is identical with English Law ".

The language of paragraph (*b*) above and the argument of the learned Attorney-General make it clear that the main ground of objection is that the case is one covered by section 124 of the Evidence Ordinance :—

" No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure ".

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It was argued that under the prevailing English Law a claim of privilege made in the form and manner as in the present case would be upheld by the Courts without question, that the Ceylon Evidence Ordinance was intended to be a statutory incorporation of the corresponding English Law, and that in the construction of section 124 our Courts would regard it as the intention of the Legislature that documents of the nature referred to in section 124 should be privileged from production in the same manner and to the same extent as such documents would be protected in England. The Attorney-General relied on section 100 of the Evidence Ordinance, not, if I understood him aright, for the purpose of contending that with regard to the subject of State privilege there is any *casus omissus* justifying resort to English Law, but rather with a view to reinforcing the argument that sections 123, 124 and 125 of our Evidence Ordinance should be construed as representing in statutory form the corresponding English Law.

While I would respectfully concur with the view adopted by six of the seven Judges who constituted the Bench of the Court of Criminal Appeal in *The King v. James Chanderesekera* [1] to the effect that we should shut our eyes to the English Law of Evidence except in so far as a *casus omissus* renders recourse to it necessary, I do not think that those observations can be seriously opposed to the general argument presented by the Attorney-General in the present case. If it is clear that any particular provision or group of provisions in our Ordinance represent in statutory form principles which were well settled and recognised in England before the enactment of our Ordinance, then our Courts would rightly look for assistance to cases in which those principles have been applied by the English Courts. In my opinion therefore it is necessary in the present case first to consider whether the Legislature in Ceylon clearly intended to introduce the then prevailing English principles into our Ordinance. If such was their intention I should have little hesitation in relying upon English precedent.

The relevant sections of our Ordinance which provide for the exclusion of official matters from evidence, place the matters in question in three different groups :—*Firstly*, there is an absolute prohibition (section 123) against the production of *unpublished official records* relating to Affairs of State except with the permission of the appropriate executive authority. *Secondly*, a public officer has the right to withhold from evidence *communications made in official confidence* when he considers that the public interests would suffer by the disclosure (section 124). *Thirdly*, certain " law enforcement officers " have the right to withhold the *source of information as to the commission of offences* (section 125).

In England there appears to be no corresponding statutory provision, but questions of a similar kind are determined by the Common Law, under which the exclusion of evidence of the nature with which we are concerned is founded on grounds of public policy. The third group of matters to which I have referred forms a separate head under the English

[1] (*1942*) *44 N. L. R. 97.*

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Common Law ; but there appears not to be in England any clear distinction between matters falling respectively within the scope of our sections 123 and 124. All these matters are dealt with in the English authorities under the head of " Affairs of State ". The principle as stated by Phipson [1] is that " Witnesses may not be asked, and will not be allowed, to state facts or to produce documents, the disclosure of which would be prejudicial to the public service. And this exclusion is not confined to official communications or documents, but extends to all others likely to prejudice the public interests ".

The procedure by which effect is given to this principle has been authoritatively determined. Once a Minister of the Crown objects to the production of a document on the ground of prejudice to the public interest the Court will not require production :—per Viscount Simon L. C. " the question, whether the production of the documents would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it ". (*Duncan v. Cammel Laird and Co.* [2]) Although that decision applies directly in relation to *documents*, it would seem also that the principle will operate in the same way where the Crown desires to withhold or to prevent the admission of *oral evidence*, the admission of which is likely to prejudice the public interest. Although the English Courts have expressed strong views as to the circumstances and the manner in which the objection of Crown privilege should be taken, it apparently is now quite clear that, once the objection is taken by the proper authority and upon grounds properly stated, the Courts will necessarily uphold the objection.

The House of Lords in the *Cammel Laird Case* (supra) expressly dissented from the decision of the Privy Council in *Robinson v. State of South Australia* [3] where it was held that the Courts in Australia had the power to inspect documents in order to determine whether their production would be detrimental to public welfare. That decision was founded on a rule of Court in the following terms :—" Where on an application for an order of inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege ". But although a rule in the same terms obtains for the English Supreme Court, the House of Lords considered that the rule was intended only for the protection of the litigant and had no application to a case where objection to production is taken on the ground of prejudice to the interests of the State.

The law as stated in our Ordinance does not in my opinion correspond exactly to the English Law. In the first place the Ordinance draws a distinction between " unpublished official records " and " communications made in official confidence ". In the case of the former, section 123 assumes that production may be prejudicial to the public interests

[1] *Phipson, Law of Evidence, 9th Edition, p. 196.*
[2] *1942 A. C. at p. 639.*
[3] *1931 A. C. 704.*

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and therefore prohibits production, except with the requisite permission, and the same prohibition applies with respect to oral evidence derived from such official records. Of course a Judge would rarely be able to decide of his own motion whether a particular official record is an " unpublished " one ; accordingly I take it that the appropriate procedure in a case where there is an attempt to produce some such record or evidence derived therefrom would be the same as that which obtains in England, namely that a Minister of the Crown would certify the document to be one protected by the section. Although it is unnecessary for me to decide whether or not such a certificate would have the same conclusive effect as in England, a consideration of that aspect of the matter is helpful for the present purpose.

Sub-section (2) of section 162 of our Ordinance provides " that the Court if it sees fit may inspect the document, *unless it refers to matters of State* ". The terms of this sub-section appear to indicate that in relation to " unpublished official records relating to affairs of state ", that is to say in cases covered by section 123, the Courts are denied the right of inspection if objection to production is duly taken on behalf of the Crown. Indeed it would seem that in regard to such cases the view as to conclusiveness expressed by the House of Lords in the *Cammel Laird* judgment is clearly incorporated in the terms of section 162 (2).

I do not think, however, that the Ceylon law is the same with respect to the case of " communications made in official confidence ". Whereas in England it may be open to a Minister to plead the objection of public policy in his discretion with respect to any matter falling within the general category of an " affair of state ", and thus to withhold evidence of any communication made to a public officer, the same absolute privilege would in Ceylon extend only to unpublished official records and not necessarily to every communication made to a public officer. Matters of the latter class are dealt with in a different manner in section 124 of the Evidence Ordinance. In my opinion, if objection to production is taken *under section 124* (and *not* in the terms set out in section 123) two matters arise for determination, firstly, whether the communication was made in official confidence and secondly, whether its disclosure would place the public interest in jeopardy. In considering those matters regard must I think be had to the provisions of section 162. The only exception to the power of inspection which is conferred by those provisions is for the case of a document which refers to matters of State. Since the Legislature has made separate provision (in section 123 and 124 respectively) for two groups of matters which are covered in England by the one general principle of public policy, it is in my opinion unsafe to ignore the distinction between matters of State referred to in section 123 and other communications which are dealt with in section 124. The exception for " matters of State " provided for in section 162 (2) should therefore be restricted to cases falling under section 123 where a similar expression occurs. But where it is alleged that some communciation was made to a public officer in official confidence, there seems to be no reason why effect cannot be given to the plain terms of section 162 which confer

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on the Court a right of inspection in order to determine the question of admissibility. The right of inspection so conferred would in my opinion be quite without meaning unless the Legislature also intended that the Court will have jurisdiction to decide the first question to which I have referred, namely whether the communication was made " in official confidence ". In the present case the District Judge has inspected the document and found that the communication in question was not made in official confidence. The Attorney-General has conceded that the mere mark " confidential " placed on a document by the individual who writes it does not convert the document into a communication made in official confidence ; and in the circumstances in which the document now in question appears to have been written and transmitted to the Minister, I cannot see how the correctness of the finding of the learned Judge can be questioned once it is held that he had the jurisdiction to reach that finding.

The second question for determination in a case alleged to fall under section 124 could only arise if a Court first agrees that the communication was made in official confidence. If and when this question has to be considered, it seems to me that the decision in the Australian case will probably have to be followed, not only because it is a decision of the highest judicial authority, but also because section 162 implies that the Court can determine by inspection whether the production of the particular communication would or would not be prejudicial to the public interest.

I have set out above my reasons for deciding that sections 123 and 124 of our Evidence Ordinance do not correspond with the English Law on the same subject, and that the general principle by which the English Courts are guided is not applicable to cases falling under section 124. But even assuming that the English Law should be applied, it is by no means clear that the general English principle would cover a case where some complaint is made by a member of the public as to the conduct of a public official. In a speech delivered in the House of Lords (a copy of which was made available to us by the learned Attorney-General) the present Lord Chancellor stated that the English Law enables Crown privilege to be claimed on two alternative grounds, the second ground being what Lord Simon described as " the proper functioning of the public service ". In dealing with the class of documents for which privilege would be claimed in England on this second ground, the Lord Chancellor referred to "the need to secure freedom and candour of communication *with and within the public service* so that Government decisions can be taken on the best advice and with the fullest information ". I am inclined to agree with the argument of the learned Attorney-General that the expression " communication made in official confidence " (occurring in our section 124) would include not merely inter-official correspondence but also correspondence by members of the public *with* public officials. It is not difficult to envisage cases in which public-spirited individuals may make disclosures to officials which are important in the public interest and for which protection may rightly be claimed and granted under section 124. But I do not think that any and every

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complaint or criticism concerning a public official can be reasonably regarded as having been made " in order to enable Government decisions to be taken on the best advice and on the fullest information ". Phipson sets out a comprehensive list of English cases in which evidence was excluded of matters held to fall under the head of " Affairs of State ". For present purposes it is sufficient, without special reference to any of these cases, merely to observe that in very nearly all of them the documents or statements for which privilege was claimed were in the strict sense of the term " State documents ", i.e., communications between officials, and that there appears to have been no single case in England in which privilege was successfully claimed for a communication from an individual containing allegations of the nature alleged to have been made in the petition which the learned District Judge admitted in the present case.

The application must be refused with costs fixed at Rs. 262·50.

K. D. DE SILVA, J.—I agree.

Application refused.

1954 *Present :* **Swan, J., and Sansoni, J.**

D. M. G. UKKU BANDA, Appellant, *and* THE RAHATUNGODA CO-OPERATIVE STORES SOCIETY LTD., Respondent

S. C. 123—D. C. Kandy, 1,592/X

Co-operative Societies Ordinance—Rule 29—Dispute between society and employee—Arbitration— Crucial date is date of reference—Second reference to arbitration—Validity—Section 45 (4).

A second reference to arbitration of the same dispute between a co-operative society and an employee is illegal as long as the first award has not been declared to be invalid by a Court of law.

Where on the date a dispute is referred to arbitration the employee concerned is still in the employ of the society, the reference is regular.

APPEAL from a judgment of the District Court, Kandy.

C. R. Gunaratne, for the defendant appellant.

No appearance for the plaintiff respondent.

Cur. adv. vult.

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December 2, 1954. SANSONI, J.—

This is an appeal by the defendant from an order made by the Additional District Judge, Kandy, allowing the application of the Rahatungoda Co-operative Stores Society to issue writ against him to recover a sum of Rs. 808·98. The appellant was the Manager of the Society from 1st February, 1945, to 20th July, 1947. On 17th July, 1947, acting under rule 29 of the rules made under section 37 of the Co-operative Societies Ordinance, No. 34 of 1921, the Assistant Registrar of Co-operative Societies referred to one H. M. W. Tennekoon a dispute which had arisen between the Society and the appellant over the value of goods entrusted to the appellant and not accounted for. The arbitrator made an award dated 27th December, 1947, directing the appellant to pay the Society a sum of Rs. 737·40. The appellant appealed against the award but his appeal was dismissed by the Registrar of Co-operative Societies.

Apparently the Registrar thereafter declared that award to be ultra vires on the ground that on the date of the award the appellant had ceased to be an employee of the Society. He is said to have taken that step in consequence of the decision of Gratiaen, J. in *Illangakoon v. Bogollagama* [1]. Another reference of the dispute was then made by an Assistant Registrar of Co-operative Societies to one M. B. Tennekoon on 11th October, 1950, and the latter made an award dated 21st November, 1950, directing the appellant to pay the Society a sum of Rs. 808·98. The order appealed from was made when the Society applied to issue writ to execute that award. Notice of that application was given to the appellant and two objections were taken on his behalf: (1) that after the first award was made the Assistant Registrar had no authority to refer the dispute again to an arbitrator; (2) that as the appellant was an officer of the Society when the first reference to arbitration was made the dispute was properly referable to arbitration even under the unamended section 45 of the Co-operative Societies Ordinance (Cap. 107), and the award made on such reference was valid. These objections among others were taken before us at the hearing of this appeal and as they are sufficient to dispose of the appeal I shall deal only with them.

To deal with the second objection first, I think the judgment of Dias, J. in *Canagasabai v. Kondavil Co-operative Stores* [2] concludes the matter; the learned Judge decided, and I respectfully agree with that decision, that the crucial date is the date of reference. If on that date the appellant was the manager, it matters not if the appellant ceased to be the manager thereafter. The vital difference between *Canagasabai v. Kondavil Co-operative Stores* (*supra*) and the present case on the one hand, and *Illangakoon v. Bogollagama* (*supra*) on the other, is that the manager in the last-mentioned case had ceased to be the manager before the matter was referred to arbitration. It seems to me that the second reference to arbitration was made because the Registrar of Co-operative Societies misunderstood the judgment of Gratiaen, J. The first award was in fact a valid award. Since there was a valid award made on 27th

[1] *(1948) 49 N. L. R. 403.* [2] *(1949) 50 N. L. R. 465.*

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December, 1947, the second reference of 11th October, 1950, was unwarranted. In saying this I do not mean to imply that a second reference would have been permissible if the first award was bad. Whether the award was good or bad I do not see how it is open to any authority except a Court of law to declare an award ultra vires or invalid. Such a declaration is a usurpation of the authority which is properly vested in a Court. If the Registrar can claim to make such a declaration, the appellant may also claim an equal right to make a declaration that the award is intra vires. The Registrar is empowered by section 45 (4) to make a decision in an appeal, and he did so ; but he has no statutory authority to make a declaration as to the validity or invalidity of an award. His decision on the appeal with respect to the first award is declared by section 45 (4) to be final and that would seem to be the end of the matter so far as he is concerned. It follows then that there was nothing to justify the second reference of the dispute, and the first objection is also sound.

In the result I would hold that the award dated 27th December, 1947, was final ; it had never been properly set aside ; the award dated 21st November, 1950, on which the application for writ was founded is invalid and the application to execute it should have been refused. For these reasons I would allow this appeal with costs.

SWAN, J.—I agree.

Appeal allowed.

1955 *Present :* **Gunasekara, J.**

T. KULASEGARAM, Appellant, *and* P. F. CHARLY SINGHO, Respondent

S. C. 663—M. C. Batticaloa, 20,643

"*Ganja*"—*Not a plant—Poisons, Opium and Dangerous Drugs Ordinance* (*Cap. 172*), *ss. 26, 28, 76* (*5*).

"Ganja" is not a plant. Possession, therefore, of an article which is described by the prosecution as "ganja, the parts of a hemp plant known as *cannabis sativa*" is not punishable under section 28, read with section 76 (5), of the Poisons, Opium and Dangerous Drugs Ordinance.

APPEAL from a judgment of the Magistrates Court, Batticaloa.

H. A. Wijemanne, Crown Counsel, for the complainant-appellant.

J. N. David, for the accused-respondent.

Cur. adv. vult.

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January 17, 1955. GUNASEKARA, J.—

This is an appeal with the sanction of the Attorney-General against an acquittal on a charge of an offence punishable under section 76 (5) of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172). The charge alleged a contravention of section 28, which provides among other things that no person shall without a licence have in his possession " any resin obtained from the hemp plant or the preparations of or extracts from the hemp plant commonly known as bhang, hashish, or ganja, or any other preparation of which such resin forms a part ".

The case for the prosecution consisted of evidence to the following effect given by a divisional preventive officer of the Excise Department and an excise guard. The respondent's house was raided by the two of them and the headman of the village at 8.50 a.m. on the 10th March. As they approached the house they saw the respondent, who had been seated on a chair in the front verandah, rush into a room. They followed him and they saw him place a packet inside a large pot that was in the room. The preventive officer immediately seized him and took the packet out of the pot. It contained a substance that the preventive officer purports to have identified as " Ceylon ganja, the parts of hemp plant known as cannabis sativa ". He took the respondent with him in a car to a dispensary and from there to the excise station, having had the substance weighed at the dispensary in the presence of both of them and the packet sealed with the respondent's left thumb impression. The two witnesses admitted in cross-examination that they also took away from the respondent's house a bottle containing two drams of arrack and a glass.

At the close of the case for the prosecution the learned magistrate delivered the following judgment :

" The accused is charged with the possession of ganja in breach of S. 28 of the Excise Ordinance. There is a fatal error committed by the D. P. O. The accused was in the rear seat of the car whilst the production was in the front seat. The guard said that it was in the pocket of the D. P. O. Hence the accused does not know whether it had been introduced or not.

Further in evidence it is stated that the accused ran inside. He did not have anything in his hand. Why he should have taken the alleged packet and placed it in a pot is inexplicable. This is necessary only if there is evidence that there were other people in the house. Further the explanation given by the guard about the removal of bottle of arrack and glass is not explained. Most probably the raiding party may have tried to introduce a sale but failed. These show that no Court can believe the story for the prosecution. I therefore acquit and discharge accused. "

I agree with Mr. Wijemanne that the fact that the preventive officer sat in the front seat with the production in his pocket while the accused was in the rear seat cannot lead to the inference that " the accused does not know whether it had been introduced or not ". There is no evidence that

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the respondent " did not have anything in his hand " when he rushed inside the house. This statement in the judgment is apparently based upon an admission by the excise guard that " he did not see whether the accused had anything in his hand " at that time, which of course is not an admission that the accused " did not have anything in his hand ". It is true that the prosecution witnesses did not explain why the bottle and the glass were removed from the house, but they were not asked for an explanation. There appears to be no ground at all for the learned magistrate's finding that most probably the raiding party tried to fabricate evidence of an illicit sale of arrack.

I agree with the contention for the Crown that the learned magistrate has misdirected himself on the evidence and that his judgment discloses no adequate ground for his disbelief of the two prosecution witnesses. It seems to me, however, that the appeal must be dismissed for the reason that the prosecution has adduced no satisfactory evidence that the substance that is said to have been found in the possession of the respondent was such a substance as is described in section 28 of the Ordinance, that is to say, any resin obtained from the hemp plant or a preparation of or extract from that plant or a preparation of which such resin forms a part. As was pointed out by Basnayake J. in *Samarasekera v. Soysa* [1] " ' Ganja ' is not a plant. It is a preparation of or extract from a plant. " The evidence of the preventive officer that the substance in question is "ganja, the parts of a hemp plant known as *cannabis sativa* ", indicates that he is unaware of a distinction between parts of the plant itself (if he can identify them) and the preparation or extract from it that is known as ganja. (The possession of any part of the plant without a licence would be breach of section 26 and a different offence to the possession of ganja without a licence.) The preventive officer stated in his evidence in chief that he had had " seven years experience " and that he had been " trained to identify ganja ". Apparently the " ganja " that he had been trained to identify is not the substance referred to by that name in section 28 of the Ordinance. The excise guard too declared that the packet contained " Ceylon ganja ". No evidence was placed before the court, however, about his qualifications to express an opinion, apparently for the reason that the preventive officer was the witness upon whose evidence as an expert the prosecution relied.

The appeal is dismissed.

Appeal dismissed.

[1] *(1951) 52 N. L. R. 380.*

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1956 *Present :* **Basnayake, C.J., and K. D. de Silva, J.**

M. IBRAHIM, Appellant, *and* N. ADUME, Respondent

S. C. 274—D. C. Matale, M. S. 290

Promissory note—" Valuable consideration "—Bills of Exchange Ordinance, ss. 27, 90.

In an action on a promissory note the evidence showed that the defendant had given the promissory note to the plaintiff in exchange for the purported surrender by the plaintiff of his " rights " to purchase a land under an agreement which was, in fact, null and void for the reason that it was oral and did not satisfy the requirements of section 2 of the Prevention of Frauds Ordinance.

Held, that the promissory note was unenforceable as there was no " valuable consideration " in the sense in which that expression is used in section 27 of the Bills of Exchange Ordinance.

APPEAL from a judgment of the District Court, Matale.

H. V. Perera, Q.C., with *T. B. Dissanayake* and *G. D. C. Weerasinghe*, for defendant-appellant.

C. G. Weeramantry, with *Ananda Karunatilleke*, for plaintiff-respondent.

Cur. adv. vult.

May 2, 1956. BASNAYAKE, C.J.—

This is an action on a promissory note. The appellant (hereinafter referred to as the defendant) and the respondent (hereinafter referred to as the plaintiff) agreed orally with another, one E. L. Senanayake, to buy for the sum of Rs. 38,000 a block of land in extent 20 acres 3 roods known as the Kalalpitiya Division, out of an Estate known as Ukuwela Estate which Senanayake had purchased for the purpose of blocking up and selling. The defendant was the moving spirit in the transaction. The arrangement between the plaintiff and the defendant was that the plaintiff should pay Rs. 5,500 and the defendant the balance.

On 16th October 1950 the first instalment of Rs. 3,500 was paid and in the receipt which was given by Senanayake the names of both plaintiff and the defendant were mentioned and the payment was described as an advance on the sale of Kalalpitiya Division, a block 20 acres, 2 roods, and 15 perches in extent. The receipt also stated that a sale agreement was to be signed on 5th November 1950 and that 50 per cent. of the balance advance of the purchase price of Rs. 38,000 was to be paid on signing the agreement. But such an agreement was never signed.

The defendant made further payments and completed the payment of the entire sum and received the transfer of another block in exchange for the Kalalpitiya Block which he had agreed to purchase.

The plaintiff contributed only Rs. 1,000 towards the purchase price. According to the defendant this contribution was made in two instalments of Rs. 500 but the plaintiff says it was made in one instalment of Rs. 1,000.

2——J. N. B 60407—1,593 (11/56)

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The plaintiff's version is that for a contribution of Rs. 5,500 he was to get 5 acres of land and a line room ; but according to the defendant the extent of the land to be given was 3 acres, 3 roods and 28 perches.

Either because of the plaintiff's inability to pay the balance sum due from him or on account of the defendant's desire to purchase the entire land, it was agreed that the defendant should refund the Rs. 1,000 paid by the plaintiff and give him a promissory note for Rs. 1,500 payable in three months in exchange for his " rights ".

It is common ground that out of the amount stipulated in the promissory note the defendant paid Rs. 100. This action is to enforce the payment of the balance Rs. 1,400 with interest thereon at 6 per cent. as stipulated in the note.

The defendant and the plaintiff are at variance as to why the promissory note was given. The defendant states that it is for loss of profits, the plaintiff states that it is for the surrender of his rights.

The sole question that was raised at the trial and in appeal was whether there was valuable consideration for the promissory note and if not whether the action could be maintained.

Counsel for the defendant against whom judgment has been given by the District Judge argued that the promissory note was unenforceable as there was no consideration for it.

He submitted that as the oral agreement between the plaintiff and the defendant in regard to the purchase by the former of a portion of the land that the latter had arranged to buy from Senanayake was of no force or avail in law the plaintiff had no " rights " which he could surrender. There was therefore no consideration for the promissory note.

Learned Counsel for the plaintiff contended that there was consideration as the right which the plaintiff gave up though not enforceable in law was something that had some value and that for surrendering something of value to him he took the promissory note which was therefore enforceable. We are unable to uphold the submission of Counsel for the plaintiff.

Section 27 of the Bills of Exchange Ordinance prescribes how valuable consideration for a Bill may be constituted. Section 90 makes the provision of the Ordinance relating to Bills of Exchange applicable with necessary modifications to promissory notes.

There can be no valuable consideration in the sense in which that expression is used in the Ordinance in an agreement which is null and void, for, that is the effect of an agreement that does not satisfy the requirements of section 2 of the Prevention of Frauds Ordinance [1].

I would therefore allow the appeal with costs.

K. D. DE SILVA, J.—I agree.

Appeal allowed.

[1] *Arsekularatne v. Perera* (*29 N.L.R. 342*).

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1955 *Present :* **Gratiaen, J., and Sansoni, J.**

T. RAMAN Appellant, *and* N. MANICKAM *et al.*, Respondents

S. C. 129—D. C. Jaffna, 6,780

Res judicata —"*247 action*"—*Attachment of property—Previous litigation as to title between judgment-debtor and claimant—Rights of judgment-creditor—Execution purchaser is "privy" of judgment-debtor—Civil Procedure Code, s. 247.*

When property attached by a judgment-creditor is the subject of a claim in a "247 action", an earlier judgment upholding the claimant's title to it as against the judgment-debtor would operate as *res judicata* in favour of the claimant.

Kuda Banda v. Dingiri Banda (1911) 14 N. L. R. 145 and *Sandrasegara v. Coomaraswamy* (1917) 4 C. W. R. 378, overruled.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, for the plaintiff appellant.

Joseph St. George, for the defendant respondent.

Cur. adv. vult.

March 14, 1955. GRATIAEN, J.—

This action was instituted under Section 247 of the Civil Procedure Code concerning a property which a judgment-creditor (the 1st respondent) had caused to be seized in execution of a money decree against his two judgment-debtors. The appellant objected to the seizure on the ground that he was its absolute owner. In due course, he instituted this action for a declaration *inter alia* that the property belonged exclusively to him and was not liable to be sold in execution of the 1st respondent's decree. The learned trial Judge dismissed the action and held that the property belonged to the 3rd respondent (the 2nd judgment-debtor) by virtue of a purchase in 1946 from the 2nd respondent (the 1st judgment-debtor).

The attachment of the property in dispute had been secured by the 1st respondent on 22nd March 1950. Nevertheless the learned Judge rejected the appellant's plea of *res judicata* based on a decree in his favour dated 16th September 1948 of the District Court of Jaffna (affirmed in appeal on 13th September 1949) in an action in which he had successfully vindicated his title to the property as against the 3rd respondent.

The state of the earlier decisions as to whether an attaching creditor in a "247 action" is bound by a judgment previously declaring the claimant entitled to the property as against the judgment-debtor is far from satisfactory. In *Kuda Banda v Dingiri Banda* [1] Lascelles, J., sitting alone, held that in such a situation the creditor (even though the seizure was effected after the date of the decree relied on as *res judicata*)

[1] *(1911) 14 N. L. R. 145.*

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was nevertheless entitled to a fresh adjudication on the merits as to his judgment-debtor's title. Six years later, in *Pedrupillai v Dionisa* [1], Ennis, J., also sitting alone, expressed a strongly-worded opinion to the contrary, but ultimately disposed of the appeal on other grounds. Ennis, J. pointed out that certain English decisions relied on by Lascelles, J. related only to "estoppels *by conduct*" which bound the judgment-debtor personally but not his judgment-creditor "who was not a party to the estoppel". I respectfully agree that Lascelles, J. appears to have lost sight of the distinction between an estoppel which merely "gives rise to the application of equitable principles between man and man", and a so-called "estoppel *by record*" which, on grounds of public policy, prohibits *in limine* a second adjudication between the same parties (or their "privies") on the subject matter of the earlier *lis*.

Six days after *Pedrupillai's case* (supra) had been decided, a similar case came up before de Sampayo, J., also sitting alone, in *Sandrasegara v. Coomaraswamy* [2]. Unfortunately, his attention was not drawn to Ennis, J.'s recent dissent, and he followed *Kuda Banda's case* (supra) on the assumption that there was no judicial pronouncement to the contrary.

The rule of *stare decisis* does not require a Bench of two Judges to accept any of these conflicting single-Judge decisions as authoritative. We must therefore come to an independent conclusion on this controversial question. In my opinion, *Kuda Banda's case* and *Sandrasegara's case* (supra) ought to be over-ruled, and the view expressed by Ennis. J. in *Pedrupillai 's case* (supra) should be adopted.

Drieberg, J. has incidentally explained in *Samaranayake v. Mendoris* [3] that a judgment-creditor in a 247 action "has to prove as against the claimant his debtor 's right to the property *as fully as the debtor himself if the latter was seeking to vindicate his title against the claimant*". The ultimate object of execution proceedings under the Code is that, upon a judicial sale of the property attached, the right, title and interest of the judgment-debtor effectually passes to an execution-purchaser, while the purchase price (or a part of it) is paid to the creditor in satisfaction of his money decree. Under certain other statutes, the purchaser enjoys the special privilege of acquiring a better title than the judgment-debtor had possessed. Not so in the case of execution sales conducted under Chapter 22 of the Civil Procedure Code. Indeed, the purchaser may himself have the sale set aside under Section 284 on discovering that the debtor had "no saleable interest" in the property.

An execution purchaser at any rate is clearly a "privy" of the judgment-debtor for the purposes of the rule of *res judicata* except in cases where the attachment of the property had preceded the date of the judgment declaring that the judgment-debtor (or claimant as the case may be) had superior title. No doubt the Judicial Committee of the Privy Council has observed in *Dinendronath v. Sanniah Ramkumar Ghose* [4] that, unlike a private purchaser, an execution purchaser acquires the title of the judgment-debtor "by operation of law". Nevertheless, it is a derivative title passing to him by law from the judgment-debtor

[1] *(1917) 20 N. L. R. 143.*
[2] *(1917) 4 C. W. R. 378.*
[3] *(1928) 30 N. L. R. 203.*
[4] *(1881) I. L. R. 7 Col. 107.*

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and from no other source. Suppose therefore that the judgment-debtor had (before attachment) unsuccessfully sought to vindicate that title against the same claimant ; it necessarily follows that, in a later litigation against the successful claimant, the execution purchaser would in effect be litigating under the same title. The relationship between judgment-debtor and execution purchaser in respect of the property contains all the essential elements of " privity of estate " so that the earlier judgment binds the privy to the same extent that it binds the parties themselves. It would be unjust and contrary to the spirit of the rule of *res judicata* to deny the claimant the fruits of his earlier victory, and to compel him to re-establish his rights a second time against the successor-in-title of his former adversary.

The relationship between the execution purchaser and judgment-debtor for the purposes of *res judicata* has now been explained. It is suggested, however, that the judgment-creditor is not a privy of the judgment-debtor in what de Sampayo, J. calls " the usual sense ". *Sandrasegara 's case* (supra) at page 381. I agree that the situation is not identical, because the judgment-creditor in a " 247 action " does not claim that his debtor 's title has already passed to him. But he does assert that the debtor enjoyed a saleable interest in the property at the date of its attachment ; and for that reason he demands an execution sale at which that interest will pass to the highest bidder (perhaps himself) in exchange for valuable consideration, the whole or part of which must be applied in satisfaction of his decree.

At every stage of the present action, 1st respondent, as judgment-creditor, was litigating under a title identical with that which his debtor had asserted in the previous litigation against the appellant. Their relationship (in respect of the latter 's title) was therefore sufficiently close to establish " privity " between them in a very real sense.

The rights conferred on a judgment-creditor upon the attachment of property in which the debtor is alleged to have a saleable interest closely resemble for all practical purposes a mortgage, even though the attachment may not strictly establish " an interest in land ". *Ibrahim v. Hongkong and Shanghai Bank* [1]. The effect of the attachment is to confer on him a preferential right to the proceeds of the sale according to rules regulated by the Civil Procedure Code. See also *Wille on Mortgage* (1st ed.) 161–162. " Privity in estate or interest ", having been established by operation of law, is the foundation of his power of attachment. In the absence of privity, the power could not exist. But in truth there is privity, and consequently the doctrine of *res judicata* either stands in his way or comes to his aid (according to the outcome of the previous litigation as to title between debtor and claimant).

The true principle has been very clearly explained in *Bigelow on Estoppel* (5th ed :) pp. 142–144, cited with approval in *Caspersz* pp. 162–3. "The ground of privity is a *property and not a personal relation* ". An earlier judgment (which was conclusive against the judgment-debtor in respect of his title to the property subsequently seized in execution against him) is equally and to the same extent binding on the judgment-creditor at whose instance the property was attached and brought *in custodia legis* with a view to having it judicially sold for his benefit. Similarly, an

[1] *(1934) 37 N. L. R. 51.*

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earlier judgment upholding the debtor 's title as against a particular claimant would operate in a " 247 action " as *res judicata* in favour of the judgment-creditor.

In the view that I have taken, there is really no need for any extension (on grounds of public policy) of the doctrine of *res judicata* as in *Dadalle Dharmalankara 's case* [1]. In the present context the doctrine operates directly. A man who claims a right in virtue of someone else's title to property cannot repudiate its infirmities which have previously been judicially declared to exist in favour of a third party. *Cui sentit commodum sentire debet et onus.*

I would answer the issue as to *res judicata* against the 1st respondent. The judgment under appeal must therefore be set aside, and judgment entered in favour of the appellant as prayed for with costs in both Courts.

Sansoni, J.—I agree.

Appeal allowed.

1956 *Present :* **Gratiaen, J., and Gunasekera, J.**

A. R. M. CASSALY, Appellant, *and* A. R. M. BUHARY *et al.*, Respondents

S. C. 76—D. C., Galle, 5,000 L

Minor—Power of curator to sell minor's property—Fideicommissum—Unborn potential fideicommissaries—Right of an existing fideicommissary to sell his spes*—Courts Ordinance (Cap. 6), s. 69 (1)—Civil Procedure Code, ss. 582* et seq.

Sale of a minor's property by his curator without the proper sanction of the Court is *ipso jure* void. If the minor subsequently seeks to vindicate title to that property, the burden is on the alience to show that the Court's sanction for the sale was validly obtained.

A person donated certain property to his son, A, subject to a fideicommissum in favour of such children of A as would be alive at the time of A's death. Before the class of potential fideicommissaries was yet capable of ascertainment and when A had three sons, one of whom was a minor, application was made to Court by a person to be appointed curator of the estate of the minor under Chapter 40 of the Civil Procedure Code " for the purpose of selling the rights of the said minor's one-third share " of the property. The application was allowed after a perfunctory inquiry, and in April 1925 the curator purported to convey to X " all the right, title, interest, claim and demand whatsoever " of the minor in the property. The fiduciary, A, did not die until 25 years later, in 1950.

Held, that the burden of proving that the Court had interposed its consent to the purported sale of the minor's interests in the property was not discharged. In the first place, the minor was not at that time vested with the undivided one-third share which alone had been authorised to be sold. Secondly, authority to sell a minor's property cannot validly be granted without reference to a specified consideration. Finally, the person appointed as curator had not obtained the sanction of the Court to dispose of the mere *spes* which was all that the minor did enjoy in 1925 ; the authority to sell the future contingent interest of a ward of the Court cannot validly be granted unless " the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries ". For these reasons the sale to X was of no force or avail against the minor.

[1] *(1952) 54 N. L. R. 181.*

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APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *Felix R. Dias*, for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *Sir Ukwatte Jayasundere, Q.C.*, and *S. K. Rodrigo*, for the 3rd and 4th defendants-respondents.

C. Ranganathan, with *P. Naguleswaram*, for the 1st defendant-respondent.

No appearance for the 2nd defendant-respondent.

Cur. adv. vult.

March 28, 1956. GRATIAEN, J.—

This action was instituted under the Partition Ordinance in respect of a property situated in Galle on the basis that the plaintiff and the 1st defendant owned it in equal shares. The 3rd and 4th defendants, who are minors, intervened in the action through their guardian-ad-litem (the 5th defendant) and objected that the property belonged exclusively to them. Another intervenient (the 2nd defendant) asserted a right to be compensated for certain improvements effected on the property, but his claim was rejected and no longer arises for consideration.

The property in dispute had admittedly belonged to Seyan Slema Lebbe, who by a deed of donation P 1 of 29th April 1897 gifted it to his son Abdul Rahiman (the father of the plaintiff and the 1st defendant) subject to a fideicommissum in favour of such children of the donee as would be alive at the time of his death. Abdul Rahiman, (hereafter called "the fiduciary") died on 11th November 1950 leaving only two children surviving him, namely, the plaintiff and the 1st defendant. Another son (Juwadu *alias* Thahir) had predeceased the fiduciary on 4th October 1949.

The plaintiff and the 1st defendant claimed that an undivided $\frac{1}{2}$ share in the property vested absolutely in them when the fiduciary interest of their father came to an end in 1950. The contention raised on behalf of the 3rd and 4th defendants, on the other hand, was that the title had already passed to their father L. P. D. Premaratne by right of purchase (under the conveyance 3D5 of 1st April 1925), his vendors being the fiduciary, the 1st defendant (acting on his own behalf and as curator of the estate of the plaintiff who was then a minor) and Juwadu *alias* Thahir. L. P. D. Premaratne gifted the entirety of his interests to the 3rd and 4th defendants in 1947, and they now claim exclusive ownership by virtue of this title.

The vital dispute between the parties relates to the legal effect of the conveyance 3D5. The learned trial Judge, in dismissing the plaintiff's action, held that this document operated as a valid transfer to L. P. D. Premaratne of absolute *dominium* in the property. Accordingly, he decided that the plaintiff had no rights of co-ownership entitling him to claim a decree under the Partition Ordinance.

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It is first necessary to set out the circumstances in which the conveyance 3D5 was executed in April 1925. The plaintiff was at that time 18 years old and, as the fiduciary was still alive, he enjoyed no more than a mere *spes* or expectation that a vested right would accrue to him in the event of his surviving the fiduciary. So too with regard to the 1st defendant and his other brother both of whom had attained majority before April 1925. The extent of the share, if any, which would ultimately vest in each of the three brothers upon the death of the fiduciary was not capable of precise ascertainment. Indeed, it was not even certain that the class of potential beneficiaries under 3D5 had yet been closed in 1925. Nevertheless, the fiduciary, the 1st defendant, and Juwadu *alias* Thahir " arranged to sell " the entire property, including the plaintiff's interests, for a composite consideration of Rs. 3,500. The 1st defendant thereupon made an application 3D1 dated 25th March 1925 to the District Court of Galle to be appointed curator of the estate of the plaintiff under Chapter 40 of the Civil Procedure Code " for the purpose of selling the rights of the said minor's (i.e., the plaintiff's) $\frac{1}{3}$ share " of the property. The application was allowed after what appears to have been a very perfunctory inquiry, and in due course a certificate of curatorship was issued to the 1st defendant for the special purpose previously referred to. This was the authority upon which the 1st defendant as curator purported, for an unspecified part of the total consideration, to convey in 1925 " all the right, title, interest, claim and demand whatsoever " of the plaintiff in a property in which no vested interest actually accrued to him until 25 years later.

The argument for the plaintiff is that 3D5 of 1925 was void and wholly inoperative as a conveyance to L. P. D. Premaratne of his future contingent interest in the property. It being conceded in argument on behalf of the 3rd, 4th and 5th defendants that the plaintiff was a minor at the relevant date, the submission is that the 1st defendant, as curator of his estate, had at best obtained the authority of the Court to sell only an undivided $\frac{1}{3}$ share which, according to the application 3D1 and the certificate of curatorship was incorrectly assumed to have already vested in him (subject only to a life-interest in his father). In other words, the application was based on an allegation of fact which had no relation to reality ; and the Court, in authorising the proposed sale, had acted upon an entirely wrong assumption. Alternatively, it was argued, the 1st defendant had no express authority from the Court to sell the future contingent interest which was all that the plaintiff himself (had he been capable of entering into a contract on his own behalf) could have disposed of.

The powers and responsibilities of a Court as the traditional " upper guardian of minors " under the Roman Dutch Law have received statutory recognition in section 69 (1) of our Courts Ordinance whereby every District Court is entrusted with the care and management of a minor's estate situated within its jurisdiction. Chapter 40 of the Code provides for the appointment of curators to take charge of such property under the general supervision of the Court. No express provision is made for granting authority to a curator to sell a minor's property, but it has always been assumed (and rightly so) that such authority may be

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given (subject to well-established limitations) in appropriate cases. Cayley, J. in *Re Hider, ex parte Corbet* [1] has clarified the rules which should guide a Judge in exercising his jurisdiction in such cases. When an application is made by a curator for sanction to sell or encumber property belonging to a minor, " there should be a decree . . . . the minor being represented by a guardian-ad-litem for the purpose. The facts should then be especially adjudicated upon, and a formal order entered. There must in fact be, as laid down in *Voet* 27 : 9 : 6, a *causae cognitio*, a *probatio*, and a *decretum*." The Court, before sanctioning a sale of property which is already vested in the minor, must be satisfied on proper material that the proposed transaction is " manifestly to his advantage ".

In Ceylon, even a lease for a term of years (being regarded as a *pro tanto* alienation) is void if granted without the sanction of the Court—*Perera v. Perera* [2]—and the rule applies even though the guardian had been expressly authorised by the donor to sell the property for the minor's benefit. *Mustafa Lebbe v. Martinus* [3]. A minor, on attaining majority, is therefore entitled to vindicate his title (which the curator had purported to alienate) by mere proof that the property had been conveyed *sine decreto* i.e. without the sanction of the Court. *Breytenbach v. Frankel* [4]. The reason is that such a sale is *ipso jure* void, and dominium has not passed from the minor. *Sande* 1 : 1 : 79. Accordingly, the burden is on the alienee to show that the Court's sanction was validly obtained. *Voet* 27 : 9 : 11.

Applying these principles to the facts of the present case, I am content to say that the burden of proving that the Court had interposed its consent to the purported sale of the plaintiff's interests in the property by 3D5 has not been discharged. In the first place, the plaintiff was not at that time vested with the undivided $\frac{1}{3}$ share which alone had been authorised to be sold. In the second, authority to sell a minor's property cannot validly be granted without reference to a specified consideration, and neither the 1st defendant's application, nor the certificate of curatorship, nor the conveyance 3D5 makes any mention of the price which was to be paid (or was in fact paid) to the plaintiff's estate out of the total consideration agreed upon. For these reasons alone, 3D5 is of no force or avail against the plaintiff. The *exceptio rei venditae et traditae* cannot apply to a transaction of this kind. Finally, the 1st defendant as curator had not obtained the sanction of the Court to dispose of the mere *spes* which was all that the plaintiff did enjoy in 1925.

This last objection goes beyond a mere technicality. It would be wrong to assume that the District Judge who issued the certificate of curatorship would have authorised the sale of the minor's future contingent interest in the property if it had been brought to his notice that the class of potential fideicommissaries in whom the title would ultimately vest upon the fiduciary's death was not capable of ascertainment in 1925. Under the general law, a stricter test must be satisfied if there are unborn potential beneficiaries to whom the property (or some interest in it) could in a certain contingency pass in due course. In that event, authority to

[1] *(1876) 3 S. C. C. 46.*
[2] *(1902) 3 Brown 150.*
[3] *(1903) 6 N. L. R. 364.*
[4] *(1939) A. D. 309 at 340.*

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sell the future contingent interest of a ward of the Court cannot validly be granted unless " the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries. " *Ex parte Visagie* [1]. Only an alienation *ob causam necessariam* would be justified. *Ex parte Koen* [2]; *Ex parte Shano* [3]. It is unnecessary to decide whether a Court's statutory jurisdiction to sanction the sale of the entire property under the provision of the Entail and Settlement Ordinance is similarly restricted where the class of ultimate beneficiaries under a *fideicommissum* has not yet been closed. Suffice it to say that this jurisdiction, with all its attendant safeguards, was not in fact invoked in the present case.

For the reasons which I have given, I would hold that the plaintiff became entitled to an undivided ½ share of the property upon the fiduciary's death in 1950. He is therefore entitled to claim a decree for partition or sale upon that basis.

There remains the question of title to the outstanding ½ share. It seems to me that the claim of the 3rd and 4th defendants is to this extent unassailable. It is true that, at the time of the conveyance 3D5, the 1st defendant had no vested interest in the property. But in his case the doctrine of *exceptio rei venditae et traditae* clearly operated to the benefit of the 3rd and 4th defendants as soon as he subsequently acquired title to an undivided ½ share in 1950. The ruling of the Privy Council in *Gunatileke v. Fernando* [4] is precisely in point, and I am unable to accept Mr. Ranganathan's argument that the *exceptio* can fairly be limited to the ⅓ share which was originally assumed to be vested in his client in 1925. The conveyance caught up " all the right, title, interest, claim and demand whatsoever " of the 1st defendant in the property, and these words are clearly wide enough to include the larger interest which he ultimately acquired.

I would set aside the judgment under appeal and send the record back with a direction that a decree be entered (either for a partition or sale of the property) on the basis that the plaintiff is entitled to an undivided ½ share and that the balance ½ share belongs to the 3rd and 4th defendants equally. The 3rd, 4th and 5th defendants must pay the plaintiff's costs of this appeal and of the contest in the Court below. The 1st defendant must, however, pay the 3rd, 4th and 5th defendants' costs of the contest in the Court below. The other costs in the lower Court will be borne *pro rata* between the plaintiff and the 3rd, 4th and 5th defendants, and the order for costs against the 2nd defendant will, of course, stand.

GUNASEKARA, J.—I agree.

Judgment set aside.

[1] *(1940) C. P. D. 42.*
[2] *(1930) O. P. D. 154.*
[3] *(1949) 3 S. A. L. R. 929.*
[4] *(1921) 22 N. L. R. 385 at 395.*

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1955 *Present :* **Gratiaen, J., and Sansoni, J.**

J. D. A. GUNASEKARA *et al.*, Appellants, *and*
B. M. SILVA *et al.*, Respondents

S. C. 374—D. C. Galle, 5167/L

Co-owner—Plantation made by him—Acquiescence of other co-owners—Right to possession—Right to order of ejectment.

A co-owner who makes a plantation on the common property with the acquiescence of his co-owners is entitled to possess the entirety of that plantation as against the other co-owners until the common ownership is terminated by a partition action. It makes no difference if two or more co-owners make the particular improvement and only some of them sue to enforce their rights of possession against a co-owner or any outsider who has no right to enjoy such improvement. The exact share of the person suing in such a case is irrelevant so long as he establishes that the person sued has no right to enjoy the improvement.

Although the co-owner who made the plantation is entitled to an order of ejectment against a person who obtained a lease of the plantation from a co-owner who had no right to enjoy the improvement, an order of ejectment will not be made against the lessor himself, as he is a co-owner of the land.

APPEAL from a judgment of the District Court, Galle.

A. L. Jayasuriya, for the plaintiffs appellants.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the defendants respondents.

Cur adv. vult.

February 2, 1955. SANSONI, J.—

The three plaintiffs sued the 1st defendant in this action claiming a declaration that they and their co-heirs were entitled to an undivided 3/10th share of a land and the plantation of 40 coconut trees on the eastern side. They also prayed that the 1st defendant be ejected from the land, and for damages until they were restored to possession. The plaintiffs claimed that this particular plantation had been made by two planters in 1905 at the instance of their predecessors in title, and had been possessed by them and their co-heirs until the 1st defendant dispossessed them in 1951.

The 1st defendant is a lessee on a deed of lease executed in 1949. His lessor, who claimed to be a co-owner of the 3/10th share of the land, was added as the 2nd defendant. The two defendants pleaded that the plantation in dispute had been made by the 2nd defendant's predecessors in title.

The learned District Judge held in favour of the plaintiffs and against the defendants on the question as to who had made the plantation but he thought that they were not entitled to any relief as they had not established the exact share to which they were entitled. I think there was ample oral and documentary evidence to support the learned Judge's finding as to who made the plantation in dispute. I would also accept his finding that the 2nd defendant is a co-owner of the land. It does not however follow that the 2nd defendant is, for this reason, entitled to a share in the produce of the plantation which was made by the plaintiff's predecessors in title.

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It may now be regarded as well settled that a co-owner who makes a plantation or builds a house on the common property with the acquiescence of his co-owners is entitled to possess the entirety of that plantation or house as against the other co-owners until the common ownership is terminated by a partition action. It makes no difference if two or more co-owners make the particular improvements and only some of them sue to enforce their rights of possession against a co-owner or any outsider who has no right to enjoy such improvement. The exact share of the person suing in such a case is irrelevant so long as he establishes that the person sued has no right to enjoy the improvement. I would therefore hold that the plaintiffs are entitled to a declaration (*a*) that they are entitled to possess the plantation in dispute as against the defendants, and (*b*) that the defendants have no right to possess that plantation.

But are the plaintiffs also entitled to an order of ejectment against the defendants ? If the improvement in dispute had been a house they would clearly have been entitled to such an order in view of the judgment in *Kathonis v. Silva* [1], but, as it is a plantation that is in dispute I think a distinction must be drawn between the two defendants. An order of ejectment may be made against the 1st defendant who is only a lessee of the plantation and who has therefore no rights outside the plantation ; but as the 2nd defendant is a co-owner of the land an order of ejectment cannot be made against him because such an order will prevent him from exercising his right to possess the land apart from the plantation. We have to enforce the rights of an improving co-owner without unduly interfering with the rights of other co-owners. I think that is why no order of ejectment was made in such cases as *Arnolis Singho v. Mary Nona* [2], and *Peeris v. Appuhamy* [3].

With regard to the rest of the relief claimed by the plaintiffs, however, the plaint itself showed that there were several other co-owners of the 3/10th share of the land, and the evidence led at the trial did not clearly establish to what specific share of the land or of the plantation the three plaintiffs were entitled. A person cannot be granted a declaration of title for himself and persons who are not parties to the action. I agree with the learned Judge that in these circumstances the plaintiffs had not established their right to a declaration of title to the 3/10th share of the land. Nor can they be awarded any damages since they have not proved the exact share of the damages which they were entitled to recover, and damages which were due to their co-heirs cannot be awarded to them. I would therefore set aside the decree appealed from and direct that a decree be entered declaring (*a*) that the plaintiffs are entitled to possession of the plantation of 40 coconut trees on the eastern side of the land described in the plaint and that the two defendants have no right to possess that plantation, and (*b*) that the 1st defendant be ejected from the said land. The plaintiffs will also be entitled to their costs in both courts.

GRATIAEN, J.—I agree.

Decree set aside.

[1] *(1919) 21 N. L. R. 452.* [2] *(1946) 47 N. L. R. 564.*
[3] *(1947) 48 N. L. R. 344.*

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1956 *Present :* **T. S. Fernando, J.**

A. JOBU NADAR, Petitioner, *and* E. J. GREY (Inspector of Police, Fort), Respondent

S. C. 784—IN THE MATTER OF AN APPLICATION FOR A MANDATE IN THE NATURE OF A WRIT OF HABEAS CORPUS UNDER SECTION 45 OF THE COURTS ORDINANCE FOR THE PRODUCTION IN COURT OF THE BODY OF PEDRUNADAR VETHANAYAGAM NADAR OF NOS. 161 and 162, MAIN STREET, MINUWANGODA.

Deportation Order—Power of Court to inquire into its reasonableness—Effect of words "deems it to be conducive to the public interest"—Power of Minister to elect between Deportation Order and Removal Order—Immigrants and Emigrants Act, No. 20 of 1948, ss. 28, 31, 45—Amending Act, No. 16 of 1955—Habeas Corpus *Application—Duty of respondent to justify detention.*

When the Minister of Defence and External Affairs makes in good faith a Deportation Order against a person under section 31 of the Immigrants and Emigrants Act on the ground that he deems it to be conducive to the public interest to make such deportation order, it is not open to a Court of law to inquire into the reasonableness of the Order and decide that the Order is invalid because the Court does not deem the making of the Order to be conducive to the public interest.

The Minister may make a Deportation Order under section 31 of the Immigrants and Emigrants Act when he deems it to be conducive to the public interest to make it, notwithstanding that a Removal Order can also be made under section 28 of the Act against the person concerned.

Upon an application for a writ of *habeas corpus*, the production by the respondent of an order, warrant of commitment or other document valid in law justifying the detention that has been challenged is a sufficient answer.

APPLICATION for a writ of *habeas corpus*.

Izadeen Mohamed, with *K. C. Kamalanathan* and *S. C. Crossette-Thambiah*, for the petitioner.

E. F. N. Gratiaen, Q.C., Attorney-General, with *M. Tiruchelvam*, Deputy Solicitor-General, and *H. L. de Silva*, Crown Counsel, for the respondent.

Cur. adv. vult.

September 14, 1956. T. S. FERNANDO, J.—

At the conclusion of the argument in this matter I made order discharging the rule and dismissing the application with costs and indicated that the reasons for that order will be set down later. I now state below the facts relevant to my order and the reasons therefor :—

The petitioner who alleges he is the employer of Pedrunadar Vethanayagam Nadar, an Indian national, seeks the release of the latter from the custody of the respondent who is detaining him under the authority of a deportation Order made by the Minister of Defence and External Affairs under the power vested in him by section 31 of the Immigrants and Emigrants Act, No. 20 of 1948. It is admitted that such a deportation Order has been made. Section 31 referred to above enacts that the

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Minister may make a deportation Order "*where the Minister deems it to be conducive to the public interest* to make a deportation Order" against the person mentioned in the Order requiring him to leave Ceylon and to remain thereafter out of Ceylon. Very similar words appear in paragraph 1 of Article 12 of the Aliens Order, 1919, of the United Kingdom under which "the Secretary of State may, *if he deems it to be conducive to the public good*", make a deportation Order requiring an alien to leave and to remain thereafter out of the United Kingdom. This paragraph was the subject of judicial interpretation by Lord Reading, C. J., in the case of *The King v. Inspector of Leman Street Police Station, ex parte Venicoff*[1], who stated that it was not for the Court to pronounce whether the making of the Order was or was not conducive to the public good and that Parliament has expressly empowered the Secretary of State *as an executive officer* to make these orders and has imposed no conditions. Again, in the case of *Point of Ayr Collieries, Ltd. v. Lloyd-George*[2] Lord Greene, M. R., called upon to interpret the following words appearing in regulation 55 (4) of the Defence (General) Regulations,

> "*If it appears to a competent authority* that in the interests of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking . . . ."

stated that "if one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority to decide as to whether or not a case for the exercise of the powers has arisen." In the course of interpreting very similar words appearing in regulation 51 (1) of the same Regulations, the same learned judge observed in the case of *Carltona, Ltd. v. Commissioners of Works*[3] that "Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if bona fide exercised no court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that the Courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction". In the course of an exhaustive examination of several relevant authorities, Choksy, A. J., in the local case of *Sudali Andy Asary v. Vanden Dreesen*[4] which arose over a deportation Order made under the same section 31 of our Immigrants and Emigrants Act, stated that if there has been a competent exercise by the Minister of a lawful authority the Court has no power to go further and say whether the Minister had material before him which a Court of law would consider sufficient for exercising that power. In the light of the above and several other authorities which have considered the meaning of provisions worded in much the same way as the relevant part of section 31 of our Immigrants and Emigrants Act, No. 20 of 1948, it is impossible

[1] (*1920*) *L. R. 3 K. B. D. 78.*
[2] (*1943*) *2 A. E. R. 547.*
[3] (*1943*) *2 A. E. R. 564.*
[4] (*1952*) *54 N. L. R. 66 at 83.*

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to contend today that the Minister of Defence and External Affairs in making a deportation Order under section 31 of the Act is acting in any other capacity than that of an executive officer or that a Court has any power to decide that the Order is invalid because the Court does not deem the making of the Order to be conducive to the public interest. There is no authority in law for the substitution of the decision or discretion of the Court in place of the decision or discretion of the Minister. Learned counsel for the petitioner conceded that, if the Order was one which the Minister had power to make, it was not possible for him, in the present state of the case law, to contend that it was open to the Court to enter upon an inquiry whether the Order was one which should have been made in the circumstances of this case.

Upon an application for a writ of habeas corpus the production by the respondent of an order, warrant of commitment or other document valid in law justifying the detention that has been challenged is a sufficient answer. The question was considered in the case of *R. v. Home Secretary, ex parte Greene*[1] where Goddard, L. J., citing from earlier cases, stated as follows :—

> " If a person committed by order of a court applies for a writ, and on a return, or, in accordance with the modern practice, by an affidavit showing cause, the gaoler produces an order of commitment regular on its face and showing that the prisoner was committed for matter within the authority of the court, the court to which the application for the writ is made, not being a court of error or of appeal, cannot entertain the question whether or not the authority has been properly exercised ".

In the same case, Mackinnon, L. J., stated that " on an application for habeas corpus, the gaoler or other person detaining the applicant must justify the detention. In an ordinary case, that is done by producing a legal order directing it. In this case, that must be a valid order of the Home Secretary issued pursuant to the Order in Council. The production of such an order in proper form would justify the detention, and prima facie would be conclusive ".

Not only has the making of the deportation Order been admitted by the petitioner, but he has actually annexed to his application to this Court a copy of the Order. I would therefore, subject to the examination of an argument addressed by learned counsel that a valid deportation Order could not have been made in the circumstances of this case, have been prepared to say that a sufficient answer to the application appears on its very face. It is however unnecessary to consider this aspect of the matter in view of the affidavit of the Minister of Defence and External Affairs that has been filed in Court on behalf of the respondent in which appears the following averment :—

> " On material placed before me I considered it to be conducive to the public interest to make a deportation Order against P. Vethanayagam Nadar and accordingly made order on 11th July, 1956, by virtue of powers vested in me as Minister of Defence and External Affairs in terms of section 31 (1) (*d*) of the Immigrants and Emigrants Act, No. 20 of 1948. "

[1] *(1941) 3 A. E. R. 104.*

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In the face of this affidavit and the admission on behalf of the petitioner referred to above, it seems to me that it is impossible to contend that the detention that has been challenged in this case is unlawful.

Learned counsel for the petitioner has, however, contended that a deportation Order under section 31 of the Act is totally inapplicable in the case of Vethanayagam Nadar. To appreciate the argument it is necessary to state certain relevant facts. It is admitted that Vethanayagam Nadar is neither a Citizen of Ceylon nor a person exempted from the provisions of Part VI of the Act. He is therefore a person to whom Part VI will apply. A temporary residence permit valid for two years had been issued to him on 5th June, 1953 and, although he applied for a renewal of that permit, no renewal was granted. As a result of the amendments to the Act introduced by the Immigrants and Emigrants (Amendment) Act, No. 16 of 1955, the provision of law which conferred the power to issue temporary residence permits has been repealed and such permits can now neither be issued nor renewed. He was requested by the Controller of Immigration to leave Ceylon before the 10th November, 1955. This date was later finally extended till 31st December, 1955. The resulting position was that the stay in Ceylon of Vethanayagam Nadar after 5th June, 1955, or after the date on which the amending Act No. 16 of 1955 came into force or, at any rate, after 31st December, 1955, became illegal and he became liable to be prosecuted for committing an offence punishable under section 45 of the Immigrants and Emigrants Act, No. 20 of 1948. He further became liable to have a removal Order made against him by the Minister acting under the powers vested in the latter by section 28 of the Act. In the state of these facts, learned counsel for the petitioner submitted that every circumstance was present enabling the Minister to make a removal Order under Chapter V of the Act, and he argued that, therefore, the making of a deportation Order under Chapter VI was totally inapplicable in this case. He went on to argue that Chapters V and VI of the Act were mutually exclusive and that as all the circumstances requisite for the making of a removal Order were present, it was the duty of the Minister to make such an Order. As I understood his argument, he went so far as to say that as Vethanayagam Nadar's stay in Ceylon on and after 1st January, 1956, had become illegal, the Minister had no option but to make a removal Order, and therefore the question whether his deportation was conducive to the public interest did not arise at all for the Minister's consideration. I am quite unable to agree with the contentions of learned counsel. While it may be quite correct that a removal Order under Chapter V of the Act could have been made on or after January 1, 1956, in respect of Vethanayagam Nadar, I can find no good reason for reaching the conclusion that the legislature left no discretion in the Minister in regard to the making of a removal Order under section 28. No reason has been advanced why the word " may " appearing in that section should not be given its ordinary meaning. There may well be cases where the Minister chooses not to effect the removal of a person notwithstanding that the person is liable to be removed in terms of the section.

Moreover, what reasons have I to assume that the Minister in making the deportation Order under section 31 of the Act has deemed it to be

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conducive to the public interest to deport Vethanayagam Nadar merely because he has refused to leave after 31st December, 1955? There is no material in this case for such an assumption by the Court and, as I have already stated, there is no power in the Court to inquire. As Lord Greene, M. R., stated in *Point of Ayr Collieries, Ltd. v. Llyod-George* (supra), " We do not know the facts, we do not know what matters may have impressed him (the Minister) and what matters of public interest may have made it very desirable to do what he did , . . . There may or may not have been facts of great importance of which the appellants do not know. I do not know; we are not told. There was no need for us to be told ". Assuming, as I must, that this deportation Order was made because the Minister deemed it to be conducive to the public interest to make it, it is impossible for me to state that it could not have been made because a removal Order could also have been made against the person concerned. If either kind of Order (removal or deportation) could have been made against Vethanayagam Nadar, the Minister is the only authority who had the power to decide which form of Order should actually have been made.

Application dismissed.

1956 *Present:* **Sansoni, J., and H. N. G. Fernando, J.**

SYADU VARUSAI *et al.*, Appellants, *and*
T. WEERASEKERAM *et al.*, Respondents

S. C. 399—D. C. Colombo, 2,874

Postponement—Refusal by Court—Withdrawal of Counsel from proceedings—Propriety—Civil Procedure Code, s. 82.

When an application for a postponement is refused it is the duty of the Counsel, who made the application, to continue to appear for his client and to conduct the case which has been entrusted to him. The only instance where a withdrawal by him from the proceedings is permissible, and then too only with the leave of Court, is where he has been retained only for the limited purpose of making the application for postponement and such application is refused by tke Court.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *C. Chellappah*, for the defendants appellants.

Cyril E. S. Perera, Q.C., with *S. W. Jayasuriya*, for the plaintiffs respondents.

Cur. adv. vult.

February 9, 1956. SANSONI, J.—

This is a partition action which was instituted in May, 1943. The first trial took place in February and March, 1947 upon certain points of contest which were raised between the plaintiffs and the 8th and 9th

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defendants, and a decree for the sale of the premises in dispute was entered in May, 1947. The 8th and 9th defendants appealed against that decree and on September 5th, 1950, this Court set aside the judgment of the District Judge and sent the case back in order that a certified copy of a last will upon which the plaintiffs relied, and a certified copy of an account filed in a testamentary case which the 8th and 9th defendants moved to read in evidence, might be admitted. It was also ordered that the parties would be entitled to lead any further evidence if they wished to do so.

When the case went back to the District Court it came up for trial on October 2nd, 1951. The plaintiffs' Counsel moved for a postponement on the ground that the witness who had given evidence on the title at the previous trial had not been summoned, as it was thought that the evidence already recorded would be acted upon. He asked for an opportunity to cite that witness, and stated that he was ready with the other witnesses. The points in dispute were recorded afresh by the trial judge and the evidence of one witness was led. In view of the reasons given by the plaintiffs' Counsel, the defendants' Counsel did not object to a postponement and the Judge allowed it for those reasons. The points of contest framed were substantially the same as those which had been framed at the previous trial.

Eventually the case came up for trial again on June 6th, 1952. Counsel for the 8th and 9th defendants then produced a medical certificate and asked for a postponement on the gound that the 8th defendant, who was said to be a material witness, was ill in India. The plaintiffs' counsel objected to the application and led the evidence of a witness who stated that the 8th defendant had been seen in Colombo on 2nd June, after the medical certificate was said to have been issued. If this evidence was believed there was every reason to suspect that the 8th defendant was not in fact ill. The trial judge refused the application for a postponement and directed that the trial should proceed. According to the record of the proceedings, Counsel for the 8th and 9th defendants then said that he was unable to take part in the further proceedings as he had no instructions with regard to the conduct of the case, and he would not be leading any evidence on behalf of the 8th or 9th defendants. The plaintiffs' Counsel then led afresh the evidence of the witness who had given evidence on the question of title at the first trial. This witness was not cross-examined. Documents were read in evidence by the plaintiffs' Counsel, including a certified copy of the last will which this Court had by its order directed should be admitted. No evidence was tendered on behalf of the 8th and 9th defendants. The District Judge then gave his judgment which was in the same terms as the judgment given after the first trial.

The 8th and 9th defendants have appealed from this order. It was submitted on their behalf (1) that the learned Judge should have granted the application for a postponement, and (2) that he should have taken into consideration the evidence which had been recorded at the first trial. It was not suggested that on the fresh evidence led before him the learned Judge could have come to any other conclusion; nor was it suggested that

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his findings would have been different even if he had considered the evidence led at the first trial. But, these considerations apart, the attitude adopted by Counsel for both parties in the lower Court was that evidence should be led *de novo*, and the trial Judge had approved of this procedure. It is, therefore, not open to the 8th and 9th defendants to argue now that the Court should have considered the evidence led at the first trial. I am therefore unable to see that there is any substance in the second point taken in appeal.

With regard to the first point, I do not think that the learned Judge on the materials placed before him when the application for a postponement was made, could have made any other order in regard to the application. It must be borne in mind that the case was sent back by this Court for a special purpose, namely, to enable each party to put in a specified document, and to lead any further evidence if they wished to do so. The 8th defendant had already given evidence at the first trial on the same points of contest. No application was made that such evidence should be taken into consideration. If further evidence was available, it should have been led at the trial, and the particular document which the 8th and 9th defendants had sought to read in evidence should have been tendered at the trial. None of these things was done or sought to be done. The only reaction of the 8th and 9th defendants' Counsel to the refusal of the application for a postponement was a withdrawal from the proceedings. He did not even cross-examine the only witness called to give evidence for the plaintiffs. It is too late now to complain if the Court decided the dispute on the evidence then placed before it. It seems to me that the application for a postponement was unnecessary in the circumstances, and if it had been granted the final decision of this action would have been postponed for an utterly inadequate reason.

The duty lies on the Court to see that a postponement is not allowed except "for sufficient cause to be specified in its written order", as directed by S. 82 of the Civil Procedure Code; and an Appeal Court will be very slow to interfere with an order refusing or allowing a postponement, since the question of a postponement is a matter entirely within the discretion of the trial Judge : see *In re Yates' Settlement Trusts* [1]. Many cases have come before us recently where applications for the postponement of trials have been made and where, when such applications have been refused, the advocate or proctor making the application has, as a matter of course, withdrawn from the proceedings. Such conduct, it seems to me, is disrespectful to the Court and displays a lack of a due sense of responsibility. Another objection to such conduct is that the client, whom the advocate or proctor was retained to represent, and whose interests he was in duty bound to protect, finds that his cause has been abandoned.

This Court has consistently said that "when an application for a postponement is refused the party affected should nevertheless proceed to call what evidence is available to him, one reason being that after this evidence is recorded it may emerge in a stronger way to the tribunal that a postponement should be granted"— per Cannon J. in *Ramapillai v.*

[1] *(1954) 1 W. L. R. 564.*

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Zavier [1]. The learned Judge also quoted with approval a passage from the judgment of Layard C. J. in *Fernando v. Andiris* [2] where the learned Chief Justice said : " After the District Judge had refused to grant a postponement the plaintiff's proctor should have called such evidence as was available on behalf of the plaintiff, and should not have declined to call any evidence. There being no evidence the order of the District Judge dismissing the plaintiff's claim is right. It would never do for this Court to encourage parties in the Court below to decline to proceed with a case simply on the ground that the District Judge had refused to grant a postponement ". Hutchinson C.J. and Wood Renton J. laid down the same rule in *Woutersz v. Carpen Chetty* [3]. They pointed out that when a postponement has been refused Counsel who made the application has no right to withdraw from the case without the consent of the Judge, and that it is his duty as an advocate to proceed as far as he can with this examination of the witnesses called on the other side, and to adduce all the evidence he has on his own side, and if it then transpires that the evidence of a particular witness whose absence was the cause of the application being made was material, the trial Judge may at that stage allow a postponement.

As was pointed out by de Kretser J. in *de Mel v. Gunasekera* [4], when an advocate or a proctor applies for a postponement on behalf of a party, the proceedings become *inter partes* because there is no such thing as a limited appearance, whether by Counsel or proctor or party. Counsel, therefore, or a proctor, should not withdraw from the proceedings once he has appeared, because the consequences to his client will be far-reaching if it be held ultimately that the application for a postponement was rightly refused. His clear duty is, as has been laid down by this Court on many occasions, to continue to appear for his client and to conduct the case which has been entrusted to him. The only instance where such a withdrawal by Counsel is permissible, and then too only with the leave of Court, is where Counsel has been retained only for the limited purpose of making an application for a postponement and such application is refused by the Court. But such a position should not have arisen in the action with which this appeal is concerned because it had come up for trial previously and the same Counsel had appeared for the 8th and 9th defendants on previous trial dates. If the 8th and 9th defendants' proctor failed to instruct Counsel adequately on the trial date in question, he should have been prepared to conduct the case himself when the judge ordered that the trial should proceed. His failure to do so cannot place his clients in a better position as regards the plaintiffs.

For these reasons I would dismiss this appeal with costs in both Courts.

H. N. G. Fernando, J.—I agree.

Appeal dismissed.

[1] *(1946) 47 N. L. R. 281.*
[2] *(1905) 2 A. C. R. 140.*
[3] *(1907) 3 Bal. 197.*
[4] *(1939) 41 N. L. R. 33.*

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1956 *Present :* **K. D. de Silva, J.**

M. I. M. THASSIM *et al.*, Appellants *and* K. S. KADIGAWA Respondent

S. C. 560–561—M. C. Galle, 19,137

Butchers Ordinance (Cap. 201)—Charge of slaughtering cattle without a "special licence"—Validity.

The permit contemplated in section 11 of the Butchers (Amendment) Ordinance No. 44 of 1947 is not the same thing as the special licence referred to in section 16 of the principal Ordinance. A charge, therefore, of slaughtering cattle without a " special licence " is not valid.

APPEAL from a judgment of the Magistrate's Court, Galle.

A. C. Gunaratne, for the accused-appellants.

T. A. de S. Wijesundera, Crown Counsel, for the Attorney-General.

September 28, 1956. K. D. DE SILVA, J.—

The two appellants were convicted under section 16 of the Butchers Ordinance (Chapter 201). The charge framed against them reads: " You are hereby charged that you did within the jurisdiction of this Court at Haliwela on 10.10.1955 not being a licensed butcher did slaughter cattle, to wit :— a red bull, without a special licence and thereby committed an offence punishable under section 16 of Chapter 201 L. E. C. "

Mr. Gunaratne who appears for the appellants contends that the conviction cannot be sustained as the charge is defective. According to section 16 of the Butchers Ordinance a special licence is required. The prosecution has failed to realise that section 16 has been amended by Ordinance 44 of 1947. According to that amendment a special licence is no longer required. What is necessary is only a permit. In the charge framed against the appellants no reference has been made to the amending Ordinance.

Learned Crown Counsel submits that no prejudice has been caused to the appellants by the defect in the charge. I am not prepared to uphold the conviction on that ground. A special licence and a permit are two different things. When what is necessary is a permit an accused person cannot be expected to obtain a licence which perhaps is something more formal than a permit. The prosecution officer concerned has been very negligent in framing the charge against the appellants.

I set aside the conviction of the appellants and acquit them.

Appeal allowed.

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1956 *Present :* **T. S. Fernando, J.**

SIRIMANIS PEIRIS, Appellant, *and* P. THAMOTHERAM PILLAI, Respondent

S. C. 653—M. C. Chilaw, 13,608

Excise Ordinance—Section 44—Charge of possession of unlawfully manufactured arrack—Quantum of evidence—Manufacture of arrack—Is it a Government monopoly ?

In a prosecution for possession of unlawfully manufactured arrack in breach of section 44 of the Excise Ordinance, the Court will not take judicial notice that any arrack that is not what is called Government arrack is unlawfully manufactured arrack.

APPEAL from a judgment of the Magistrate's Court, Chilaw.

A. C. Alles, Crown Counsel, with *P. Weerasinghe*, Crown Counsel, for the Attorney-General.

K. C. de Silva, with *V. C. Gunatilaka*, for the accused-respondent.

Cur. adv. vult.

August 21, 1956. T. S. FERNANDO, J.—

The complainant appeals to this Court with the sanction of the Attorney-General against the acquittal of the accused who was tried on a charge of possession of 7 drams of unlawfully manufactured arrack in breach of section 44 of the Excise Ordinance.

The learned Magistrate has accepted the evidence of the witnesses for the prosecution in regard to the possession by the accused of the arrack, but has acquitted him on the ground that there was no " strict proof " that the arrack was unlawfully manufactured. The evidence relied on by the prosecution to discharge the burden that lay upon it to establish beyond a reasonable doubt that the liquid produced in court in bottle P. 1 was unlawfully manufactured arrack was a report of the Government Analyst. The relevant part of this report reads as follows :—

> " The physical and chemical characteristics of the contents of P. 1 were not similar to those of any variety of Government arrack. In my opinion P. 1 contained arrack, but not any variety of Government arrack as issued from Government Warehouses. "

This report proves that the contents of P. 1 were arrack and that this arrack was not Government arrack as issued from Government Warehouses. Does it also prove that the arrack was unlawfully manufactured ? Or can I say that what is not Government arrack as issued from Government Warehouses must be unlawfully manufactured arrack ? The appeal really turns on the answer to one or other of these two questions.

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I regret I am unable to take judicial notice that any arrack that is not what is called Government arrack is unlawfully manufactured arrack. Mr. Alles has referred me to the following observations of Soertsz J. in *Yoganathan v. Mudiyanse* [1] in dealing with an argument that what is not Government arrack is not necessarily unlawfully manufactured arrack.

> "The manufacture of arrack is a Government monopoly in the Island. The arrack manufactured by the Government has certain characteristics. Therefore all arrack can be sub-divided into two, and only two, classes for the purposes of the Ordinance, and a valid proposition stated as follows that arrack that is not Government arrack must be unlawfully manufactured arrack."

If the manufacture of arrack is a Government monopoly in this Island I would, with great respect, agree with the observation that what is not Government arrack is unlawfully manufactured arrack. As stated earlier, however, I am not prepared to take judicial notice that such a Government monopoly exists. These observations of Soertsz J. were made in 1938, and without evidence I am not prepared to say that there has been no change in Government policy on this question all these eighteen years. Moreover, if the manufacture of arrack is a Government monopoly today, it is surely not a difficult matter, and certainly not one outside the resources of the Excise Department, to establish that fact in evidence at the trial.

Another case [2] recently decided by Weerasooriya J. was also cited to me in support of this appeal. In that case there was not only evidence that the liquor produced was not Government arrack, but also specific evidence to satisfy the court that manufacture of arrack was being done (a) under licence and only at nine specified distilleries in the Island and (b) at the Government distillery at Seeduwa. That case is therefore clearly distinguishable from the one now before me. Indeed, if evidence had been led in this case to establish to the satisfaction of a court that the manufacture of arrack is a Government monopoly, the prosecution would have been in no difficulty in discharging the burden that lay upon it to establish that the liquor in P.1 was unlawfully manufactured arrack.

As a final argument, Mr. Alles brought to my attention the fact that two witnesses for the prosecution had stated in evidence that P.1 contained unlawfully manufactured arrack. Mr. de Silva argued that the evidence of these witnesses on this point cannot be accepted as they have not stated what experience they had to enable them to distinguish one kind of arrack from another. It is true that the witnesses were not cross-examined on the point, but as the learned Magistrate's judgment is silent on the question of this evidence there appears to have been an implied refusal by him to act on this evidence. Moreover, it is quite apparent that in preferring this appeal reliance was placed by the complainant really on the Government Analyst's report and not on the evidence of

[1] *S. C. No. 1002/P. C. Kurunegala 55,816—S. C. Minutes of 2. 3. 1938.*
[2] *S. C. No. 1587/M. C. Chilaw 7,412—S. C. Minutes of 8. 3. 1956.*

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these two witnesses. The prosecution might have been permitted to make use of this evidence if it had been attempting to maintain a conviction entered by the Magistrate ; but different considerations should weigh in the present circumstances where an accused person has been acquitted and the real question upon which the appeal turned has been answered against the prosecution. It would not be fair to permit the prosecution to revive this evidence at this stage, and this appeal must therefore be dismissed.

Appeal dismissed.

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1956 *Present:* **K. D. de Silva, J., and H. N. G. Fernando, J.**

M. B. NANDAWATHIE DE SILVA, Appellant, *and* M. B. YASAWATHIE DE SILVA *et al.*, Respondents

S. C. 51 (Inty.)—D. C. Galle, 5470/L

Discovery and Inspection of Documents—Scope and procedure—Objection to inspection on ground that documents do not support opponent's case—Form of affidavit—Civil Procedure Code, ss. 50, 51, 102, 103, 104, 105, 106, 109.

An order for discovery of documents need not be made as a matter of course, but is discretionary and may be resisted by a claim of privilege although no express provision in this behalf is to be found in section 102 of the Civil Procedure Code.

Although section 106 of the Civil Procedure Code does not on its face authorise the Court to refuse inspection of documents, the obligation to produce documents for inspection is much more restricted than the obligation to disclose their existence. One of the main grounds of protection is that the documents relate solely to the case of the party giving the discovery.

Where objection is taken to the inspection of any documents on the ground that they relate solely to the case of the party giving the discovery, the following is the proper procedure:—the party must declare by affidavit that the documents in question support or relate exclusively to his own case and that they contain nothing supporting or tending to support the adversary's case. An assertion in these terms is conclusive " unless the Court is reasonably satisfied or reasonably certain from particular sources that the nature of the document has been erroneously misconceived or that the documents are of such a character that the party cannot properly make such an assertion or the case has been misconceived ". In view of the conclusive effect which an affidavit made in the proper terms may have, a very serious responsibility is imposed on the legal advisers to peruse carefully all the documents and to refrain from advising their client to swear the affidavit unless the documents in questions do not even *tend to support* the opponent's case.

Where the party noticed fails to make the appropriate averments in the affidavit, the Court will usually not reject the affidavit without giving the party a further opportunity to make a further affidavit.

APPEAL from an order of the District Court, Galle.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff-appellant.

D. S. Jayawickreme, Q.C., with *C. D. S. Siriwardene*, for the defendants-respondents.

Cur. adv. vult.

February 28, 1956. H. N. G. FERNANDO, J.—

The plaintiff instituted this action for a declaration that three deeds executed by her deceased mother on 6th October, 1952, are null and void on the ground that their execution was secured by the defendants (brother

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and sisters of the plaintiff) by fraud and collusion. After filing answer denying the allegations in the plaint, the defendants moved for notice on the plaintiff to declare by affidavit the documents to be relied on by her at the trial. Notice having issued, the plaintiff filed the necessary list which referred to three classes of documents—certain deeds and copies thereof, prescriptions and certificates issued by doctors, and letters written to the plaintiff's husband by the 3rd defendant and by the broker who arranged the marriage between plaintiff and her husband. In the accompanying affidavit, the plaintiff objected to the production of the two latter classes of documents " on the ground that they relate solely to my own title and contain evidence by which I seek to prove my case ". The defendants thereafter applied for an order of inspection in relation to all the documents, and, in response to the notice to produce, the plaintiff has again objected to production in the same terms, subject to the alteration that " they relate solely to my title and case ".

At the inquiry into the application for inspection, the learned District Judge rejected the objections of the plaintiff for the reason that in his opinion the documents " do not relate to title whatsoever, but to other facts which are expected to help the plaintiff to prove her case ". He accordingly ordered the production for inspection of all the documents the production of which was pressed for at the inquiry.

It was agreed on both sides that in the Courts outside Colombo recourse is not often had to those provisions of the Civil Procedure Code relating to discovery and inspection of documents, and in view of the fairly full arguments which have been urged at the hearing of this appeal, we consider this a suitable opportunity to attempt some explanation of those provisions.

The Court has power under section 102 to order any party to declare by affidavit all the documents in his possession or power relating to any matter in question in an action, and in an affidavit under the section, the party is required to specify which of the listed documents he objects to produce and the grounds of his objection. Application for such an order may be made by a party at any time before the hearing.

Section 103 empowers the Court at any time during the pendency of an action to order the production of documents in the possession or power of a party and to deal with the documents when produced in such manner as appears just. This section does not confer any right on a party to ask for production, but appears rather to give the Court a discretion to order production in the interests of justice, without necessarily permitting inspection by the other party. As the section does not appear to confer rights on parties, no need arises for the consideration of this section in the present action.

Section 104 enables a party to obtain an order of Court for notice requiring any other party to produce for inspection (and for the taking of copies) any document referred to in the pleadings or affidavits of the party noticed. A notice under this section can issue either in relation to documents mentioned in the pleadings or else to documents declared

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by affidavit in pursuance of an order under section 102. Sub-section (2) of this section provides that once a notice issues under section 104, the party noticed is bound to respond to the notice at the risk of being precluded from producing the particular document in the action, unless he is able to satisfy the Court when he seeks to produce it " that such document relates only to his own title or that he had some other or sufficient cause for not complying with such notice ". Without comment at this stage on the words just cited from sub-section (2), I pass to the subsequent provisions of the Code.

The response to a notice under section 104 may be of two kinds. The party noticed would either comply with the notice within the time specified in section 105, or, if he objects to production of any documents, he will state through the Court the grounds of his objection to the production.

Section 106 deals with cases where either there is no response whatever to an order under section 104, or the party noticed objects to giving inspection. In each of these events application may be made to the Court for an order of inspection, which if made must be complied with at peril of his action being dismissed or his defence being struck out, as well as of punishment for contempt—(section 109).

It has not been disputed at the argument in appeal that the object of these provisions was to introduce the procedure and practice obtaining in England. But it was only after considerable discussion and examination of the authorities that Counsel and ourselves were able to acquire any adequate knowledge of what that practice and procedure actually is. In the first place, although section 102 of our Code is silent on the point, a party is not entitled *as of right* to require his opponent to make a declaration of documents. " Discovery is no longer granted as of right but as a matter of discretion based on the facts of the particular case under consideration ". (Halsbury 3rd Edn. Vol. 12 p. 5). But quite apart from the discretionary power of the Court to refuse discovery, there are special grounds of privilege upon which discovery may be denied, including " the protection from disclosure of documents relating solely to the case of the party giving discovery " (idem p. 7). It will be seen therefore that except in regard to documents produced with the plaint or to be relied on as evidence (which must be produced or listed as required by sections 50 and 51 of the Code), a plaintiff would not necessarily be bound to make a full declaration under section 102 unless the Court in its discretion so orders. There is no express provision in the Code with regard to the production or listing of documents relied upon by a *defendant* and it is not necessary for the purposes of the present appeal to consider whether or not section 102 is the only provision under which a defendant can be required to make a disclosure of documents but clearly he too would be in the same position as a plaintiff if in fact an application is made to Court under section 102 for a declaration by affidavit. With regard to this section the point which does appear to need some emphasis is that an order for discovery need not be made as a matter of course, but is discretionary and may be resisted by a claim of privilege although no express provision in this behalf is to be found in section 102.

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As to the procedure for inspection as opposed to discovery, it is clear from section 104 that the notice to produce may issue upon an *ex parte* motion. But where there is no response to such a notice the power of the Court to make an order of inspection is discretionary. (Halsbury p. 35). Order 31 Rule 18 of the Rules of the Supreme Court contains the proviso that the order (for inspection) " shall not be made when and so far as the Court or a Judge shall be of opinion that it is not necessary either for disposing fairly of the cause of matter or for saving costs ". Again, Halsbury at page 38 says " Many relevant documents, although their existence must be disclosed in the affidavit of documents, are, nevertheless, protected from production. The obligation to produce documents for inspection is much more restricted than the obligation to disclose their existence ". (cf. Halsbury, p. 38 for the 8 main heads of protection). One of the main grounds of protection " is that the documents relate solely to the case of the party giving the discovery ".

Although therefore section 106 does not on its face authorise the Court to refuse inspection, the English practice if followed would enable a party to resist inspection on any of the specified grounds of protection, including in particular the ground I have expressly cited.

I should now refer to the proper procedure which should be followed where objection is taken to the inspection of any document on this ground.

The Code nowhere sets out the various objections which may be taken or the form in which objection should be made. In England, it would appear that the Courts now recognise the following as the appropriate form of affidavit in a case such as the present one :—" The party must swear that (to the best of his belief, and after proper examination) they form or support or evidence or relate exclusively to his own case, that they contain nothing supporting or tending to support the adversary's case ". An assertion in these terms is in England accepted as conclusive " unless the Court is reasonably satisfied or reasonably certain from particular sources that the nature of the document has been erroneously misconceived or that the documents are of such a character that the party cannot properly make such an assertion or the case has been misconceived ". (p. 503 Annual Practice 1955 and the cases there cited).

I should like to emphasise, particularly in view of the conclusive effect which an affidavit made in the proper terms may have, that a very serious responsibility is imposed on the legal advisers of a party who has been noticed to produce documents for inspection. What is contemplated by the English procedure is that the advisers will carefully peruse all the documents with a view to forming an honest opinion as to their possible relevancy, both to their client's case as well as to that of his opponent, and that the client will not be advised to swear an affidavit in the terms stated unless the documents in question do not even *tend to support* the opponent's case. The adviser must bear in mind the fact that the Court will be bound by the assertions in the affidavit and will not reject them unless it is apparent from the description of the documents that the assertions are erroneous or misconceived.

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Where there is an affidavit in the specific terms required by the English practice, the Court will usually not reject the affidavit without giving the party noticed a further opportunity to make a further affidavit. For instance in *O'Rourke v. Darbishire and others* [1] the party noticed to produce filed an affidavit, but the Judge held that it was insufficient and ordered a further and better affidavit. In this further affidavit objections to the production of certain documents was taken in the recognised terms and the objections were thereupon entertained. Indeed the rights of a party noticed appear to have been extended in the recent case of *Brooks and another v. Prescott and others* [2] where although a quite insufficient affidavit was furnished in the Court of trial, the Court of Appeal admitted and acted upon a sufficient affidavit which was sworn after the trial Judge had ordered inspection. The failure of the party noticed to make the appropriate averments in the original affidavit were not considered by the Court of Appeal to be a sufficient ground to draw an inference that the documents would have supported the opponent's case.

Involved in the ground of objection that a document relates solely to the case of the party noticed is the principle " that it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side-issues ; and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous ". (per Lindley L.J. in *Re Strachan* [3] ; see also Halsbury). While therefore the Court must consider the advantages to be gained in the matter of saving delay and costs, there must also be regard to the question whether an order to permit inspection would impose an unfair disadvantage on the party noticed.

While the terms of the affidavit and the statement of objections which have been filed in the present case do not correspond to those which are made essential by the English practice, the question still arises whether in the circumstances of the case the terms actually employed are insufficient. As stated already, objection was taken to the production of documents of three classes :—

(*a*) A register of prescriptions and two medical certificates presumably relating to drugs or treatment for the executant of the impugned deed. I think that with regard to these documents it is manifest from their description that in all probability they cannot be said to relate solely to the plaintiff's case. Undoubtedly such prescriptions must contain references to drugs or medicines, the nature of which may assist the plaintiff to establish (together with other evidence) the state of health of the executant ; but there is at least the same probability that they may help the defendants to establish that the state of health of the executant was not the same as that which the plaintiff may propose to establish. The defendants are therefore in my opinion entitled to an opportunity to inspect these documents with a view to preparation of their case.

[1] (*1920*) *A. C. 581.* [2] (*1948*) *1 All. E. R. 907.*

[3] (*1895*) *1 Ch. 439.*

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The second class of documents consists of letters written by the 3rd defendant to the plaintiff's husband. In this connection Counsel for the respondent relied on the following observations of Odgers (Pleadings and Practice 13th Edn. p. 220) " Some letters have, as a rule, passed between the parties before the action was commenced, and these may contain important admissions, or be evidence of some material fact ; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's ; and in the absence of copies, neither set is properly intelligible without the other. It is most desirable that anyone who intends to give evidence should, if possible, read over his own letters before he enters the witness-box. For his recollection of an interview which took place many months ago is probably somewhat hazy now, and far less reliable than his account of it, given in a letter written at the time, which remains in black and white, as clear and intelligible now as it ever was. Moreover, there is no better material for cross-examining an opponent than his letters written before the dispute arose. Hence it is generally desirable for each party to see all material documents in the possession of his opponent, and to take copies of the more important ones ".

I think this statement must be read subject to the circumstances of the particular case. If, for example, some commercial agreement or business transaction is the subject of litigation, and the terms of the arrangement between the parties are to be found wholly or mainly in correspondence exchanged between them, it is in the interests of both parties that their memories be refreshed by inspection in order that they be made fully aware of the actual terms and conditions of the transaction. Such a course will clearly make for expeditious disposal of an action and may even enable a party to admit a claim of his opponent. But the position I think must necessarily be different if the documents in question do not in fact evidence the terms and conditions of a disputed transaction, but merely contain statements made by parties after a dispute has arisen, or, though made before the dispute, cannot reasonably be supposed to relate to the disputed transaction. In the present case the plaintiff's suit is for the annulment of deeds executed by her mother in October 1952, but most of the letters for which protection is sought were letters written by the 3rd defendant between December 1952 and September 1953. The plaint, be it noted, was filed in November 1953. The disputed question will apparently be whether the executant was of sound mind or subject to undue influence in October 1952, and it is impossible to say without actually perusing the letters which were written long after, whether they would in any way assist the defendants to establish the soundness of the mind or the freedom of the will of the executant in October 1952. The learned District Judge therefore, if he had properly addressed his mind to the question he had to decide, could not in my opinion possibly have concluded that the failure of the plaintiff to aver that the letters did not tend to support the defendants' case was in any way an indication that they would in fact tend to support that case.

The other letters of the 3rd defendant which were written in June, August and September, 1952 (before the execution of the deed) may on the other hand contain material relating to the circumstances in which

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the impugned deed came to be executed, and in the absence of a positive averment that they do not tend to support the defendants' case, it cannot fairly be said that they are entitled to protection.

The third class of documents, namely letters alleged to have been written by a marriage broker to the plaintiff's husband before their marriage are also documents which from their description are not to be necessarily regarded as only tending to establish the case for the plaintiff. From their description they may well contain material concerning the arrangements or agreements made with regard to the marriage and to property proposed to be given to the plaintiff on her marriage. That being so, they may well contain material of assistance to the defendants.

I should add that I have thought fit to deal in appeal with matters which should more properly have been dealt with by the trial Judge, and which therefore might have been remitted to the trial Court to deal with at this stage. But having regard to the excusable ignorance of the terms in which the appropriate affidavit of objections should have been prepared, and also to the fact that there appears to have been no earlier decision of this Court emphasising the responsibility of the legal advisers of a party noticed, in the matter of the preparation of the affidavit, the case appears to be one which is best dealt with in appeal on its merits.

For the reasons set out above I would vary the order of the District Judge of 15th November, 1954 by the omission, from the direction to produce, of the documents specified in items numbered 6-12. The direction for production of the other documents itemized in the order will stand. The direction that the plaintiff pay Rs. 52·50 as costs of the inquiry is set aside. There will be no costs of this appeal.

K. D. DE SILVA, J.—I agree.

Order varied.

1956 *Present :* **Basnayake, C.J., and K. D. de Silva, J.**

M. SELVAN, Appellant, and SENARATNE (Police Sergeant), Respondent

S. C. 887—M. C. Ratnapura, 48,063

Evidence—Government Analyst's report—Admissibility—Criminal Procedure Code s. 406 (3) and (4).

The whole of a report issued by a Government Analyst under section 406 (3) of the Criminal Procedure Code is admissible in evidence.

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APPEAL from a judgment of the Magistrate's Court, Ratnapura. The question of law involved in this case was reserved in the following terms by Gunasekara, J., under section 48 of the Courts Ordinance, for decision by more than one Judge :—

" The learned Magistrate's finding that the liquor in question has been unlawfully manufactured appears to be based entirely upon the report P8 submitted by the Government Analyst.

The Analyst states in his report ' In my opinion P1 and P2 are liquors which do not fall under the following categories :—

(1) Approved brands of Imported liquors.

(2) Liquors manufactured under licences issued under the Excise Ordinance.'

The question arises whether the admission of the material portions of this report involves the admission of inadmissible hearsay. On this question there appears to be a conflict of opinion among the Judges of this court. This conflict is exemplified by the views expressed by Nagalingam J. in *Ramasamy Kone et al. v. Ginigathena Police* [1] and by Sansoni J. in *S. C. No. 496E–M. C. Colombo South No. 62,792* [2] decided on the 24th August, 1955.

In this conflict of opinion I think it is desirable that I should reserve this appeal for the decision of more than one Judge of this court and I direct that the case be submitted to My Lord, the Chief Justice, for an order constituting a bench to hear the appeal."

B. A. R. Candappa, with *M. Shanmugalingam*, for the accused-appellant.

A. C. Alles, Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, for the Attorney-General.

February 29, 1956. BASNAYAKE, C.J.—

The question which arises for determination on this appeal is whether the following statement in the Government Analyst's report is inadmissible on the ground that it is hearsay evidence.

" In my opinion P1 and P2 are liquors which do not fall under the following categories :—

(1) Approved brands of Imported Liquors.

(2) Liquors manufactured under licences issued under the Excise Ordinance ".

[1] *(1954) 56 N. L. R. 404.*

[2] *Fernando v. Goonewardane (1955) 57 N. L. R. 17.*

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Under section 406 (3) of the Criminal Procedure Code

"any document purporting to be a report under the hand of the Government Analyst upon any matter or thing duly submitted to him for examination or analysis and report may be used as evidence in any inquiry, trial or other proceeding under this Code".

The Analyst's report P8 has therefore been properly used in evidence. The question is whether all the facts stated in a report by the Government Analyst, whether they are matters within his own personal knowledge or not, are admissible in evidence. Section 406 (4) of the Criminal Procedure Code provides that either party in a case may request the attendance of the Government Analyst at any trial or proceeding where his report is used in evidence for the purpose of giving evidence. In the instant case there has been no such application. Where the report of the Government Analyst is made admissible it is our opinion that the whole of such report may be used in evidence.

Counsel for the Crown has referred us to the judgment of my brother Sansoni in *Fernando v. Goonewardene* [1], where he has taken the same view. We are in agreement with that judgment. Our decision on the point referred to us is that the whole of the report of the Government Analyst is admissible in evidence. In this case the prosecution has led the evidence of a clerk in the Excise Commissioner's Department to prove some of the material facts referred to in the report of the Government Analyst but it is not necessary to do so where the report is issued under section 406 (3) of the Criminal Procedure Code. We therefore dismiss the appeal.

K. D. DE SILVA, J.—I agree.

Appeal dismissed.

1956 *Present :* **Gunasekara, J.**

I. P. JOHN, Appellant, *and* POLICE SERGEANT, GALEWELA, Respondent

S. C. 396—M. C. Dambulla, 7,270

Lorry—Use of it outside area of operation specified in licence—Elements of offence—Motor Traffic Act, No. 14 of 1951, ss. 86 (3), 186.

When a licence is issued to use within a specified area a lorry that will usually be kept at a place outside that area, driving the lorry unladen between the place where it is usually kept and the area of operation, for the purposes of its authorised use in that area, is not an offence within the meaning of section 186 of the Motor Traffic Act.

[1] (1955) 57 *N. L. R.* 17.

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APPEAL from a judgment of the Magistrate's Court, Dambulla.

C. D. S. Siriwardene, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 27, 1956. GUNASEKARA, J.—

This is an appeal by the driver of a lorry against a conviction under section 186 of the Motor Traffic Act, No. 14 of 1951, for using the lorry on a highway outside the area of operation specified in the revenue licence, which was the Anuradhapura and Polonnaruwa districts. The evidence against him was that a police officer found the lorry being driven by him at Makulugaswewa, a place outside this area.

The licence states that the lorry " will usually be kept " at Halpe, Mirigama, which is outside the Anuradhapura and Polonnaruwa districts. The place where the lorry was found lies between these districts and Mirigama, and the lorry was empty at the time. It is contended for the appellant that in view of these circumstances the prosecution has failed to prove that it was being " used " within the meaning of section 186.

At the time of the alleged offence the owner of the lorry held a private carrier's permit, granted by the Commissioner of Motor Traffic under Part V of the Act, which authorized him to use the lorry in the area of operation for the carriage of goods in connection with his business as a " contractor and supplier of building materials and cadjans ". It described his " principal place of business " as Halpe, Mirigama, and the " area of operation " as the Anuradhapura and Polonnaruwa districts. Thus, the carrier's permit, read in the light of the revenue licence, purported to authorize the use of the lorry for the carriage of goods in the area of operation specified in the permit, although the lorry would usually be kept at Mirigama, outside that area.

The discretion to issue carrier's permits that is vested by the Act in the Commissioner is not fettered by any requirement that a lorry specified in a permit may not be one that will usually be kept at a place outside the area of operation. Indeed, the Act contemplates a discretion in the Commissioner to include in a permit authority even to carry goods outside that area ; for section 86 (3) requires an applicant for a permit to specify " the place or places, if any, outside the proposed area of operation between or from or to which it is proposed to carry goods ".

A permit to use within a specified area a lorry that will usually be kept at a place outside it must be taken to authorize the driving of the lorry, unladen, between that place and the area of operation for the purposes of its authorized use in the area of operation ; for whenever anything is authorized and it is found impossible to do that thing unless

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something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment (*Fenton v. Hampton* [1]). It follows that section 186 must be so construed as not to apply to a lorry to which such a permit relates, when the lorry is driven unladen between the place where it is usually kept and the area of operation, for the purposes of its authorized use in that area. There is nothing in the evidence in this case to exclude the possibility that when the lorry in question was found at Makulugaswewa itwas being driven in accordance with the authority granted by the permit. The appeal must therefore be allowed.

Another fatal defect in the case for the prosecution is that there is no evidence that the place where the lorry is alleged to have been used was a highway. I do not base my decision on this ground, however, because the point was not argued at the hearing of the appeal.

The conviction of the appellant and the sentence passed on him are set aside and he is acquitted.

Appeal allowed.

1955 *Present :* **K. D. de Silva, J.**

THE CEYLON COCONUT PRODUCERS CO-OPERATIVE SOCIETIES UNION LTD., Petitioner, *and* L. G. WEERAMANTRY *et al.*, Respondents

S. C. Application 140 of 1954—In the matter of the Application for a Writ in the nature of Certiorari *and Prohibition*

Co-operative Societies Ordinance (Cap. 107)—Section 45—Rule 38 (14)—" Legal practitioner ".

Rule 38 (14) of the Co-operative Rules of 1950 provides : " In proceedings before the Registrar or an arbitrator or arbitrators no party shall be represented by a legal practitioner. "

Held, that an Advocate who has ceased to practise as a lawyer for such a long period as eighteen years cannot be regarded as a legal practitioner within the meaning of the Rule. The fact that he is entitled to practise as a lawyer at any time does not affect the position.

Obiter : There is no valid objection to a legal practitioner who is a member of the Committee or an office-bearer of a Co-operative Society representing that Society in his capacity as a member of the Committee or an officer-bearer.

APPLICATION for a writ in the nature of *Certiorari* and Prohibition.

E. R. S. R. Coomaraswamy, for the petitioner.

D. S. Jayawickrama, Q.C., with *H. L. de Silva*, for the 2nd respondent.

Cur. adv. vult.

[1] *11 Moo. P. C. 347 at 360.*

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September 9, 1955. K. D. DE SILVA, J.—

The petitioner and the 2nd respondent are Co-operative Societies, duly registered under the provisions of the Co-operative Societies Ordinance (Cap. 107). A dispute touching the business of these two Societies having arisen the matter was referred to the Registrar of Co-operative Societies for decision in terms of Section 45 of the Ordinance. On or about the 14th February, 1954, the Registrar referred this dispute for disposal to the 1st respondent as arbitrator. When the matter came up for inquiry before the 1st respondent on the 3rd day of March, 1954, Mr. S. W. R. D. Bandaranaike, a committee member of the 2nd Respondent Society appeared before him and informed him that he had been appointed to represent the 2nd respondent. The petitioner objected to the 2nd respondent being represented by Mr. Bandaranaike, on the ground that he was a legal practitioner, being an advocate of the Supreme Court. This objection was based on Rule 38 (14) of the Co-operative Rules of 1950. The 1st respondent overruled the objection. Thereafter the petitioner made this application for a writ in the nature of *Certiorari* and Prohibition.

At the hearing of this application Mr. Coomaraswamy conceded that he was not entitled to apply for a writ of *Certiorari* and restricted the application to a writ of Prohibition. The Rule 38 (14) reads as follows :—

> " In proceedings before the Registrar or an arbitrator or arbitrators no party shall be represented by a legal practitioner. "

Mr. Bandaranaike has stated that he is not a legal practitioner although he is an advocate of this Court. He has not practised his profession for a period of 18 years. For the purpose of this argument, Mr. Coomaraswamy while conceding that Mr. Bandaranaike is not in active practice, invited the ruling of this Court on the following two points :—

> (1) Is a lawyer who is not actively practising his profession a legal practitioner within the meaning of rule 38 (14) ?
>
> (2) Is a legal practitioner who is also a member of the Committee or an office-bearer of a Co-operative Society entitled to represent that Society in arbitration proceedings under Section 45 of the Co-operative Societies Ordinance (Cap. 107) as amended by Acts Nos. 21 of 1949 and 17 of 1952 ?

The 1st Respondent held that Mr. Bandaranaike was a legal practitioner although he is not in active practice, because his name appears on the role of Advocates and he has a right to appear in Courts of Law. He further held that Mr. Bandaranaike was entitled to represent the 2nd respondent because he was seeking to do so not in his legal capacity but as a member of the Committee of the 2nd Respondent Society. I am unable to agree with the 1st respondent's view that Mr. Bandaranaike is a legal practitioner within the meaning of Rule 38 (14). The word " practise " is defined in the " Oxford Concise Dictionary " as " to

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perform habitually " " to exercise a profession " and gives as examples practising Doctor and practising Barrister as opposed to a retired Doctor or Barrister or one who is merely qualified as such. " Practitioner " is defined as " one engaged in the practice of any art, profession or occupation ". Mr. Bandaranaike who has ceased to practise as a lawyer for such a long period as eighteen years cannot therefore be regarded as a legal practitioner within the meaning of Rule 38 (14). The fact that he is entitled to practise as a lawyer at any time does not affect the position. Whether a person qualified to practise a profession is or is not a practitioner of that profession is a question of fact to be decided on the circumstances of each case. This disposes of the 1st point raised by Mr. Coomaraswamy. For the purpose of this case it is not necessary to give a ruling on the 2nd point raised by him. I might however observe that I see no valid objection to a legal practitioner who is a member of the Committee or an office-bearer of the Co-operative Society representing that Society not in the capacity of a lawyer but in his capacity as a member of the Committee or an office-bearer. I therefore dismiss the application with costs.

Application dismissed.

1956 *Present :* **H. N. G. Fernando, J.**

D. D. BENJAMIN, Petitioner, *and* E. J. GUNAWARDENA (S. I. Police), Respondent

S. C. 316—Application in Revision in M. C. Avissawella, 10,438

Compounding of offences—Scope of Magistrate's jurisdiction—Criminal Procedure Code, s. 290.

A Magistrate, in granting his consent under section 290 of the Criminal Procedure Code to the compounding of an offence, has no jurisdiction to lay down any terms binding the parties.

APPLICATION to revise an order of the Magistrate's Court, Avissawella.

M. M. Kumarakulasingham, for the accused-petitioner.

E. A. G. de Silva, for the complainant-respondent.

Cur. adv. vult.

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October 12, 1956. H. N. G. FERNANDO, J.—

The petitioner and another person were charged in the Magistrate's Court of Avissawella with the offence of intimidation. On 18th June, 1954, the case was compounded and the accused discharged on terms thus recorded by the Magistrate :—

" It is now agreed between the parties that the budded rubber portion in Rose Valley Estate be handed over to Albert Edirisinghe, the V. H. of Mabula, to be looked after.

D. D. Martheenu the complainant in this case will file a civil action for declaration of title to the said plantation within two months from today. The V. H. of Mabula will deposit the proceeds of this budded rubber plantation to the credit of the civil case.

The accused and complainant further undertake not to enter into this budded rubber portion *until* the decision in the civil action. If the civil action is not filed on or before 18th August, 1954, then the possession of this budded rubber portion is to be handed over to the 1st accused and he will also hand over the proceeds of this budded rubber portion for the two months to the 1st accused.

In view of this agreement the parties move to compound the case. I allow the application and discharge the accused. "

An action for declaration of title to the land in question was subsequently filed by the complainant in the District Court, but was withdrawn on 15th June 1956 with liberty to institute an action for partition.

The petitioner thereafter applied on 25th June 1956 to the Court for an order " discharging the Village Headman from managing the budded rubber portion of the Rose Valley Estate ". Upon this application the Magistrate on 21st July 1956 made the order now complained against, directing " that the V. H. do hand over the land in question to the complainant who was in possession at the time the Village Headman took over ".

In my opinion both the petitioner, in making this application for the " discharge " of the Headman from management, and the Magistrate, in directing restoration of possession of the land to the complainant, have misconceived the power of a Magistrate's Court in regard to such matters.

A Magistrate, in granting his consent under section 290 of the Code to the compounding of a case, has the duty only to state his *reasons* for consent, but has no jurisdiction to lay down any terms binding the parties. The journal entry of 18th June 1954 is an ORDER, *only in so far as it allows the compounding and discharges* (*and acquits*—vide section 290 (5)) the accused. The Magistrate did not in fact make, and had indeed no power to make, any order that the Headman should manage the land. That part of the entry which relates to the terms on which the parties applied to compound the case is only a record by the Magistrate of an agreement between the parties—an agreement which constitutes sufficient reason for the Magistrate to consent to the compounding. I see at present no objection whatever to such a record being

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made, but the making of it does not have the effect of extending the Magistrate's jurisdiction beyond its point of termination, i.e., the discharge of the accused, or of conferring jurisdiction to determine rights in property. This latter jurisdiction a Magistrate enjoys, but only for the limited purpose of determining whether or not a person charged is guilty of some offence, and not for the purpose of placing any party in possession of land.

In my opinion therefore—

(*a*) the Magistrate was wrongly called upon to vacate his order as to management, for the reason that he made no such order ;

(*b*) the Magistrate should not have directed restoration of possession to the complainant, because he lacked the jurisdiction to do so.

For these reasons I set aside the order of 21st July 1956. The parties and the Village Headman must advise themselves on the problem with which they are now faced.

Order set aside.

1954 *Present :* **Sansoni, J.**

J. K. WARAWITA, Appellant, *and* JANE NONA, Respondent

S. C. 1,563—A. M C Colombo, 20,040

Maintenance—Illegitimate child—False statements made by defendant—Corroborative evidence.

In an application for maintenance in respect of an illegitimate child, evidence of mere opportunity for intimacy between the mother and the defendant does not amount to corroboration, but a ralse statement made by the defendant denying such opportunity may remove a doubt that may exist on the question of corroborative evidence.

APPEAL from a judgment of the Additional Magistrate's Court, Colombo.

H. V. Perera, Q. C., for the defendant-appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

November 2, 1954. SANSONI, J.—

This is an appeal by the defendant against an order which condemned him to pay maintenance for four illegitimate children born to the applicant. The applicant's case briefly was that she had worked for some

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time as a domestic servant for the defendant and his family in the latter's house in Ambalangoda till 1938, after which she went to live in a house on a land of 10 acres belonging to him at Porowagama. She said that she was placed in charge of that land by the defendant and while she was there he often visited her and even stayed with her in that house ; she claimed to have been his mistress for some years. About 1947, according to her, one Sadiris came to live in that house at the instance of the defendant, and she and Sadiris then lived there as man and wife till 1951 and she had three children by Sadiris before they were turned out of the land by the defendant. In 1953 she instituted these proceedings asking for maintenance for four children aged 12, 10, 8 and 5 years respectively who she said were the defendant's children. The applicant produced a postcard of 1950 and a letter of 1941 said to have been received by her from the defendant : they contain instructions regarding the working of the land, such as would normally be sent by an estate owner to one in charge of his estate. I shall have to refer again to these documents.

The defendant's position was that the applicant first came to work on his land in 1945 together with Sadiris, and that she did so because her elder sister and brother-in-law were already there from 1941. He first said that he used to write to the applicant's sister but not to the applicant, but he later changed his story by saying that he wrote the post card of 1950 to the applicant and the letter of 1941 to her sister. I should add that the person addressed in both writings is Jane. He denied that the applicant had ever been his mistress.

In order to corroborate her evidence the applicant called a witness Parlis who lived about 9 miles away from that land. Parlis said that the defendant brought the applicant to live on that land from his house in Ambalangoda, that she was living alone on the land and was frequently visited by the defendant, and that she had four children by him. He also said that the defendant once told him that he would board and educate these children. According to Parlis, Sadiris was brought by the defendant to live on the land some time after the applicant had come there.

The learned Magistrate held that the defendant was the father of the four children in question, and that he had been maintaining them from their birth until 1951. He clearly preferred to believe the applicant and Parlis rather than the defendant. It was submitted for the defendant that the evidence of the applicant as to paternity had not been corroborated, but I think that the evidence of Parlis affords some corroboration though not perhaps of a very weighty nature. I agree that as the defendant was the owner of the land on which the applicant was living he could well have visited the land frequently, given instructions to applicant as to its working, and treated her and her children generously, consistently with his position as owner. This case should not lead estate owners in general to feel that if they adopt a generous attitude towards their employees, and pay regular visits to their lands, they would find themselves in the same position as the defendant.

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But there is an aspect of the evidence given by the defendant, as compared with that given by the applicant, which seems to me to be decisively in the applicant's favour. It is clear that the defendant was not speaking the truth when he said that the applicant came to live on this land only in 1945, that it was to the applicant's sister and not to the applicant that he sent the written instructions regarding the working of the land in 1941, and that the applicant was known as Caroline and came to be known only later as Jane. In themselves these details were not very important, and if the defendant had spoken the truth in regard to them it might have been difficult to say that the relationship between him and the applicant was anything more than that of an employer and employee. Parlis' evidence might then have been of a merely equivocal nature and it might well have been argued that the evidence established only the mere opportunity for intimacy. The situation is different when it becomes clear that the defendant has been lying on these matters. He has attempted to disclaim any knowledge of the applicant prior to 1945, obviously in order to render it impossible for him to be the father of the two elder children, and highly improbable that he is the father of the two younger children.

It is in such a situation that the dictum of Lord Dunedin in *Dawson v. Mckensie* [1], quoted by Lawrence, J., in *Jones v. Thomas* [2], serves as a valuable guide, for he said: "Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defendant which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made". Lord Hewart, L.C.J., in *Jones v. Thomas* (supra) said: "As I read those dicta it is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence, and not that the mere fact of the alleged father having knowingly made false statements is in itself corroboration within the statute". More recently Lord Goddard, L.C.J., in *Credland v Knowler* [3] quoted these dicta and said: "In other words one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told". In this case the learned Magistrate was satisfied that the applicant's evidence was corroborated, and to quote Lord Goddard again: "What this Court has to decide is whether or not there was evidence which could corroborate the evidence of (the applicant) because, if there was such evidence, it was for the appeal committee to decide whether they regarded it as corroboration. That is always

[1] *(1908) S. C. 648.*

[2] *(1934) 1 K. B. 323.*

[3] *35 Criminal Appeal Reports 48.*

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the position when an appeal is brought on the question of corroboration, whether in a case tried before a jury or by justices. It is not for this Court to say whether the tribunal of fact ought to be satisfied. We have to decide whether the evidence given is such as in law can be regarded as corroboration ; and it is for the tribunal of fact, the jury or justices, whichever it may be, to decide for themselves whether it did corroborate ".

Applying these principles, I think the false statements made by the defendant remove any doubt that may have existed on the question of corroborative evidence, and I dismiss this appeal.

Appeal dismissed.

1956 *Present :* **Sinnetamby, J. and L. W. de Silva, A.J.**

FERNANDO, Appellant, *and* JOSSIE *et al.*, Respondents

S. C. 302—D. C. Balapitiya, 398/L

Construction of Deeds—Paramount importance of the words used—Intention of parties not material.

In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used.

APPEAL from a judgment of the District Court, Balapitiya.

Sir Lalita Rajapakse, Q.C., with *V. C. Gunatilaka*, for the plaintiff-appellant.

S. W. Jayasuriya, for the defendants–respondents.

Cur. adv. vult.

October 4, 1956. L. W. DE SILVA, A.J.—

The Plaintiff-Appellant instituted this action in 1952 for a declaration of title to a boutique marked No. 6 and the soil covered by it as depicted in the Plan No. 2,620 marked X and made for the purposes of this action. The plan shows a horizontal line of 5 boutiques. The disputed boutique No. 6 adjoins boutique No. 5 on its southern side. The appellant, who became the owner in 1942, conveyed on the deed 1D 1 of 1948 the boutique No. 5 with the soil covered by it to the first defendant-respondent who is the wife of the second defendant-respondent.

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The deed gives the boundaries for the entire land and is in the following terms which are entirely free from ambiguity :—

> " The boutique room bearing No. 5 with the undivided soil covered thereby out of the five boutique rooms bearing Nos. 1, 2, 3, 4 and 5 built abutting the high road on the land called one third portion of Urugasmanhandiya Manana Kebella bearing lot No. 12 " etc.

The respondents disputed the appellant's title to the boutique No. 6 and claimed it as a part of the boutique No. 5 on the allegation that Nos. 5 and 6 were one building. They thus contended that the deed 1D 1 did not exclude the sale of No. 6, the existence of which as a separate entity was denied by them.

The learned District Judge found as a matter of fact that the boutique No. 6 existed immediately behind No. 5. With that finding we are in entire agreement. But he dismissed the appellant's case and declared the first respondent the owner of the boutique No. 6 and allotted compensation to the appellant. The reason for the learned trial Judge's finding is stated in his judgment as follows :—

> " The mention of all the boutique rooms with the boundaries of the whole land and the transference of an undivided soil indicate that the bare land and buildings behind were considered as part and parcel of all the rooms. With this understanding between the plaintiff and the defendants, the soil that covered room No. 5 and all that appertained to it was transferred by 1D 1. "

This interpretation of the deed of transfer by the appellant in the name of the first respondent is clearly wrong. According to the plain meaning of the words used, the transfer was of the boutique room No. 5 with the soil covered thereby. Neither the use of the word " undivided " nor the recital of boundaries for the whole land could in any way enlarge the specified corpus conveyed. In *Maharaja Manindra Chandra Nandi v. Raja Durga Prashad Singh* [1], Lord Parmoor said :—

> " In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used. "

We have had no difficulty in coming to the same conclusion. We therefore allow the appeal with costs both here and in the Court below. In setting aside the judgment and decree of the District Court, we direct a decree to be entered in favour of the plaintiff-appellant in terms of the prayer in the plaint with damages at the agreed rate of Rs. 10 per month from 12th October 1951.

SINNETAMBY, J.—I agree.

Appeal allowed.

[1] *A. I. R. (1917) Privy Council 23.*

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1955 *Present :* **Swan, J.**

DEWASURENDRA, Appellant, *and* ALAHAKOON (Court Officer), Respondent

S. C. 915—M. C. Walasmulla, 13,217

Causing interruption to judicial officer—Must be intentional—Penal Code, S. 223.

In a prosecution under section 223 of the Penal Code for causing interruption to a public servant while such public servant is sitting in any stage of a judicial proceeding, the Court has to be satisfied that the act of the accused was intentional.

APPEAL from a judgment of the Magistrate's Court, Walasmulla.

Sir Ukwatte Jayasundera, Q.C., with *Sunil K. Rodrigo*, for the accused appellant.

Lucien de Alwis, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 24, 1955. SWAN, J.—

The appellant was charged with having intentionally caused interruption to the Magistrate at Walasmulla when he was holding an inquiry into a murder case by uttering the words " oka boru " meaning " that is a lie ", and thereby having committed an offence punishable under Section 223 of the Penal Code.

The incident arose in the following circumstances. Mr. S. S. Kulatilleka was conducting the inquiry in case No. 12,995 of the Magistrate's Court of Walasmulla, and while he was examining a witness the appellant who was the father of one of the accused used the words in question. At the trial of this case Mr. Kulatilleka giving evidence for the prosecution stated that he was interrupted and had to stop the proceedings and call the appellant up for having given utterance to that expression. He added, however, that he would not say it was a deliberate act and that he thought that it was not intentional, but he could not say so definitely. It appeared to him, however, that it was a spontaneous outburst.

The Assistant Superintendent of Police said that due to the interruption it was not possible for him to continue leading evidence. He admitted in cross-examination that up to the time of the interruption the accused was seated in Court and behaving quite normally. He said that the

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accused must have been grieved by the evidence of the witness, that after the interruption there was no further trouble and that the appellant did not create a scene.

This was the evidence for the prosecution. For the defence only one witness was called, namely Mr. H. A. Bastiansz who was the Proctor for the accused in the murder inquiry. He described the words used by the appellant as " an outburst of pent-up feelings of a father who was grieved at his son being charged ". In answer to Court he said that the words were not uttered in an offensive way.

The learned Magistrate deferred his order which he delivered one week later. He found the accused guilty and sentenced him to pay a fine of Rs. 50. In the course of his judgment he stated that the Section under which the accused was charged consisted of two parts, namely (*a*) whoever intentionally offers any insult to any public servant while such public servant is sitting in any stage of a judicial proceeding, *and* (*b*) whoever causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding. The case he was considering came under (*b*). Under that part, as he understood it, he seemed to think that there was no necessity for proving that the accused's act was intentional.

There can be no doubt that the learned Magistrate has misunderstood the section. The adverb " *intentionally* " modifies both the phrases " *offers any insult* " and " *causes any interruption* ". That seems obvious when one considers how the section has been framed and pays heed to the punctuation. A glance at the side note makes this quite clear.

The corresponding section of the Indian Penal Code is section 228 and is identical with our own. In *Re Ramasamy Gounden* [1] it was held that the Court had to be satisfied that the accused intentionally offered interruption to the Court. There are also some local cases on contempt to the same effect.

I think that the learned Magistrate was clearly wrong when he tried to place his own interpretation on the section. Learned Crown Counsel tried to support the conviction on the ground that there was sufficient evidence to prove that the interruption was intentional. He argued that there was in fact an interruption of the proceedings and, applying the principle that a man must be presumed to intend the natural and probable consequences of his acts, one must infer that the interruption was intentionally caused. But the circumstances negative intention. Even Mr. Kulatilleka said that he could not be definite whether the appellant's act was intentional or not.

I set aside the conviction and acquit the accused.

Appeal allowed.

[1] *16 Indian Cr. L. J. R. 610.*

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1955 *Present :* **Sansoni, J.**

SAMARAWEERA, Petitioner, *and* BALASURIYA, Respondent

S. C. 398—Application for a Writ of Mandamus on the Chairman of the Urban Council, Matara

Urban Councils Ordinance, No. 61 of 1939—Special meeting of Council—Duty of Chairman to convene one—Sections 38 (2) and 166—By-laws—Mandamus—*Effect thereon of alternative remedy.*

A writ of *mandamus* lies against the Chairman of an Urban Council if he refuses to convene a special meeting of the Council when required to do so under section 38 (2) of the Urban Councils Ordinance. In view of the provisions of section 166, a Rule in terms of Rule 9 (*c*) of the By-laws of the Urban Council of Matara must give way to section 38 (2).

An alternative remedy provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot operate as a bar to the application for *mandamus*.

APPLICATION for a writ of *mandamus*.

N. Nadarasa, with *S. Sharvananda*, for the petitioner.

Sir Ukwatte Jayasundera, Q.C., with *G. T. Samerawickreme*, for the respondent.

Cur. adv. vult.

April 6, 1955. SANSONI, J.—

This is an application for a Writ of Mandamus made by a member of the Urban Council, Matara, against the Chairman of that Council. The petitioner and five other members of the Council requested the respondent Chairman, by their letter dated 28th July, 1954 to convene a special meeting of the Council forthwith for the purpose of debating seven resolutions in the following terms :—

(1) That the Chairman U. C. Matara, be surcharged the amount of salaries and allowances paid to all employees appointed by him to the Council without the previous sanction of the Council or whose appointments have not been subsequently confirmed by it.

(2) This Council calls upon the Auditor-General to send immediately a special officer to investigate cases of unauthorised expenditure and payments made by the Chairman U. C. Matara.

(3) That the power of appointment of all necessary officers and servants permanent or temporary and of their removal or suspension, be exercised by this Council (and not by the Chairman alone) in all cases where the salary or wages of any such employee does not exceed Rs. 100.

(4) That on the ground of economy, the appointment of G. P. H. Arthur, of Totamune be forthwith cancelled and his duties delegated to the former occupant of the post, in addition to the duties now discharged by this former occupant.

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(5) That work relating to the maintenance and repair of roads now being done in only ward No. 9, be forthwith stopped and work in all wards be carried out in conformity with a list of priorities decided on by the Council.

(6) This Council resolves to rescind resolutions No. 26 (2) passed on 23.1.1954, leaving the matter of the issue of licences for temporary picture-halls and carnivals to the Chairman U. C.

(7) This Council resolves to rescind resolution No. 22 passed on 5.4.1954 adding the words " and to authorise the necessary expenditure " to items (*d*) and (*e*) of resolution No. 25 of 23.1.1954.

By his letter dated 29th July 1954 the respondent acknowledged receipt of the letter and informed the petitioner that the Resolutions Nos. 1, 2, 3, 4, 6, and 7 were disallowed while Resolution 5 would be submitted for debate at a meeting to be held on 2nd August 1954 at 3.30 p.m. Apparently such a meeting was held on the appointed date but these resolutions which had been disallowed were not placed on the agenda and this application has been made in order that the respondent may be directed to convene a meeting for the purpose of discussing those resolutions.

The respondent has justified his action by relying on Rule 9 (*c*) of the By-Laws of the Council which reads :—

" Before any notice of motion is placed on the agenda paper, it shall be submitted to the Chairman, who, if he be of opinion that it is out of order, shall cause the giver of the notice to be so informed. "

He pleads that his decision was made bona fide and in the discharge of a statutory duty devolving on him as Chairman. He also relies on Rule (1) (*d*) of the By-Laws which reads :—

" No business shall be brought before or transacted at any meeting ordinary or special, other than the business specified in the notices of meetings without the permission of the Council. "

His position is that the petitioner could have moved the resolutions at the special meeting with the permission of the Council.

Mr. Nadarasa for the petitioner referred to the peremptory wording of Section 38 (2) of the Urban Councils Ordinance No. 61 of 1939 which, as amended, reads :—

" The Chairman may convene a special meeting of the Council whenever he may consider it desirable and shall, whenever requested in writing by any two or more members of the Council to convene a special meeting for any purpose specified in such writing, forthwith convene a special meeting for that purpose. Two days' notice of the day appointed for any such special meeting shall be given to, or left at the residence of, each member of the Council. "

He submitted that this provision gave no discretion to the Chairman either in the matter of summoning a special meeting or in the matter of placing the resolutions specified in the requisition before such a meeting. Sir Ukwatte Jayasundera for the respondent conceded that the respondent

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was bound to convene a special meeting when required to do so under Section 38 (2). He claimed, however, that the respondent had a discretion in regard to the resolutions which could be put before the meeting, and this Court would not interfere with its exercise.

It seems to me that if Rule 9 (*c*) applies to this case the petitioner's application must fail, while if it does not apply the petitioner must succeed in view of the imperative provisions of section 38 (2) of the Ordinance which are clear and free from ambiguity. I have dealt at some length with a very similar matter in an order which I delivered on 20 October, 1954, [1] and I do not wish to repeat all I said then. The relevant by-laws and statutory provisions are the same in both cases, although that was a case which arose under the Town Councils Ordinance, No. 3 of 1946. I there decided that a by-law worded similarly to Rule 9 (*c*) does not apply to a special meeting, because all that section 38 (2) requires, once the Chairman has received a request in writing specifying a purpose, is that two days' notice of the day appointed for the meeting should be given and that the meeting should be convened for the specified purpose. Rule 9 (*c*) is inconsistent with the peremptory provisions of section 38 (2) because it vests a discretion in the Chairman and confers on him the right to rule out of order a resolution which is specified in a requisition. In view of the provisions of section 166 of the Ordinance the Rule in question must give way to section 38 (2) of the Ordinance ; see also *De Silva v. De Silva* [2].

It cannot be denied that all the resolutions which were ruled out of order by the respondent are relevant to questions affecting the Council administration. It is therefore not necessary to consider what the position would be if the resolutions had no bearing at all on the business of the Council. The words " any purpose " in section 38 (2) must be given a reasonable construction in the light of the other provisions of the Ordinance ; they do not include any purpose under the sun, for it must be remembered that they appear in an Ordinance enacted to establish Urban Councils for the purpose of local Government.

With regard to the alternative remedy open to the petitioner under Rule 1 (*d*), it is no remedy at all unless the petitioner obtains the permission of the Council. Moreover, section 38 (2) of the Ordinance not only gives him a right to have resolutions discussed without such permission but also ensures that all the members of the Council will have due notice of the purpose of the special meeting. The procedure under Rule 1 (*d*) would place the petitioner at a disadvantage. The alternative remedy should be equally convenient, beneficial and effectual.

It is trite law that Mandamus is only available to compel the doing of a duty not done, and not on the ground that a duty had been done erroneously. The cases cited by the respondent's counsel establish this proposition. But the petitioner's complaint is that the respondent has failed to do the duty cast upon him by section 38 (2) and I think it is a just complaint. For these reasons I allow the application of the petitioner with costs.

Application allowed.

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[1] (1954) 56 N. L. R. 450. [2] (1943) 44 N. L. R. 337.

1956 *Present :* **Basnayake, C.J., and K. D. de Silva, J.**

COMMISSIONER OF INCOME TAX, Appellant, *and* C. S. DE ZOYSA Respondent

S. C. 175—Income Tax Case No. 53/2260/BRA. 236

IN THE MATTER OF A CASE STATED UNDER SECTION 74 OF THE INCOME TAX ORDINANCE (CAP. 188)

Income Tax Ordinance (Cap. 188)—" Trade "—" Business "—Requirement of repetition of activity—Sections 2, 6 (1) (a), 6 (1) (h).

An isolated transaction does not amount to carrying on or exercising a trade or business within the meaning of section 6 (1) (*a*) of the Income Tax Ordinance so as to render the profits of the transaction liable to taxation.

A land owned by the assessee's wife was requisitioned during the war, and the Admiralty erected ten hangars thereon. After the war, availing himself of the concession granted by the Admiralty to owners of requisitioned land of purchasing the buildings erected thereon, the assessee bought nine of the hangars and made a profit by re-selling them.

Held, that the purchase and re-sale of the hangars did not come within the expression " trade " or " business " in section 6 (1) (*a*) of the Income Tax Ordinance. The sum, therefore, earned by the assessee was not liable to tax as being profits within the meaning of section 6 (1) (*a*).

CASE stated under Section 74 of the Income Tax Ordinance.

M. Tiruchelvam, Deputy Solicitor-General, with *A. Mahendrarajah,* Crown Counsel, and *H. L. de Silva,* Crown Counsel, for Appellant.

No appearance for Respondent.

Cur. adv. vult.

May 29, 1956. BASNAYAKE, C.J.—

The assessee's wife owned a four-acre block of land at Boosa and also undivided shares in other surrounding lands. These lands had been requisitioned during the war and the Admiralty had erected 10 hangars and some buildings thereon. By the end of 1947 it became known that the Admiralty was about to move out of the land. As the policy of the Admiralty was to give the owners of land on which it had erected buildings the option of purchasing them, the assessee approached the Senior Surveyor of Lands with a view to buying the hangars. He obtained the permission of the other co-owners of the lands surrounding the four-acre block to negotiate on their behalf with the Admiralty for the purchase

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2—J. N. B 61296-1.593 (12/56)

of the hangars, and he also paid them certain sums of money for the surrender of their option to purchase and the right to damage compensation. His negotiations with the Senior Surveyor were conducted through one H. W. Gunatilleke of H. W. Gunatilleke & Company Limited, whose business was the purchase and sale of surplus war materials and supplies.

After the assessee had commenced negotiations with the Admiralty, the Ceylon Government acquired the land for the use of the Railway. Thereafter the assessee continued negotiations with the Railway and agreed to purchase 9 of the hangars at Rs. 90,000. The tenth was sold to a third party later. The assessee himself had no money to purchase the hangars, and H. W. Gunatilleke agreed to arrange the finance on condition that he received one-third share of the net profits. As hangars were in great demand in India, Gunatilleke advertised in the Indian papers and visited India along with the assessee. Many offers were received from India but no sale was concluded as the highest tenderer withdrew his offer after inspection. Ultimately Gunatilleke found a Ceylonese purchaser, one T. B. Beddewela, who agreed to buy the 9 hangars for Rs. 288,000. An advance of Rs. 5,000 was paid and he undertook to pay the balance in instalments but failed to do so. Unable to find the money Gunatilleke gave up the quest retaining for himself the sum of Rs. 5,000 which Beddewela had paid him as an advance. As the Railway was pressing the assessee for payment, he sought the aid of his father, from whom he obtained Rs. 45,000, and the balance Rs. 45,000 he obtained from Senator Cyril de Zoysa. He paid the Railway the full sum of Rs. 90,000 on 15th June 1954. The assessee advertised the sale of the hangars once more, and Beddewela, the previous defaulting purchaser, made a second offer of Rs. 279,000 for a purchaser from Pakistan. The offer was accepted and the sale concluded. A profit of Rs. 189,000 accrued to the assessee out of which he paid Senator Cyril de Zoysa one-fourth share amounting to Rs. 47,250 for the advance made by him. The Assessor agreed to fixing the assessee's share of the profit at Rs. 144,000. It was made up as follows :—

			Rs.
¾th Share of Profit	..	..	141,750
Sale of Corrugated Sheets	..	..	20,250
			162,000
		Rs.	
Less Retained by Gunatilleke	..	5,000	
Expenses including payment to co-owners at Boosa	..	13,000	
			18,000
			144,000

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The assessee's income was assessed for the income tax year of assessment 1948–49 at Rs. 200,000 and for the year 1949–50 at Rs. 200,000. He was also assessed for profits tax for the year 1949 at Rs. 200,000. The assessee appealed against these assessments on the ground—

(*a*) that the profits sought to be taxed were in fact capital accretions and not liable to tax, and

(*b*) that the profits were of a casual and non-recurring nature and therefore not liable to tax.

The Commissioner of Income Tax fixed the statutory income from the sale of the hangars for the year 1948–49 at Rs. 144,000 and the profits tax assessment for the year 1949 at the same amount. He allowed the appeal against the assessment for 1949–50. Thereupon the assessee appealed to the Board of Review. The Board by a majority of two to one decided that the appeal against the income tax assessment for 1948–49 should be allowed. The Board also decided that the appeal against the profits tax assessment for 1949 should be allowed. Thereupon the Commissioner of Income Tax, who was dissatisfied with the decision of the Board, applied for a case stated.

The question of law stated for the opinion of this Court is as follows :—

"On the facts established in this case, is the sum of Rs. 144,000 earned by the assessee by the purchase and re-sale of hangars liable to tax as being profits falling within the meaning of section 6 (1) (*a*) of the Income Tax Ordinance ?"

It was urged by counsel for the Commissioner that the assessee had engaged in a trade or business even though it was one act of purchase and sale, and that therefore the profit he made on the sale of the hangars fell within the ambit of section 6 (1) (*a*) of the Ordinance.

It will be convenient, before proceeding further, to examine the relevant provisions of the Income Tax Ordinance. Section 5 of the Ordinance provides that income tax shall subject to the provisions of the Ordinance be charged in respect of the profits and income of every person for the year preceding the year of assessment wherever arising in the case of a person resident in Ceylon. Section 6 (1) defines the expressions "profits and income", "profits", and "income". Among other meanings, these expressions also mean the profits from any trade, business, profession, or vocation for however short a period carried on or exercised. Paragraph (*h*) of section 6 (1) excludes profits of a casual and non-recurring nature from the definition of profits.

I shall now proceed to examine the meaning and content of section 6 (1) (*a*). It is not contended that the assessee carried on any profession or vocation. These expressions need not therefore be considered. It is urged that the purchase and re-sale of the hangars comes within the expression "trade" or "business". These expressions are defined in section 2 of the Ordinance. I shall therefore quote these definitions.

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" Trade " includes every trade and manufacture, and every adventure and concern in the nature of trade ; " business " includes agricultural undertaking. The expression " trade " is generally used in connexion with the activity of buying and selling [1]. Trade is a term of the widest scope. In its widest sense it indicates a way of life or an occupation. It may in certain contexts have an extended meaning so as to include manufactures [2] as in a law which prohibits offensive or dangerous trades. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. For buying and selling to come within the ambit of the expression " trade ", there must be some amount of repetition in the acts of buying and selling. In this connexion it would be appropriate to quote the words of Scrutton L.J. in *Brighton College v. Marriott* [3] :

> " In my view, when any person habitually and as a matter of contract supplies money's worth for full money payment, he ' trades ' within the meaning of Schedule D. "

This idea is elaborated by Rowlatt J. in the case of *Pickford v. Commissioners of Inland Revenue* [4]. He says :

> " Now of course it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade. "

This view of the meaning of the expression " trade " in the Income Tax Acts runs through the decisions. Here we have something more than the mere expressions " trade " and " business ". These expressions are used in association with the expression " carried on or exercised ". The expression " carried on " implies a repetition of acts [5]. When the expression " trade ", which even when used by itself implies the concept of a repetition of acts of buying and selling, is coupled with such words as " carried on or exercised ", then it is beyond question that there should be a repetition of acts of buying and selling to constitute " trade ".

In *Grainger & Son v. Gough* [6], Lord Morris said :

> " There can be no definition of the words ' exercising a trade '. It is only another mode of expressing ' carrying on a business ', but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, and that it cannot apply to isolated transactions. "

[1] *Harris v. Amery, L.R. 1 C. P. 148.*
[2] *Commissioner of Taxation v. Kirk, 1900 A. C. 588.*
[3] *10 T. C. 213 at 227.*
[4] *13 T. C. 262 at 263.*
[5] *Smith v. Anderson, (1880) L. R. 15 Ch. D. 247 at 277.*
[6] *3 T. C. 462 at 472.*

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The expression " business " also in a context such as section 6 (1) (*a*) means an activity continuously carried on. Here we have an isolated transaction of sale. The appellant sought to take advantage, as he was entitled to do, of the concession granted to owners of requisitioned land of purchasing the buildings erected thereon. It has been repeatedly held in England that an isolated transaction does not amount to carrying on or exercising a trade or business. The decisions on the point are too numerous to be quoted here ; but I shall content myself with citing the *dicta* from two of the better known cases.

In the case of *Commissioners of Inland Revenue v. Livingston and others*[1], Lord Blackburn said :

> " It is well settled that an isolated trading transaction of a simple character outside a man's ordinary business does not amount to the carrying on of a trade within the meaning of the section so as to render the profits of the transaction liable to taxation. They are casual profits which do not form part of his regular income. "

In *Pickford v. Commissioners of Inland Revenue* (*supra*), Sargant L.J. said (at page 275) :

> " It seems to me perfectly simple and straightforward to come to the conclusion that one transaction was not in itself a carrying on of a trade or business, ... "

Learned counsel for the Commissioner of Income Tax urged that if the transaction in question was not a trade or business it was an adventure or concern in the nature of a trade as contemplated in the definition of trade. For anything to be in the nature of a trade it must have the characteristics of " trade ". As I have said earlier " trade " involves a repetition of activity, and an adventure or concern in which there is no repetition of acts cannot be said to be in the nature of trade.

In the case of *Commissioners of Inland Revenue v. Livingston & others* (*supra*), Lord President Clyde said (at page 542) :

> " I think the profits of an isolated venture, such as that in which the respondents engaged, may be taxable under Schedule D provided the venture is ' in the nature of a trade '. I say ' may be ' because in my view regard must be had to the character and circumstances of the particular venture. If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was ' in the nature of " trade " ' ; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. "

[1] *11 T. C. 538 at 546.*

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It is clear from the decisions I have quoted that the purchase and sale of the hangars in the instant case does not come within section 6 (1) (*a*).

There is another fact that must not be overlooked in a consideration of section 6 (1) of our Ordinance and that is that paragraph (*h*) excludes "profits of a casual and non-recurring nature" from the definition of "profits" or "income".

I am of opinion that the Board of Review is right in their decision that the assessee's profit is not liable to tax, and I would accordingly state my opinion in answer to the question that on the facts established in the case the sum of Rs. 144,000 earned by the assessee by the purchase and re-sale of hangars is not liable to tax as profits coming within the ambit of section 6 (1) (*a*) of the Income Tax Ordinance.

There will be no costs as there has been no appearance for the respondent.

K. D. DE SILVA, J.—I agree.

Appeal dismissed.

1956 *Present :* **Basnayake, C. J., and K. D. de Silva, J.**

C. A. H. DAVOODBHOY, Appellant, *and* M. J. M. FAROOK *et al.*, Respondents

S. C. 49—D. C. Colombo, 6,419

Evidence Ordinance—Section 90—Document thirty years old—"Proper custody"—Will executed in 1850—Proof thereof—Frauds and Perjuries Ordinance, No. 7 of 1840, s. 15.

The duplicate of a Will which is over thirty years old and which was duly admitted to probate in a testamentary case the record of which is missing is admissible in evidence under Section 90 of the Evidence Ordinance provided it is produced from the proper custody as contemplated by that Section.

Whether or not a particular custody is proper is a question of fact to be determined according to the circumstances of each case. Proper custody does not necessarily mean legal custody. It is sufficient if the circumstances render it probable that the origin was legitimate.

The duplicate of a Will executed in the year 1850 was transmitted to the District Court by the Notary who attested it. The Notary transmitted it to the District Court because he had some reason to believe, though mistakenly, that such transmission was required by law. The document was later transferred to the Registrar-General, who produced it in the present case after it had been in the custody of the Land Registry for over 100 years.

Held, that the document was produced from proper custody within the meaning of Section 90 of the Evidence Ordinance.

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APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *G. D. C. Weerasinghe*, for the defendant appellant.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the plaintiffs respondents.

Cur. adv. vult.

April 26, 1956. K. D. DE SILVA, J.—

This is an appeal by the defendant from an order made by the Additional District Judge, Colombo, admitting certain documents in evidence having overruled an objection taken by the defendant's Counsel that they were inadmissible. The documents in question are P9, P10, P11, P14 and P15. At the hearing of this appeal the objection was confined to P14 and P15. The document P15 is claimed to be the duplicate of the Last Will No. 418 dated 22nd July, 1850, of one Mohideen Natchia who died in the year 1855, while P14 is a certified copy of that document. It is necessary to set out, in brief, the respective claims of the plaintiffs and the defendant in this action in order to consider the question raised in this appeal in its correct perspective.

The plaintiffs instituted this action against the defendant for a declaration of title to the piece of land described in the schedule to the plaint and for consequential relief. It is common ground that this land originally belonged to Mohideen Natchia. According to the plaintiffs, Mohideen Natchia by Last Will No. 418 dated 22nd July, 1850, bequeathed her property including the subject matter of this action to her two sons, Hamidu Lebbe and Ahamadu Lebbe. She died on 24th July, 1855. Thereafter, plaintiffs allege, that her Last Will was admitted to probate in D. C. Colombo Testamentary Case No. 1734. It was contended by the plaintiffs that this Last Will created a fideicommissum in favour of the descendants of Hamidu Lebbe. If in fact no such fideicommissum was created the plaintiffs' action admittedly fails. Ahamadu Lebbe was the executor under the Last Will of his mother, and he by executor's conveyance P7 of 1856 conveyed to his brother Hamidu Lebbe the interests that the latter was entitled to under his mother's Last Will. Hamidu Lebbe died leaving three children namely Noordeen, Samsudeen and Cadar Umma and they by deed P8 of 1902 amicably partitioned the property which their father acquired under this Last Will. At this division, the land in suit was allotted to Samsudeen who died leaving a son and a daughter namely Jaleel and Zubaida Umma. It is alleged that Jaleel has not been heard of since the year 1942 and on the presumption that he is dead his rights devolved on his three children the 1st and 2nd plaintiffs and one Quirasha who died leaving as her heirs the 3rd and 4th plaintiffs. The 6th plaintiff is a purchaser of certain rights from 1st and 2nd plaintiffs. According to the plaintiffs Zubaida Umma left no issue and

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her share devolved on her brother Jaleel whose rights passed to the plaintiffs. The defendant claims the entire land by right of purchase on deed P13 of 1917 from Jaleel who had already acquired the share of his sister Zubaida Umma on deed P12 of 1917 from the latter's husband. The defendant does not admit that Mohideen Natchia left a Last Will or that such a Will was admitted to probate. Even if such a Will was proved he contends that it did not create a fideicommissum. He also takes up the position that neither the Will nor the probate relied on by the plaintiffs was registered and that therefore he acquired an absolute title to the whole land on P13.

At the trial the plaintiffs' Counsel raised, *inter alia*, the following issues :—

1. Did the Last Will No. 418 dated 22.7.1850 create a fidei commissum for four generations ?
2. Was the said Last Will duly admitted to probate ?
3. Was the property in the hands of Hamidu Lebbe Samsudeen subject to a fideicommissum for ever in favour of his children and descendants ?
4. If so, are the plaintiffs entitled to the entirety of the property in dispute in the shares set out in paragraph 9 of the plaint ?

Some of the issues raised by the defendant's Counsel were :—

1 (*a*) Was Mohideen Natchia the owner of the premises in question ?

1 (*b*) Did she execute the Last Will No. 418 dated 22.7.1850 ?

2 (*a*) If not, is this action maintainable ?

2 (*b*) Is this action maintainable unless the probate of the said Last Will is produced ?

In the course of the trial the Counsel for the plaintiffs sought to produce a document which purported to be a certified copy of the Last Will No. 418.

Mr. Weerasooria, Q.C., the Counsel for the defendant objected to the production of this document. This objection was upheld. Thereafter the plaintiffs' Counsel stated to Court that he wished to summon the Registrar-General to produce the original of the duplicate of the Last Will. The learned Judge accordingly adjourned the trial. When the trial was resumed on 1.1.'54 the 1st plaintiff stated that the Last Will of Mohideen Natchia was admitted to probate in Testamentary Case No. 1734 of the District Court, Colombo, but that the record of that case was missing. In support of his statement he produced P5, a letter, dated 13.9.'52 of the Secretary of the District Court, Colombo, in which it is stated that according to an inventory prepared some years ago the record of D. C. Colombo Testamentary Case No. 1734 is missing. He also produced P6 which is a certified extract from the Testamentary Index Register of the District Court, Colombo, which shows that the estate of Mohidin Natchie was administered in Case No. 1734. Thereafter one

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D. S. Peiris a clerk of the Land Registry produced P15 the duplicate of Last Will No. 418 dated 22nd July, 1850 and P14 a certified copy of that duplicate. Mr. Weerasooria objected to the production of these two documents. After hearing the arguments of the Counsel for plaintiffs and the defendant the learned Judge made the following order :—

> " I admit in evidence Last Will 418 of 22.7.1850. I shall give my reasons in my judgment. "

It is from this order that the defendant has appealed. Further trial has not been proceeded with in view of this appeal.

Mr. H. V. Perera contended :—

(1) that P15 is only a copy of the Last Will.

(2) that it is not a public document within the meaning of Section 74 of the Evidence Ordinance (Cap. 11).

Therefore he argued that it is inadmissible in evidence. Mr. Thiagalingam on the other hand maintained that this document should be regarded as the original Will and that in any event it is a public document within the meaning of Section 74 (*b*) of the Evidence Ordinance as a public record of a private document and that on either of these two grounds it was admissible. I would first deal with the question as to whether or not this document is admissible under Section 90 of the Evidence Ordinance. That Section provides that any document thirty years old produced from any custody which the Court in the particular case considers proper, may be presumed to be genuine both regarding to its contents and its due execution. The explanation appearing under that Section reads :—

> " Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be ; but no custody is improper if it is proved to have had a legitimate origin, or in the circumstances of the particular case are such as to render such an origin possible. "

There is no doubt that the word " document " in this Section refers to the original document. Mr. Perera contended that P15 is not the original Will. Although Mr. Thiagalingam at one stage suggested that P15 may well be the very document which was admitted to probate in Case No. 1,734 there does not appear to be any merit in that contention. In fact the plaintiffs' case in the Court below was that the original Will admitted to probate had been lost and that P15 was its duplicate lying at the Land Registry. P15 itself shows that the Last Will of Mohideen Natchia was attested in triplicate, for the attesting Notary states therein :—

> " In witness to the declaration and execution of this Last Will and Testament the signature and seal were affixed to three of these same presents in the presence of Pakirthamby Sesma Lebbe of Old Street, Colombo, and Kunji Mohamadu Nagutha Segu Fareed of New Street, Colombo, on the date and year aforesaid. "

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Therefore I would proceed to treat this document as a duplicate and consider the question of its admissibility on that basis. The duplicate of any document is necessarily identical with the original in regard to its contents. Both the original and the duplicate are prepared and signed at the same time and by the same parties. It was held in *Kiri Menika v. Duraya* [1] that a duplicate of a deed is not a copy but must be treated as the original itself. Lascelles C.J. stated in that case :—

> " The document in question cannot, in my opinion, be treated as a copy of the original deed. This document, no less than the deed which passed to the grantee, was signed by the parties and attested by the Notary. It is in all respects an original deed. "

That was the duplicate of a deed over thirty years old and the learned Chief Justice held that it was admissible in evidence provided it came from the proper custody. On the analogy of that decision Mr. Thiagalingam submitted that the learned District Judge was correct in admitting P15. Mr. Perera, however, contended that the reason why the duplicate of that deed was admitted was because every deed has to be executed in duplicate and the duplicate must be forwarded to the Registrar of Lands and it was that duplicate which was sought to be produced in that case. It does not appear, however, from the judgment that the reason for treating the duplicate as the original itself was due to the legal requirement that deeds should be executed in duplicate. The reference in that judgment to the legal requirement that deeds must be executed in duplicate was made in considering the question whether the document came from the proper custody. The character of the duplicate of a document is not dependent on whether or not the law requires that the particular document should be executed in duplicate. The original and the duplicate are contemporaneous in execution, identical in terms and signed by the same parties. Apart from that parties to the document intend to treat them alike. Although there is no legal requirement that a Will should be attested in duplicate there is nothing to prevent it being so attested if the testator desires to do so. A duplicate is not the same as a protocol. In *Raliya Umma v. Mohamed* [2]. Gratiaen J. said :—

> " 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— ".

In that case Gratiaen J. seems to have taken the view that although a protocol of a Will is not admissible to prove the contents of the Will the duplicate is entitled to take the place of the original. I am therefore of the view that the duplicate of a Will over thirty years old is admissible under Section 90 of the Evidence Ordinance provided it is produced from the proper custody as contemplated by that Section. The Will in question

[1] *(1913) 17 N. L. R. 11.* [2] *(1954) 55 N. L. R. 385.*

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purports to have been attested in the year 1850. Therefore it is over thirty years old. But does P15 come from the proper custody ? According to Mr. Perera it does not. He submitted that at the relevant time there was no provision either to attest deeds in duplicate or to forward a duplicate to any Government office. Mr. Thiagalingam however argued that in the year 1850 the law required duplicate of Wills to be deposited in the District Court. I am unable to agree with him on that point. It is Section 4 of The Frauds and Perjuries Ordinance No. 7 of 1834 which required deeds and Wills to be attested in duplicate. The same Section enacted that duplicates of deeds and Wills should be transmitted by the Notary to the District Judge who was enjoined to preserve them. Section 8 (6) of the Notaries Ordinance No. 1 of 1837 provided that duplicates of all deeds and Wills should be transmitted to the District Court as required by Ordinance No. 7 of 1834. A breach of that requirement was made punishable with a fine. This Ordinance was repealed by the Notaries Ordinance No. 4 of 1839. Section 6 (4) of the latter Ordinance enacted that duplicates of all deeds and Wills should be sent by the Notary to the District Court " as requird by law ". The " law " referred to here is Ordinance No. 7 of 1834. The Frauds and Perjuries Ordinance No. 7 of 1840 repealed Ordinance No. 7 of 1834. Section 15 of Ordinance No. 7 of 1840 required every deed or other instrument except any Will to be executed in duplicate and that the Notary should at the end of each month transmit the duplicate of all deeds or other instruments executed by him during the month to the District Court. This Ordinance however did not expressly enact that Wills should not be executed in duplicate. But as Ordinance No. 7 of 1834 was repealed by it the legal requirement that Wills should be executed in duplicate ceased to exist. So that at the time that Will No. 418 of Mohideen Natchia was attested it was not obligatory to attest Wills in duplicate. But, at that time Notaries Ordinance No. 4 of 1839 was still in operation. Although by reason of the repeal of Ordinance No. 7 of 1834 the requirement under Section 6 (4) of Ordinance No. 4 of 1839 for the transmission of the duplicates of Wills ceased to operate, notaries do not appear to have realized that that necessity no longer existed because no specific reference was made in Ordinance No. 7 of 1840 to Section 6 (4) of Ordinance No. 4 of 1839. It would not be strange that if they thought that they were still required to send duplicates of Wills to the District Court for the reason that Ordinance No. 4 of 1839 had not been repealed. That probably was the reason why the Notary who executed this Will transmitted a duplicate to the District Court. Ordinance No. 8 of 1863 enacted that District Judges should send up the duplicates of all deeds and Wills in their possession to the Registrar of Lands. That is how these duplicates came into the custody of the Registrar of Lands.

Does the fact that there was no legal requirement to transmit the duplicate of a Will—in this case—to the District Court make it inadmissible in evidence on the ground that it does not come from the proper custody ? If there was such a requirement the custody from which this document P15 comes must, without question, be held to be the proper custody. But the absence of such a requirement does not necessarily follow that the custody involved in this case is improper. The reason

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why Section 90 insists on proper custody is to ensure the authenticity of the documents admitted under that Section. Whether or not a particular custody is proper is a question of fact to be determined in the circumstances of each case. Proper custody does not necessarily mean the best or the strictly legal custody. It is sufficient if the circumstances render it probable that the origin was legitimate. In *Bishop of Meath v. Marquess of Winchester*[1] which is a case decided by the House of Lords, Tindal C.J. said,

> " . . . . for it is not necessary that they should be found in the best and the most proper place of deposit. If documents continued in such custody there never would be any question as to their authenticity ; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found ; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable, though differing in degree ; some more so, some less ; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. "

The principle laid down in this case was followed by Wendt and de Sampayo JJ. in *Maria Silva v. Adoris Soysa* [2].

Do the circumstances in this case suggest that the custody of P15 had a legitimate origin ? I think they do. It has been in the custody of the Land Registry for over 100 years. There are no suspicious circumstances as to the manner that this Government Department came to possess it. The custody from which it comes is undoubtedly disinterested. It has been transmitted to the District Court by the Notary who attested it, at a time when he had some reason to believe—though mistaken—that such transmission was required by law. There is no reason at all to doubt the authenticity of the document. Therefore I hold that P15 comes from the proper custody and it is admissible under the provisions of Section 90 of the Evidence Ordinance. The certified copy P14, too, is admissible. It is not therefore necessary to consider the question whether P15 is a public document.

Accordingly I dismiss the appeal with costs.

BASNAYAKE, C.J.—

I have had the advantage of reading the Judgment prepared by my brother de Silva with which I agree. As my brother has stated the relevant facts fully I shall confine my Judgment to the question of law involved in this appeal.

[1] *(1836) 3 Bing. (N.C.) 183.* [2] *1 Balasingham's Reports 46.*

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The sole question for determination on this appeal is whether the learned District Judge is right in admitting in evidence the duplicate of the Last Will No. 418 dated 22.7.1850 produced from the custody of the Registrar-General.

Section 90 of the Evidence Ordinance provides—

" 90 : Where any document purporting or proved to be thirty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested ".

The will in question which is in Tamil is clearly over thirty years old and purports to be signed by the testator and two witnesses and attested by a notary public. It is produced from the custody of the Registrar-General. The evidence of the officer of the Registrar-General's Department who produced the document in question is that the will was in the volume of deeds containing the duplicates of notary K. M. Mohammed Lebbe for the years 1849–1851. He also stated that these documents were originally in the custody of the District Court of Colombo and was later transferred to the Registrar-General. The learned District Judge considers that on the facts of this case the custody from which the Will has been produced is proper custody. I am not prepared to say that on the material before us the learned District Judge is wrong. In that view of the matter the Court may presume the actual attestation and execution of the Will.

On the subject of the presumption created by the section it is sufficient to refer to the case of *Munnalal v. Kashibai* [1].

Appeal dismissed.

1956 *Present :* **Pulle, J., and Weerasooriya, J.**

FERNANDO, Appellant, *and* PERERA, Respondent

S. C. 316—D. C. Ratnapura, 1,053

Partition action—Interlocutory decree—Its binding effect on the parties—Title as to building erected by a co-owner—Res judicata.

By an interlocutory decree entered in an action for the partition of a land, A was declared entitled as against B to a garage which had been put up by a co-owner on the land and transferred by him to A. The decree was silent as to any rights of B in the land sought to be partitioned. Subsequently A sued B in the present action for the recovery of mesne profits in respect of the garage from the date of its purchase by A.

[1] (1947) A. I. R. 15.

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Held, that the interlocutory decree entered in the partition action was binding on B and operated as *res judicata* in regard to the title of the parties to the garage in the present action.

APPEAL from a judgment of the District Court, Ratnapura.

T. B. Dissanayake, with *E. S. Amerasinghe*, for the plaintiff appellant.

H. Wanigatunga, for the defendant respondent.

Cur. adv. vult.

March 27, 1956. WEERASOORIYA, J.—

By an interlocutory decree for partition (P1) dated the 26th May, 1953, entered in D. C. Ratnapura Case No. 9,135 the plaintiff-appellant (who is the 3rd defendant in that case) was declared entitled to certain undivided shares of the land sought to be partitioned and also to the buildings C, D and E in Plan No. 1,155 (P2). It would appear that two alternative schemes of partition are under consideration in that case and no final decree has yet been entered. Of the buildings referred to, C is a garage and is the subject matter of the present action.

In the plaint in the present action, dated the 28th July, 1954, the plaintiff recited his title to the garage as by right of purchase upon a deed of transfer No. 10,672 dated the 14th June, 1947, and also the interlocutory decree in the partition case No. 9,135. The cause of action pleaded was that since the plaintiff 's purchase the defendant-respondent disputed his title to the garage and appropriated the rent of the same and the relief claimed against the defendant was the recovery of mesne profits from the date of plaintiff 's purchase up to the 31st May, 1953, which for the purposes of the action were restricted to a sum of Rs. 1,200 with legal interest and costs of suit.

The defendant-respondent is the 3rd plaintiff in the partition action. In that action a contest arose between him and the plaintiff-appellant over the garage in question which the latter claimed to be entitled to exclusively as an improvement effected by the transferor on Deed No. 10,672. The contest was resolved in favour of the plaintiff-appellant and no appeal was filed against the interlocutory decree declaring him entitled to the garage. That decree is silent as to any rights of the defendant in the land sought to be partitioned.

At the trial of the present action the following three issues were raised which the trial Judge was invited by the parties to try as preliminary issues :—

(1) Does the interlocutory decree in D. C. Partition Case No. 9,135 by which the plaintiff in this case, who was the 3rd defendant in the said partition case No. D. C. 9,135, was declared entitled to the garage referred to in the schedule to the plaint, operate as *res judicata* against the defendant in this case with regard to the title to the said garage ?

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(2) Does the interlocutory decree referred to in paragraph 2 of the plaint, vest title in the plaintiff in respect of the said garage ?

(3) If not, can the plaintiff maintain this action ?

The learned trial Judge answered each of these issues in the negative and accordingly dismissed the plaintiff's action with costs. From this order the plaintiff has appealed.

In disposing of the action in this way the learned Judge regarded as decisive the *dictum* of Bonser C.J. in the case of *Pieris et al. v. Perera et al.* (F.B) [1] that an " interlocutory decree for partition, unless proceeded with, is useless for all purposes. It would not even support a plea of *res judicata* ". But the substantial ground on which the judgment of the trial Court was reversed and the case remitted for a fresh trial was the inadequate nature of the investigation into the rights of the parties before Court and of certain other persons whose interests in the land sought to be partitioned had been disclosed, and the *dictum* quoted above cannot, therefore, be regarded as forming part of the collective decision of the Appellate Court, nor have we been referred to any subsequent decision where that *dictum* was adopted as correct. The contrary seems to have been laid down in *Silva v. Silva et al.* [2] (also a Full Bench case, but a decision by the majority of the Court) where it was held, following certain earlier cases, that a preliminary decree for partition which is entered in accordance with the judgment is binding on the parties as long as it stands unreversed. In that case, under the interlocutory decree for partition, one of the parties had been declared entitled to an undivided share to the exclusion of another. Although the judgment in terms of which the decree was entered was, as subsequently transpired, based on an erroneous interpretation of a document, no appeal was filed against it but after the commissioner who was appointed to prepare a scheme of partition had made his return, the successor in office of the Judge who was responsible for the wrong order amended the interlocutory decree with a view to rectifying the error. It was held in appeal that the interlocutory decree was binding on the parties and that it was not open to the Judge to amend it. In the case of *Tillekeratne v. de Silva* [3] the preliminary decree for partition contained an express declaration that the land sought to be partitioned was subject to a *fidei commissum* but such a declaration was omitted in the final decree in regard to the shares in severalty allotted to the parties. It was contended in appeal that the omission had the effect of making the parties entitled to the shares free of the *fidei commissum*. In rejecting this contention Soertsz S.P.J. stated as his view that the Partition Ordinance (Cap. 56) contemplates only one decree, namely, that provided expressly as a decree in Section 4, and that while Section 6 provides for a " final judgment " confirming the partition proposed by the commissioner, it is the decree under Section 4 which under Section 9 is given good and conclusive effect as regards the partition or sale and the title of the parties. He held that the shares awarded in severalty were subject to the *fidei commissum* notwithstanding the

[1] *(1896) 1 N. L. R. 362.* [2] *(1910) 13 N. L. R. 87.*
[3] *(1947) 49 N. L. R. 25.*

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omission to reserve it in the " final decree ". It must be noted, however, that the view of Soertsz S.P.J. is not in accordance with certain previous decisions of this Court of which I need refer only to the case of *Catherinahamy et al. v. Babahamy et al.* [1] where it was expressly held that the decree which is conclusive under Section 9 of the Ordinance is the final judgment under Section 6 allotting the shares in severalty in the case of a partition. But this decision did not touch on the question of the binding effect of an interlocutory decree on the parties to it as long as such a decree stands unreversed in appeal. On the authority of *Silva v. Silva et al.* (supra) I would hold that the interlocutory decree entered in Case No. 9,135 is binding on the defendant-respondent and operates as *res judicata* in regard to the title of the parties to the garage in the present action. I may say that for the purposes of the present case it is not necessary for me to consider the rights of parties under an interlocutory decree entered in a partition action in regard to which an order of abatement is made under Section 402 of the Civil Procedure Code prior to the entering of the final decree. That such an order could be made in a partition action was recognised in the case of *Muthucumaraswamy v. Sathasivam et al.* [2]

Mr. Wanigatunge who represented the defendant-respondent sought to reinforce the position of his client by the argument that all that the plaintiff-appellant is entitled to by virtue of interlocutory decree in Case No. 9,135 is the allocation of the soil on which the garage stands as part of the share in severalty that would eventually come to him under the partition decree or in lieu thereof to be paid compensation as for an improvement of the soil should that portion be awarded to another co-owner under the scheme of partition that will be adopted by Court. In support of this argument he cited the case of *Moldrich v. LaBrooy* [3], but it cannot be said that the decision in that case was intended to be exhaustive of the rights of a co-owner in the common property. In the case of *Girihagama v. Appuhamy* [4] it was held that a co-owner who has built a house on the common land is entitled to claim damages for the period during which he is deprived of his possession of the same by another who though not a co-owner had entered into occupation of it, but without the former's consent, on the strength of having paid off a mortgage to which it was subject. The decision in that case was based on the judgment of Ennis A.C.J. in *Kathonis v. Silva* [5] where he said that he could see no reason why a co-owner who exercises his rights as such and builds a house should not eject another co-owner who attempted to occupy it without his permission. In the case of *Peeris v. Appuhamy* [6] it was held by Keuneman A.C.J. that a co-owner who makes a plantation on common property is entitled to retain possession of the improved portion until the rights of the parties are finally decided in a partition action. In the case of *Cooray et al. v. Samaranayake* [7] it was held that a possessory action for a plantation can be maintained by one co-owner against another. In view of these decisions the argument advanced by Mr. Wanigatunge is not tenable and must be rejected.

[1] (*1908*) *11 N. L. R. 20.*
[2] (*1951*) *53 N. L. R. 97.*
[3] (*1911*) *14 N. L. R. 331.*
[4] (*1939*) *14 C. L. W. 11.*
[5] (*1919*) *21 N. L. R. 452.*
[6] (*1947*) *48 N. L. R. 344.*
[7] (*1946*) *32 C. L. W. 43.*

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In the present case, having regard to the terms of the interlocutory decree entered in the partition action (No. 9,135) the defendant-respondent is not even a co-owner of the land on which the garage stands. I see no reason to hold that the plaintiff 's action is not maintainable. It will be noted, as stated already by me, that the claim for mesne profits is up to the 31st May, 1953. The interlocutory decree was entered on the 26th May, 1953. The plaintiff 's title prior to that date would rest on his deed of transfer No. 10,672, and in regard to his claim for mesne profits up to the 31st May, 1953, he would be entitled to rely on that deed as well as on the interlocutory decree.

The order dismissing the plaintiff 's action with costs is set aside and the case is remitted for trial before another Judge on the basis that the interlocutory decree operates as *res judicata* in regard to the rights of the parties to the garage as from the date thereof. The plaintiff will be entitled to his costs here and in the Court below.

PULLE, J.—I agree.

Judgment set aside.

1954 *Present :* **Gratiaen, J.**

G. L. JAYASINGHE, Appellant, *and*
THE LINDULA POLICE, Respondent.

S. C. 1130—M. C. Hatton, 2105

Criminal Law—Non-disclosure of defence to Police—Inference of guilt.

The failure or refusal of an accused person to disclose his defence to the Police does not justify an inference of guilt, although it may, in any particular case, affect the weight of the evidence which is led in support of it.

APPEAL from a judgment of the Magistrate's Court, Hatton.

H. V. Perera, Q.C., with *J. C. Thurairatnam* and *F. Silva*, for the accused appellant.

T. A. de S. Wijesundera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 11, 1954. GRATIAEN, J.—

This case has caused me a great deal of anxiety. The appeal is from a conviction for the theft on 12th June 1953 of 82 lb. of manufactured tea from the factory of Melton Estate, Lindula, of which Mr. M. J. Maitland is the Managing Proprietor. The appellant was the estate teamaker and had served Mr. Maitland in that capacity for over 31 years.

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It is common ground that at about 5.50 p.m. on the day in question Mr. Maitland, who was in his bungalow, received an anonymous letter to the following effect :

" Honoured Sir,

Check the Hoare & Co. van immediately. Urgent. "

On receipt of this document, Mr. Maitland went up to the factory and saw a van belonging to the firm of engineers concerned whose representatives were at that time engaged in attending to some work in the factory. The van was searched, and there was found in it a sack containing 82 lb. of manufactured tea. I agree with the learned Magistrate that the identity of the tea as tea manufactured in Melton Estate has been established beyond doubt.

Mr. Maitland proceeded with his investigations, and it was brought to light that the author of the anonymous letter was the " learner tea maker " Selladurai who claimed that his suspicions had been aroused when he noticed an estate labourer putting " a bag " into the van at about 3.30 p.m. that afternoon. The labourer concerned was the prosecution witness Sandanam who explained that he had done so on the instructions of the appellant. Sandanam denied, however, that the bag was the same article (containing tea) which Mr. Maitland later discovered in the van. The van-driver also stated that the appellant had requested him to return " a bag of rice " on his account to the firm of David & Co. when the van returned to Talawakelle, the explanation being that David & Co. had sold him a bag of rice which on examination was found to be of poor quality.

The appellant gave evidence on his own behalf admitting the versions of the van-driver and Sandanam to be true. He also called David Silva of Talawakelle who confirmed that he had in fact despatched a bag of rice by Horare & Co.'s van to the appellant earlier in the day. David Silva's evidence on this point was not challenged.

The defence was that some enemy of the appellant (possibly Selladurai, the author of the anonymous letter which led to the detection of the " theft ") had caused a sack of tea to be substituted for the rejected " bag of rice " at sometime between 3.30 p.m. and 5.50 p.m. that evening. The appellant protested his innocence and relied strongly on his long and unblemished record of service in a position of responsibility under Mr. Maitland.

The bare possibility of substitution could not be ruled out completely. It is true that the door of the van was found " closed " when Mr. Maitland inspected it, but there was no suggestion that it had been " locked " during the crucial period. It is also a matter of some importance that the sack of tea was discovered in the van more than two hours after Sandanam had placed in it a bag whose contents had not been examined during that long interval of time.

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Although Sandanam and the van-driver were vital witnesses for the prosecution, the learned Magistrate seems to have regarded them as accomplices of the appellant, and he rejected their evidence on every point except when it implicated him. The learned Magistrate also disbelieved the appellant and, in convicting him, stated somewhat dramatically that he " would have to torture himself into having fantastic doubts to give any weight " to the defence.

The case is certainly one of very strong suspicion, but it is indeed unfortunate that Selladurai, instead of busying himself over the preparation of an anonymous letter, did not immediately examine in Sandanam's presence the bag which Sandanam had carried into the van. Had that been done, the defence of substitution, if false, would have been conclusively disproved. It would be quite unjust for me to reject the evidence of this witness as untrue without having had the advantage of seeing and hearing him for myself, particularly as he made a favourable impression on the learned Magistrate. But I am not precluded from observing that his regrettable preference for anonymity has deprived the Court of material evidence on a very vital issue.

There is one matter at least on which the learned Magistrate, in analysing the defence, has seriously misdirected himself in law. It has been proved that, at a certain stage of the investigation, the appellant was taken to the Police Station to have his statement recorded. What he stated to the investigating officer I do not know. But he admitted under cross-examination that " at that time I did not think of protesting to anybody that in reality it was a bag of rice that I put in. I cannot remember what I told the constable ". In considering this admission, the learned Magistrate made the following criticisms which, to a very large extent, formed the basis of his ultimate conclusions :

" This conduct of the accused appears to me to be the conduct of a guilty man, *for an innocent man with 31 years' service would, I think, immediately have protested his innocence* ".

It seems to me that, in making this observation, the learned Magistrate regarded the appellant's failure to disclose his defence to the Police with any precision as tantamount to a confession of guilt. That was a grave misdirection. There is no evidence that the appellant did not protest his innocence, and if he had made any statement to the Police which would justify the inference that he admitted his guilt, section 25 of the Evidence Ordinance would necessarily have shut it out.

Even in England, where a voluntary statement made by an accused person to a Police officer, after being duly cautioned, is admissible in evidence at his trial, the Courts have consistently pointed out that failure or refusal to make such a statement does not justify an inference of guilt. Similarly with regard to a prisoner's replies to the committing Magistrate. In *R. v. Naylor* [1] the prisoner, in answer to a statutory caution addressed to him by the Magistrate said, " I do not wish to say anything except that I am innocent ". At the subsequent

[1] (1952) 1 K. B. 685.

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trial, the Recorder, in his summing up to the Jury, commented on this answer and said that " if the prisoner was innocent he would doubtless have disclosed his defence in the Police Court ". The Court of Criminal Appeal held that this was a misdirection, and quashed the conviction; see also *R. v. Leckey* [1] and *R. v. Haddy* [2].

I agree that adverse comment is permissible if an accused person, by disclosing his defence at a very late stage, has thereby deprived the prosecution of a reasonable opportunity of testing the truth of his evidence—*R. v. Parker* [3], *R. v. Littleboy* [4], and *R. v. Tune* [5]. If, therefore, the learned Magistrate had confined his criticism only to the delay in disclosing the defence of substitution in so far as that delay had to some extent prejudiced the Police investigation, such comment would have been unobjectionable. But the actual criticisms which I have quoted go beyond legitimate comment. As Lord Hewart C.J. pointed out in *Littleboy's case* (*supra*) :

> " It is one thing to make an observation with regard to the force of a defence (e.g. an alibi) and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested ; *but it is another thing to employ that non-disclosure as evidence against an accused person* ".

In other words, a delay in disclosing one's defence may, in any particular case, go to the weight of the evidence which is led in support of it ; but such delay can never be regarded as evidence of guilt. The learned Magistrate seems to have misunderstood the purport of the legitimate cross-examination of the appellant on this aspect of the case.

In my opinion, it is not safe, in view particularly of this misdirection, to allow the conviction to stand. I allow the appeal and acquit the accused.

Appeal allowed.

1956 *Present :* **T. S. Fernando, J.**

SUPPRAMANIAM CHETTIAR, Appellant, *and* M. A. WAHID, Respondent

S. C. 11—C. R. Colombo, 43,869

Execution of decree to pay money—Judgment debtor an employee in a shop or office—Liability of his salary and allowances to be seized in execution—Civil Procedure Code, s. 218 (m)—Amending Act, No. 20 of 1954, has no retrospective effect—Interpretation Ordinance (Cap. 2), s. 6 (3) (b and c).

The amendment of section 218 (*m*) of the Civil Procedure Code by Act No. 20 of 1954 exempting from seizure in execution of a decree to pay money the salary and allowances of an employee in a shop or office, if such salary and allowances

[1] (*1944*) *K. B. 80.*
[2] (*1944*) *K. B. 442.*
[3] (*1933*) *1 K.B. 850.*
[4] (*1934*) *2 K.B. 408.*
[5] (*1944*) *29 C. A. R. 162.*

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do not exceed Rs. 500 per mensem, does not have any retrospective operation so as to deprive a judgment-creditor, who had obtained a decree in his favour before the date on which the amending Act came into force (viz., March 17, 1954), of his right to seize the salary and allowances payable to his judgment-debtor even after the date of the amendment.

APPEAL from an order of the Court of Requests, Colombo.

C. Ranganathan, with *S. C. Crossette-Thambiah*, for the plaintiff-appellant.

No appearance for the 2nd defendant-respondent.

Cur. adv. vult.

September 24, 1956. T. S. FERNANDO, J.—

The amendment of section 218 of the Civil Procedure Code effected by the Amendment Act, No. 20 of 1954, exempted from seizure in execution of a decree to pay money the salary and allowances of an employee in a shop or office, if such salary and allowances do not exceed five hundred rupees per mensem. This appeal raises the interesting question of law whether this amendment has retrospective operation so as to deprive a judgment creditor who has obtained a decree in his favour before the date on which the Amendment Act came into force of the right he had of seizing the salary and allowances of his judgment-debtor.

In order to discuss this question of law it is necessary first to state the relevant facts. The plaintiff filed this action on 13th February, 1953, against the 1st defendant and the 2nd defendant (who is the respondent to this appeal), and on 21st May 1953 judgment was entered against both defendants whereby they were ordered to pay jointly and severally to the plaintiff a sum of Rs. 145/62, with interest on Rs. 135 at 18 per cent. per annum from date of action up to date of decree and thereafter with legal interest on the aggregate amount until payment in full. It was further ordered that the amount of the decree was payable by the defendants by monthly instalments of Rs. 12/50, payable on the 5th day of each month commencing from 5th June 1953. In default of the due payment of a single instalment writ was to issue on the balance then due on the decree. It is admitted that the defendants paid the instalments due in June and July, 1953, and that default was made in the payment of subsequent instalments. The plaintiff applied for writ against the defendants on 24th March 1954, and in execution of that writ the fiscal seized a sum of Rs. 37/69 in the hands of the 2nd defendant's employer, the Associated Newspapers of Ceylon, Ltd., which sum represented the payment due to the 2nd defendant for working overtime in the month of June 1954. After the seizure had been effected the 2nd defendant moved the Court of Requests for a release of the seizure on the ground that the Amendment Act No. 20 of 1954 exempted this sum from seizure. It was admitted that the 2nd defendant's salary and allowances for a month do not exceed Rs. 500, that he was employed in an office within the meaning of the Act and that the payment for working overtime would come within the

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meaning of "salary and allowances" in section 218, but the plaintiff resisted the motion for the release of the seizure claiming that the right to seize the 2nd defendant's salary and allowances had accrued to him before 17th March 1954 (the date on which the Amendment Act came into force), and that such right was not taken away by the Act.

The learned Commissioner of Requests held that at the date on which the Amendment Act came into force (viz., 17th March 1954) no right had been acquired by the plaintiff to seize any payment by way of salary or allowance which had not fallen due by that date and, as the sum of Rs. 37/69 represented overtime payment in respect of June 1954, he held that the seizure had to be released. I am unable to agree with the view taken by the learned Commissioner as the right that had been acquired by or accrued to the plaintiff by 17th March 1954 was not merely a right to seize some particular property that had, so to speak, come into existence (in this case the sum of Rs. 37/69) but also the right to do something, i.e., the right to seize all salary and allowances. If it was the intention of the legislature to deprive judgment-creditors of rights they had acquired before the Amendment Act came into force, that intention should have been clearly expressed in the statute or should be one which could be gathered by necessary implication from the wording of the statute. The presumption that the legislature intends a statute to be prospective only has not been rebutted.

The rule of construction cited in Maxwell on the *Interpretation of Statutes* (10th edition), at page 221 in the following form :—

> "In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights."

is applicable in this country as well—see the case of *Guneratne v. Appuhami*[1]—and is recognized in our law by section 6 (3) (*b*) of the Interpretation Ordinance (Cap. 2) which enacts that whenever any written law repeals either in whole or in part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected any right acquired under the repealed written law. By virtue of the decree in this case on 21st May 1953 before the Amendment Act came into force a right had accrued to or become vested in the plaintiff to seize the salary and allowances of the defendant. The salary and allowances capable of being so seized were not limited to salary and allowances which had fallen due for payment by the date of decree and remaining unpaid, but extended also to salary and allowances payable even after the date of the decree. An examination of relevant authorities, both English and local, compels me to reach the conclusion that the plaintiff's claim to seize the sum in question was not affected by the Amendment Act in any way.

In the case of *Knight v. Lee* [2], the defendant employed the plaintiff, a betting agent, to make certain bets in his (the plaintiff's) name on the defendant's behalf. The bets having been made and lost, the plaintiff

[1] *(1906) 9 N. L. R. 97.* [2] *(1893) L. R. 1 Q. B. D. 41.*

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paid the amount of the losses on the defendant's account. This occurred prior to the passing of the Gaming Act, 1892. After the passing of the Act, the plaintiff commenced an action to recover from the defendant the money so paid. The defendant pleaded the Act as a bar to the action. Section 1 of the Act which was the relevant provision provided that " any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 and 9 Vict. C. 109 . . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money ". Mathew J. in the course of holding that the 1892 Act was not retrospective and that the action might be maintained stated that " the implied promise by the defendant to repay to the plaintiff the sum paid by him on the defendant's account was a perfectly valid promise at the date when it was made, and the presumption is that the legislature did not by subsequent legislation intend to deprive the plaintiff of his right under that promise ".

In the later case of *Henshall v. Porter* [1] McCardie J. called upon to consider the question whether section 1 of the Gaming Act of 1922 which enacted that no action under section 2 of the Gaming Act of 1835 to recover back money paid in respect of gaming debts " shall be entertained in any court ", held that as the plaintiff's cause of action had vested in him before the Gaming Act of 1922 had come into force he was not prevented from commencing the action after the Act came into force and was entitled to recover from the defendant. Dealing with an argument that the debt owed by the defendant gave rise only to a right to recover and that such a right was not " property ", the learned judge stated as follows at page 197 :—

> " Take the broad facts here. On July 20, 1922, the plaintiff possessed fully accrued rights under the Act of 1835. The defendant then owed him statutory debts. These debts constituted property in the fullest sense of the word. Can it be justly said that on July 20, 1922, that property was wholly destroyed by an ambiguously worded Act of Parliament ? In my opinion the answer is No."

The ratio decidendi of the case of *Hai Bai v. Perera* [2] which was concerned with the effect which an Act amending the Public Servants (Liabilities) Ordinance had on the rights enjoyed by judgment creditors appears to me to be equally applicable to the case now before me. In that case decree had been entered in favour of the plaintiff on September 30, 1952, in an action on two promissory notes. At the time the defendant borrowed money on the promissory notes he was a public servant receiving a monthly salary exceeding Rs. 300 and therefore outside the protection of the Public Servants (Liabilities) Ordinance (Cap. 88). During execution proceedings he pleaded that, inasmuch as the Public Servants (Liabilities) Ordinance, as amended by the Amendment Act, No. 10 of 1951 (which came into force on March 15, 1951), protected public servants drawing a monthly salary of Rs. 520 or less, he was entitled to be protected from proceedings in execution of the decree. Gratiaen J. in holding against this plea stated

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[1] *(1923) L. R. 2 K. B. 193, at 197.* [2] *(1954) 55 N. L. R. 442.*

that 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 or transactions entered into before 15th March 1951, and that, 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.

A decree might for all practical purposes be an empty decree if all that it permits its holder to do is to seize such sums of money as are in existence at the date of the entering of the decree. It cannot be doubted that at the date on which the decree in the present case was entered, viz., 21st May 1953, the judgment-creditor had a right to seize all sums of money falling due even after the date of decree until the decree in his favour was satisfied. Such a right is truly a vested right. What is there in the Amendment Act of 1954 to compel one to conclude that the legislature intended to take away that vested right ? I should refer in this connection to the effect of another provision of the Interpretation Ordinance, namely section 6 (3) (*c*), which provides that a repeal of a written law shall not, in the absence of any express provision to that effect, affect or be deemed to have affected any action, proceeding or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal. The action which the plaintiff instituted and which had reached the stage of the entering of the decree on 21st May 1953 had not been completed at the time the question arose before the learned Commissioner. The fact that the question arose in execution proceedings did not make it any the less a question that arose when the action was pending. In point are the observations of the Judicial Committee in the case of *Redfield v. The Corporation of Wickham*[1] in which their Lordships were considering the interpretation to be placed on a certain provision of a statute which enacted that nothing therein contained shall in any manner affect suits then pending in any court of law :—

> " the respondents are within the exception, because the section in which their decree was obtained was actually in dependence at the time of its passing. It was argued for the appellants that the exception is limited to suits during their dependence, and does not apply to proceedings taken in execution of a judgment after the suit is at an end. That construction of the clause would deprive it of all meaning."

For the reasons indicated above, I am of opinion that the accrued or vested right of the plaintiff to seize all sums of money by way of salary and allowance extended also to sums of money which had not fallen due on the date of the decree and that this right was not taken away by the Amendment Act, No. 20 of 1954. The appeal is therefore allowed with costs and the seizure in question will stand.

Appeal allowed.

[1] *(1888) L. R. 13 App. Cases 467, at 473.*

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1956 *Present :* **Pulle, J., and Weerasooriya, J.**

DE SILVA *et al.*, Appellants, *and* SILVA *et al.*, Respondents

S. C. 159—D. C., Matara, 22,869 L

Trusts—Transfer of property to defraud creditors—Constructive trust—Elements necessary—In pari delicto potior est conditio possidentis—*Rule against unjust enrichment—Trusts Ordinance, ss. 82, 83.*

A executed a conveyance of certain lands in favour of B intending to transfer to B not only the legal title to the lands but also the beneficial interest in them so as to put them beyond the reach of his creditors, fully believing that in due time B, in whom A had complete confidence, would effect a re-transfer of the same lands in favour of A.

In the present action A's intestate heirs sued B claiming a reconveyance of the lands to them.

Held, (i) that although the facts might have constituted a ground for a Paulian action at the instance of the creditors of A, no constructive trust within the meaning of sections 82 and 83 of the Trusts Ordinance was created by the conveyance executed by A.

(ii) that, even if a constructive trust was established, the plaintiffs, as heirs of A, would have to rely on the fraud committed by A. The maxim *in pari delicto potior est conditio possidentis* being applicable in the circumstances, the plaintiffs could not maintain the action.

Held further, that, inasmuch as the execution of the conveyance by A actually resulted in his creditors being defrauded and any unjust enrichment accruing to B was at the expense of the defrauded creditors and not of the plaintiffs, the plaintiffs could not avail themselves of the maxim that no person ought to be enriched at the expense of another (*nemo cum damno alterius locupletior fieri debet*).

APPEAL from a judgment of the District Court, Matara.

Sir Lalita Rajapakse, Q.C., with *A. C. Gunaratne*, for the plaintiffs-appellants.

D. S. Jayawickreme, Q.C., with *D. R. P. Goonetilleke*, for the 1st defendant-respondent.

N. E. Weerasooria, Q.C., with *D. R. P. Goonetilleke*, for the 2nd defendant-respondent.

Cur. adv. vult.

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2——J. N. B 61990—1,593 (12/56)

May 18, 1956. WEERASOORIYA, J.—

In this case the plaintiffs-appellants seek to obtain a decree declaring—

(*a*) that Deed No. 688 (P1) dated the 27th November, 1948, executed by one William Ediriweera in favour of the 1st defendant-respondent created a trust and that the 1st defendant-respondent held the several lands transferred thereon in trust for the plaintiffs ;

(*b*) that Deed No. 34065 dated the 2nd August, 1951, by which the 1st defendant-respondent purported to sell the said lands to the 2nd defendant-respondent " is of no force or avail in law as the 2nd defendant has purchased the said properties with notice of the said trust " ; and

(*c*) that the 2nd defendant-respondent is liable to re-convey the said lands to the plaintiffs.

The 1st and 2nd defendants in the respective answers filed by them take up the position that Deed P 1 was a transfer for valuable consideration paid by the 1st defendant to William Ediriweera and on the execution thereof the legal title to, as well as the beneficial interest in, the said lands passed to the 1st defendant who subsequently, by Deed No. 34065, conveyed the same to the 2nd defendant, also for valuable consideration, and they accordingly pray for a dismissal of the action.

The 1st plaintiff is the widow and the 2nd to 8th plaintiffs are the minor children of William Ediriweera who died on the 13th May, 1950, and they bring this action as his intestate heirs. The 1st plaintiff also claims to be the duly appointed administratrix of the estate of her husband in D. C., Matara, Case No. 4,472 (Testamentary).

The case went to trial originally on eight issues the first of which is in the following terms : " Was deed No. 688 of November 27, 1948 (P1) attested by Mr. R. Hewagama, Notary Public, executed by the late William Ediriweera in favour of the 1st defendant in trust for the said William Ediriweera ? ". It is clear that a decision of this issue in the negative would necessarily involve a dismissal of the entire action. Under Sections 82 and 83 of the Trusts Ordinance (Cap. 72) a constructive trust is created whenever the owner of property transfers it and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein. The burden was, therefore, on the plaintiffs to prove the alleged circumstances in which P 1 came to be executed from which it cannot reasonably be inferred that Ediriweera intended to dispose of the beneficial interest in the lands transferred thereon. In order to discharge this burden the 1st plaintiff stated in the evidence given by her at the trial that Ediriweera was very attached to the 1st defendant, who is a son of Ediriweera's mother's brother, and had complete confidence in him. About three years prior to the execution of P 1 the 1st defendant had purchased in his name, on Deed P 3, a certain land for a sum of Rs. 1,400. It has been

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established conclusively that the full consideration on P 3 was provided by Ediriweera. The 1st plaintiff also stated that on the 1st defendant's marriage he received as a gift a substantial sum of money from Ediriweera and that on other occasions as well the 1st defendant benefited by Ediriweera's generosity towards him.

There is evidence that on the same date on which P 1 was executed Ediriweera transferred to one Julian Silva, a brother of the 1st plaintiff, by Deed P 2 such divided interests in Ediriweera's residing house and garden and another land as would be allotted to Ediriweera (in lieu of his undivided interests) in two partition actions which were then pending in the District Court of Matara in respect of those lands. P 2 purports to be a deed of sale for a sum of Rs. 1,000 and is attested by the same notary who attested P 1 and he has declared in the attestation clause that the full consideration on P 2 passed in his presence. Both P 1 and P 2 have been duly registered. Although the consideration on P 1 is stated to be Rs. 7,000, the lands dealt with in that deed would appear to be worth much more, as one of them alone had been purchased by Ediriweera in 1947 at a partition sale for Rs. 7,000. The 1st plaintiff also stated that at or about the time of the execution of P 1 and P 2 Ediriweera transferred certain other lands of his in favour of one William Silva, who is another brother of the 1st plaintiff, and that after Ediriweera's death William Silva re-transferred those lands to the 1st plaintiff. Neither the original transfer in favour of William Silva nor the deed of re-transfer have, however, been produced in these proceedings.

At the time when P 1 and P 2, as also the transfer in favour of William Silva, were executed it would appear that Ediriweera was indebted to various creditors to the extent of Rs. 15,000, and that in an action filed by another creditor writ had been taken out against Ediriweera to enforce payment of the comparatively small sum of Rs. 300 for which judgment had been entered in favour of the plaintiff in that case. According to the 1st plaintiff the object of her husband in executing these transfers was to put his properties out of the reach of his creditors. That he achieved this object is shown by the fact that in two subsequent actions filed by certain of his creditors for the recovery of monies due to them the decrees which they obtained against Ediriweera remained unsatisfied. Affidavits were filed by Ediriweera in those actions stating that he was not possessed of any property or income.

The 1st plaintiff stated, further, that even after P 1 had been executed, her husband continued to be in possession of the properties which had been transferred on that deed and took the income from them. In support of this assertion she produced the documents P 5A, P 6A, P 7, P 8 and P 9. P 5A and P 6A are dated respectively the 1st December, 1948, and the 31st December, 1949, and they purport to be receipts for rent for premises described as No. 157, Bogahalange, Pinwatta. P 7 is a receipt for irrigation contribution in respect of the land Muhandiramge Ammai. Apart from the evidence of the 1st plaintiff there is nothing, however, to show that the lands to which these documents refer are any of the lands transferred on P 1. P 8 is a certified copy of a plaint filed by Ediriweera in the

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year 1945 suing a certain party in respect of an alleged encroachment of one of the lands transferred on P 1. P 9 is a certified copy of the decree entered in the case and it shows that a few months after the execution of P 1 the dispute was compromised by the payment of a sum of Rs. 550 to Ediriweera by the defendant in the case. The fact that Ediriweera agreed to this compromise does not appear in any way to bear out the evidence of the 1st plaintiff that the land which was the subject matter of that action was possessed by Ediriweera even after P 1 had been executed.

In regard to the consideration of Rs. 7,000 on deed P 1, the 1st plaintiff tried to make out that it was provided by Ediriweera. She does not claim, however, to have been present when P 1 was executed, and in order to substantiate this allegation she had to rely on the evidence of the notary who attested P 1 and his clerk. The evidence of both these witnesses was unsatisfactory and was completely discredited by the trial Judge.

After the 1st plaintiff had given her evidence-in-chief on the first date of trial, two further issues of law were raised by counsel for the 2nd defendant and allowed by the trial Judge without any objection being taken to them. These issues (as subsequently amended) read as follows:—

" 9. Did William Ediriweera purport to transfer to the 1st defendant with the intention of defrauding his creditors or with the intention of perpetrating a fraud ?

10. If so, are the present plaintiffs entitled to maintain this action for the re-transfer of the land from the 2nd defendant ? "

The 1st plaintiff was recalled and further examined-in-chief and also cross-examined, and then counsel for all the parties invited the Court to decide these issues as preliminary issues. Although counsel for the 1st defendant reserved further cross-examination of the 1st plaintiff on certain unspecified points, it would appear that at this stage all the evidence available to the plaintiffs in proof of their case had been adduced by them. The learned trial Judge thereupon gave judgment answering issue No. 9 in the affirmative and issue No. 10 in the negative and dismissing the plaintiff's action with costs. In so answering these issues the trial Judge held—

(*a*) that P 1 was executed for valuable consideration paid by the vendee to the vendor ;

(*b*) that neither William Ediriweera nor the plaintiffs had possession of the lands in suit since the execution of P 1 ; and

(*c*) that the purpose of the execution of P 1 was to delay payment of the debts due from Ediriweera to his creditors and to put the transferred lands beyond their reach and that both of these illegal objects had been achieved.

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He held on the authority of *Saurmma et al. v. Mohamadu Lebbe* [1] that as the plaintiffs, in order to establish a constructive trust as alleged by them, would have to rely on the fraud committed by Ediriweera in executing P1, the maxim *in pari delicto potior est conditio possidentis* applies and they cannot, therefore, maintain this action.

In regard to the findings at (*a*), (*b*) and (*c*) above, there is sufficient evidence on record to justify them and I see no reason to disturb them. On these findings the position that emerges is that Ediriweera in executing P 1 intended to transfer to the 1st defendant not only the legal title to the lands in question *but also the beneficial interest in them* so as to put them beyond the reach of his creditors, fully believing that in due time the 1st defendant, in whom (as the 1st plaintiff herself stated) Ediriweera had complete confidence, would effect a re-transfer of the same lands in Ediriweera's favour. Assuming that the 1st defendant was aware of the purpose of the transfer (on which matter there is no definite finding by the trial Judge) the facts may have constituted a ground for a Paulian action at the instance of the creditors of Ediriweera who were defrauded by the execution of P 1, but it is apparent that no constructive trust was created on that deed, and if the occasion had arisen for the trial Judge to decide on the other issues as well, issue No. 1 would have had to be answered in the negative and the plaintiffs' action dismissed.

In regard to the actual ground on which the plaintiffs' action was dismissed, learned counsel representing them at the hearing of the appeal sought to distinguish the present case from that of *Saurmma et al. v. Mohamadu Lebbe* (*supra*) on the submission that even if the 1st plaintiff became aware of Ediriweera's fraud it was after P 1 had been executed and that as she was no party to it neither she nor, in any event, the other plaintiffs could be regarded as *in pari delicto* so as to justify the application of the maxim relied on by the trial Judge. Learned counsel had to concede, however, that had Ediriweera himself sued the 1st defendant for a declaration that P 1 had been executed in trust the maxim would undoubtedly have been applicable and his action dismissed. I do not see how the plaintiffs can claim to be in a better position since they too have to set up Ediriweera's own fraud as the ground on which they ask for the declaration that P 1 created a constructive trust.

Learned counsel for the plaintiffs also relied on the case of *Andris v. Punchihamy* [2]. The report of this case has the misleading head-note that the point decided was that where A transferred his property to B without consideration and with the object of defrauding his creditors, it was open to the heirs of A to sue B for the same. The facts of that case are that the plaintiff sued for a declaration of title and ejectment of the defendant who was the widow of the vendor on a deed by which the latter purported to sell to the plaintiff for valuable consideration the land in dispute. The defendant while admitting the transfer stated that her husband (the vendor) received no consideration, that the deed was executed in trust and with the object of defrauding his creditors, that notwithstanding its execution the vendor remained in possession of the

[1] (*1943*) *44 N. L. R. 397.* [2] (*1922*) *24 N. L. R. 203.*

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land and that after his death she, as his widow, continued in possession. This evidence of the defendant was accepted by the trial Judge who, however, gave judgment for the plaintiff. But the judgment was reversed in appeal by Ennis J., who, while accepting the findings of fact arrived at by the trial Judge, held that although under Roman-Dutch Law a person who conveys with an intention to defraud is not entitled to any relief, this was a case where the plaintiff could not be allowed to enrich himself at the expense of the defendant who was in possession of the land. The judgment does not indicate whether the execution of the deed actually resulted in the creditors of the vendor being defrauded. In the present case, however, there is clear evidence that Ediriweera succeeded in achieving what he set out to do when he executed P 1, and even if the Roman-Dutch Law maxim that no person ought to be enriched at the expense of another (*nemo cum damno alterius locupletior fieri debet*) is applicable in an appropriate case, it cannot avail the plaintiffs in the present case since any unjust enrichment accruing to the 1st defendant was at the expense of Ediriweera's creditors and not of the plaintiffs.

The same maxim was applied in favour of the plaintiff in *Mohamedu Marikar v. Ibrahim Naina* [1] but that case too can be distinguished from the present case as it was held there that, although the plaintiff's transfer was without consideration and intended to defraud third parties, the contemplated fraud was not effected. On the facts of that case it could have been urged, therefore, that as between the plaintiff and the defendant, who was the administrator of the estate of the deceased transferee, there would have been unjust enrichment accruing to the transferee's estate at the expense of the plaintiff if the impugned deed was allowed to stand.

In my opinion the appeal fails and must be dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

1956 *Present :* **Weerasooriya, J.**

K. K. N. M. PUNCHI BANDA, Petitioner, *and* K. M. P. RAJARATNE, Respondent

Election Petition No. 3 of 1956

Election for the Welimada Electoral District No. 78 holden on 7th April, 1956

Election petition—Who may present petition—Mistake in entry of petitioner's name in register of voters—Effect thereof—Illegal practice—Effect of conviction prior to year 1956—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 (1) (c a. d f), 68A, 68B, 70, 72, 77, 79.

[1] *(1910) 13 N. L. R. 187.*

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(i) In this election petition presented by a voter under section 79 of the Ceylon (Parliamentary Elections) Order in Council, 1946, the petitioner's name as appearing in the register of voters was in every respect identical with his name as given in the caption to the election petition except for the last two letters of the last word of the name which consisted of six words. There was no doubt, however, on the evidence led at the inquiry, that the entry in question in the register of voters related to the petitioner and to no other person.

Held, that the election petition could not be rejected on the ground of a preliminary objection taken on behalf of the respondent that the petitioner was not a person who had a right to vote at the election.

(ii) By Section 16 of the Ceylon Parliamentary Elections (Amendment) Act, No. 16 of 1956—

"Where a person is at the commencement of this Act subject to the incapacity . . . . of being elected . . . . as a Member of Parliament by reason of his conviction of a corrupt practice under paragraph (*c*) or paragraph (*f*) of sub-section (1) of section 58 of the Order in Council prior to its amendment by section 15 of this Act . . . . , such incapacity shall cease on the date of the commencement of this Act notwithstanding anything to the contrary in the Order in Council.

Held, that the Section was intended to apply to those persons only whose incapacity proceeded from their having been found guilty of a corrupt practice. The Section, therefore, was not applicable to a person whose incapacity, on the date of the commencement of the amending Act, proceeded from a conviction for an illegal practice within the meaning of sections 70 and 72 of the principal Act of 1946.

ELECTION petition questioning the validity of the election and return of the respondent as the member for Electoral District No. 78 (Welimada) at the Parliamentary election held for that electoral district on the 7th April, 1956.

Issadeen Mohamed, with *Sunil K. Rodrigo*, *H. D. Thambiah* and *Nanda K. Rodrigo*, for the petitioner.

A. B. Perera, with *J. C. Thurairatnam*, *W. Wimalachandra* and *P. Gunasekera*, for the respondent.

Cur. adv. vult.

October 1, 1956. WEERASOORIYA, J.—

The petitioner Kosgaha Kumbura Navasiya Mudiyanselage Punchi Banda has filed this petition questioning the validity of the election and return of the respondent as the member for Electoral District No. 78 (Welimada) at the Parliamentary election held for that electoral district on the 7th April, 1956, on the ground that by reason of his conviction of an illegal practice the respondent was, in terms of S. 72 (1) of the Ceylon (Parliamentary Elections) Order in Council, 1946, (hereinafter referred to as the Order in Council) disqualified at the time of the said election and return from being elected as a member of Parliament.

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It would appear that at a previous Parliamentary election for the same electoral district held on the 4th July, 1952, the respondent was an unsuccessful candidate. At that election the respondent was his own election agent and he failed to transmit to the returning officer a return of his election expenses as required by S. 70 of the Order in Council. In respect of that omission he was tried on an indictment in Case No. 5193 of the District Court of Badulla on a charge of having committed an illegal practice and was found guilty of the charge on the 26th August, 1955, and sentenced to pay a fine of Rs. 100. An appeal filed against the conviction and sentence was rejected by the Supreme Court. Formal evidence in proof of this conviction was adduced by the petitioner and not challenged by the respondent.

Paragraph 1 of the petition avers as the ground entitling the petitioner to present this petition in terms of S. 79 of the Order in Council that he is a person who had a right to vote and voted at the election to which it relates. At the trial a preliminary objection was taken by counsel for the respondent that the petitioner was not a person who had a right to vote at the election in question, but as this was a matter which formed part of the case to be established by the petitioner before he became entitled to the relief claimed by him, counsel for the respondent agreed that the trial might be proceeded with and the point raised by him decided along with the substantial question of the disqualification of the respondent.

The register of electors in operation for the 1956 Parliamentary elections is the document P6. At page 248 of it in entry No. 285 appears the name Kosgahakumbura Navasiya Mudiyanselage Punchibandara as one of the electors in Palugama Town. The same name appears in entry No. 272 at page 181 of the register R1 on which the 1952 Parliamentary elections were held. That name is in every respect identical with the petitioner's name as given in the caption to the petition except for the last two letters of the last word. The question that arises is whether the said entry No. 285 in P6 does not relate to the petitioner but relates to some other person.

The petitioner is the Chairman of the Village Committee of Udapalata and prior to his election as Chairman he was for several years its Vice-Chairman. He stated in evidence that although his name is as given in the caption to the petition, he is sometimes referred to as Punchi Bandara by way of respect. He concedes, however, that Punchi Bandara may also in certain cases denote a different name from Punchi Banda. While in view of the variation further inquiry is called for and the burden is on the petitioner to establish that entry No. 285 at page 248 of P6 relates to him, there is, apart from the evidence of the petitioner himself, the evidence of the Village Headman of Palugama and Proctor Ratnayake, both of whom claim to know the petitioner for a considerable period, that they have heard him occasionally addressed or referred to as Punchi Bandara, being a respectful variation of the name Punchi Banda. It was conceded by learned counsel for the respondent that the question whether the said entry No. 285 in P6 relates to the petitioner or not is one of fact. He submitted, however, that the entry relates to an entirely

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different person from the petitioner. But no evidence was adduced on behalf of the respondent to contradict the evidence of the Village Headman or Proctor Ratnayake or to show that there is a person other than the respondent to whom the entry may relate. In the absence of such evidence learned counsel for the respondent restricted himself to a criticism of the evidence of the petitioner, in particular, and of the Village Headman of Palugama as unworthy of credit. The petitioner stated that there was no other person in Palugama Town who bore the identical name as himself but he admitted that outside the town area of Palugama there was one other person having the same name who had left the locality some three years ago and has since been resident in Gal-Oya. This admission, however, little avails the respondent since the entry referred to can relate only to a person who is a resident within the Palugama Town area and it is the petitioner's evidence that he has throughout been residing within that area. The petitioner also stated under cross-examination that his name appeared as a voter in the register on which the 1947 Parliamentary elections were conducted and that he exercised his right to vote on that occasion, but he was contradicted on this point by the production of the register R2 according to which his name (or the name as given in entry No. 285 at page 248 of P6) does not appear as an elector in the Palugama Town area. Counsel for the respondent drew attention to this evidence of the petitioner as indicative of his general unreliability as a witness. The Village Headman of Palugama stated that in connection with the compilation of the registers P6 and R1 he visited the various households in the Palugama Town and other areas within his jurisdiction and drew up lists of the several occupiers constituting each household. While granting that for any official purpose he would not have referred to the petitioner as Punchi Bandara he said that he may have inadvertently entered the petitioner's name in that form in these lists although he did not undertake to be definite about it as he had no clear recollection of the matter. Learned counsel for the respondent stressed the improbability that the petitioner's name would have been so entered by the Village Headman in these lists and that it is more likely, therefore, that entry No. 285 at page 248 of P6 and entry No. 272 at page 181 of R1 relate to a person other than the petitioner.

Having given careful consideration to these and the other submissions made by counsel for the respondent in this connection, I hold on the evidence before me that entry No. 285 at page 248 of P6 relates to the petitioner and that he is, therefore, competent to present this petition.

I shall now deal with the next and only other question for determination in these proceedings, namely, whether the respondent was by reason of his conviction on the 26th August, 1955, for an illegal practice incapable of being elected as a member of Parliament at the time of his election and return as the member for Electoral District No. 78 (Welimada) at the 1956 Parliamentary elections. S. 72 (1) of the Order in Council provides that one of the disqualifications consequent on a person being convicted by a District Court of an illegal practice is that he shall be incapable for a period of three years from the date of his conviction of being elected as a member of Parliament, which expression is defined

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in S. 3 (1) of the same Order in Council as meaning a member of the House of Representatives. P8 is a copy of the *Ceylon Government Gazette* containing a notification dated the 10th April, 1956, in terms of S. 50 of the Order in Council that the respondent had been elected as a member of the House of Represenatives for Electoral District No. 78 (Welimada). This notification refers to a proclamation dated the 18th February, 1956, and published in the *Ceylon Government Gazette* of that date by which the Governor-General dissolved the existing Parliament and summoned a new Parliament to meet on the 19th April, 1956, and also, *inter alia*, fixed certain dates for the general election of members of Parliament. The date of the respondent's election, according to the evidence, was the 7th April, 1956. It is, therefore, clear that if S. 72 (1) of the Order in Council applies to this case the respondent was at that date incapable of being elected as a member of the House of Representatives.

Learned counsel for the respondent argued, however, that in view of certain provisions of the Ceylon Parliamentary Elections (Amendment) Act, No. 16 of 1956 (hereinafter referred to as the amending Act) the disqualification in S. 72 (1) of the Order in Council cannot be said to have attached to the respondent consequent on his conviction of the illegal practice in the District Court case against him.

The preamble to the amending Act refers to certain recommendations of a Select Committee appointed to report on amendments to the Order in Council and to the need to give effect to some of them and also to terminate the incapacity to which any person was subject on the date of the commencement of the amending Act (the 16th February, 1956) " by reason of an act or omission which before that date *was a corrupt practice* and which on or after that date will be an illegal practice ".

The amending Act provided, *inter alia*, for the repeal of paragraphs (*c*) and (*f*) of S. 58 (1) of the Order in Council and also introduced two new sections, 68A and 68B, into the Order in Council ; and the effect of these provisions (to put the matter shortly) was that a candidate or election agent who, prior to the 16th February, 1956, would have been guilty of a corrupt practice in regard to any act or omission as specified in paragraphs (*c*) and (*f*) of S. 58 (1) of the Order in Council would, subsequent to that date, have been guilty of only an illegal practice and punishable accordingly. It may be stated here that the period of disqualification from being elected as a member of the House of Representatives in the case of a person convicted of a corrupt practice is seven years whereas in the case of a person convicted of an illegal practice it is only three years.

It was stated from the Bar by counsel for both parties that at the time when the amending Act was introduced as a bill in Parliament one E. L. Senanayake had, in proceedings in which his election as the member of Parliament for Kandy at the 1952 Parliamentary elections was challenged, been found guilty by the report of an election Judge of corrupt practices under paragraphs (*c*) and (*f*) of S. 58 (1) of the Order in Council, and the finding had been affirmed in appeal. Senanayake was a member of the United National Party and had been put forward

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as the party candidate at the 1952 elections. Counsel also stated that under the relevant provisions of the Order in Council the finding of the election Judge had the same effect as a conviction by a District Court of the corrupt practices involved in the finding and consequently at the time referred to Senanayake was under the incapacity that such a conviction entailed and would have remained in that state of incapacity for a further considerable period and certainly during the next general election of a new Parliament that was then expected to take place shortly.

S. 16 of the amending Act provides for the termination of any existing incapacity in any person arising out of the commission by him, prior to the commencement of the operation of that Act, of a corrupt practice under paragraphs (*c*) or (*f*) of S. 58 (1) of the Order in Council as it then stood. The effect of S. 16 was undoubtedly to relieve Senanayake of the incapacity under which he lay and make him eligible thereafter for election as a member of Parliament.

The argument of learned counsel for the respondent that S. 72 (1) of the Order in Council does not operate so as to render the respondent incapable of being elected as a member of Parliament for a period of three years consequent on his conviction for an illegal practice is based almost entirely on S. 16 of the amending Act and, paradoxically as it were, S. 16 seems to be the very section which also destroys his argument. According to learned counsel the provisions of S. 16 and, indeed, all the other provisions of the amending Act are of general applicability and are not to be construed in favour of a particular individual only. If S. 16 is construed as not applicable to the respondent who was the only other person besides Senanayake who at the time of the coming into operation of the amending Act was known to be under the same incapacity though for the shorter period of three years, consequent on his conviction of an illegal practice, it would lead to injustice and absurdity which the legislature could never have intended and such a construction should, therefore (in counsel's submission), be avoided.

Learned counsel conceded that on a plain reading of the language used in S. 16 of the amending Act the respondent would appear not to come within the benefit of it. But he contended that this was a case where such additional words as may be necessary should be read into its provisions so as to extend the provisions to the case of a person who at the time of the commencement of the operation of the amending Act was under incapacity consequent on his conviction of an *illegal practice*.

As stated in the case of *The King v. Ettridge*[1] a Court of Law may in construing a particular statute " reject words, transpose them, or even imply words if this be necessary to give effect to the intention and meaning of the legislature ; and this is to be ascertained from a careful consideration of the entire statute ". Maxwell in his treatise on the Interpretation of Statutes[2] deals with the same matter under a chapter which is headed " Exceptional Construction " and in a passage which reads as follows :—

" Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the

[1] (*1909*) *2 K. B. D. 24 at 28.* [2] (*10th edition*) *Chap. 9, 229.*

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apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, or by rejecting them altogether, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a Statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense."

When one turns to S. 16 of the amending Act and compares its language with the wording in the preamble there is no room for the view that construing that section according to the ordinary meaning of the language used would lead to a manifest contradiction of the apparent purpose of the enactment or that it was the intention of the legislature that a person under incapacity as a result of a conviction of an illegal practice should come within the benefit of the section but that intention has been reduced to a nullity by the draftsman's unskilfulness in the choice of his words. In my opinion neither in the preamble nor in the section itself could it have been more plainly indicated that the section was intended to apply to only those persons whose incapacity proceeded from their having been found guilty of a corrupt practice. I find no difficulty, therefore, in holding that in terms of S. 72 (1) of the Order in Council the respondent was at the time of his election which is challenged in this petition incapable of being elected as a member of the House of Representatives, and that S. 16 of the amending Act is not inconsistent with such an interpretation.

S. 77 of the Order in Council provides that the election of a candidate as a member of Parliament shall be declared void if on an election petition it is proved to the satisfaction of the election Judge that the candidate was at the time of his election a person disqualified for election as a member of Parliament. I accordingly declare that the election of the respondent as the member for Electoral District No. 78 (Welimada) at the Parliamentary election held on the 7th April, 1956, was void. In regard to the relief in paragraph (*b*) of the prayer in the petition claiming the seat for one of the other candidates, counsel for the petitioner stated at the commencement of the trial that he was abandoning that claim. The respondent will pay the petitioner's costs of these proceedings which by agreement of counsel for both parties are fixed at three hundred guineas.

Election declared void.

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1956 *Present :* **Gunasekara, J., and Sinnetamby, J.**

S. M. SOLAMUTHU, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 84/1956—Application C/4,417/0

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 15—Right of appeal thereunder—Power of Supreme Court to order fresh inquiry—Application for registration—Evidential value of investigation officer's report.

The appellate jurisdiction that is conferred on the Supreme Court by section 15 of the Indian and Pakistani Residents (Citizenship) Act necessarily involves a power to set aside the order that is appealed from ; and such a power in turn implies a power to order the Commissioner to take any consequential steps which it may be necessary for him to take so that he may dispose of the application for registration.

Where, in an application for registration under the Indian and Pakistani Residents (Citizenship) Act, the rejection of the applicant's testimony that he was resident on a certain Estate was based entirely upon an allegation in an investigation officer's report which was not disclosed to the applicant and which he was given no opportunity of meeting—

Held, that it was not open to the Commissioner to reject the applicant's evidence upon such a ground.

APPEAL against an order made under the Indian and Pakistani Residents (Citizenship) Act.

Cecil de S. Wijeratne, for the applicant-appellant.

R. S. Wanasundera, Crown Counsel, for the respondent.

Cur. adv. vult.

November 9, 1956. GUNASEKARA, J.—

This is an appeal against an order made under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, refusing an application made by the appellant, Sithambalam Mookan Solamuthu, for registration as a citizen of Ceylon.

The application is dated the 20th July 1951 and the order in question was made by a deputy commissioner on the 14th December 1955 after an inquiry held on that day in pursuance of a decision under section 9 (3) (*a*) of the Act. One of the questions for determination at this inquiry was whether the appellant had been continuously resident in Ceylon during the period 1st January 1936 to 20th July 1951. The only evidence

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adduced at the inquiry was that of the appellant himself, who presented his case in person. At the close of his evidence the deputy commissioner made the following order :—

> " Applicant has no witnesses to prove the period of residence from 1–1–36 to 1947. During this period he states he was at Erracht Estate and at Sunderland Estate. Particulars verified at Sunderland Estate show that Solamuthu s/o Mookan who had been at Sunderland Estate is married, whereas the applicant states that he is not married. As such this evidence cannot relate to applicant. There is also no evidence of residence of applicant at Erracht Estate. It was open to applicant to produce witnesses to prove his period of residence, but he failed to do so. He has no documentary evidence either. I refuse the application and inform the applicant accordingly ".

The verification that is referred to by the deputy commissioner was an investigation made by an officer of his department behind the appellant's back. The rejection of the appellant's testimony that he was resident on Sunderland Estate is based entirely upon an allegation in the investigating officer's report which was not disclosed to the appellant and which he was given no opportunity of meeting. It was not open to the deputy commissioner to reject the appellant's evidence upon such a ground. He was also in error when he held that there was " no evidence of residence of applicant at Erracht Estate ". On that point he had before him the oral evidence of the appellant and a certificate from the superintendent of the estate which the appellant had submitted in support of his application. For these reasons, the order that is appealed from must be set aside.

There has been no proper inquiry into the appellant's application, and an order cannot be made upon it until such an inquiry has been held. It is contended for the Crown that this court has no power to remit the case to the respondent for a fresh inquiry. It seems to me that even in that view of the law a fresh inquiry must be held once this court has set aside the order that is the subject of the appeal ; for the proceedings upon the application cannot end at the point at which they would then be left, but must be continued by the Commissioner from that point.

The learned crown counsel has cited the case of *Pitchamuthu v. Commissioner for Registration of Indian and Pakistani Residents* [1] as supporting his contention. The decision in that case, however, provides no answer to the present question. The question there was whether, in a case where the order that was appealed from was not shown to be wrong, this court had the power to remit the case to the Commissioner to enable the appellant to supplement his case by adducing further evidence. That is different from the present question, which is whether, in a case where the order that is appealed from is set aside, this court can order a fresh inquiry. In my opinion, the appellate jurisdiction that is conferred on the court by section 15 of the Act necessarily involves a power to set aside the order that is appealed from ; and such a power in turn implies a power to order the Commissioner to take any consequential steps which

[1] *(1955) 57 N. L. R. 184.*

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it may be necessary for him to take so that he may dispose of the application for registration. In *Paramasivam v. Commissioner for Registration of Indian and Pakistani Residents*[1] Gratiaen J. held, *obiter*, that this court has the power and the duty to order a fresh inquiry whenever justice cannot be achieved by other means. With all respect, I agree with that view.

I would set aside the order made by the deputy commissioner and order that a fresh inquiry be held in pursuance of section 9 (3) (*a*) of the Act, and I would order the respondent to pay the appellant Rs. 105 as the costs of this appeal.

SINNETAMBY, J.—I agree.

Order set aside.

1956 *Present :* **T. S. Fernando, J.**

K. N. MEERA, Appellant, *and* C. D. P. W. JAYAWARDENE, Respondent

S. C. 243—C. R. Colombo, 54,839

Landlord and tenant—Advance rent received by landlord—Right of tenant to set off unpaid rent—" Receipt " of money—Rent Restriction Act, No. 29 of 1948, ss. 8, 13 (1).

Where a landlord accepts from his tenant a sum of money in advance to be accounted as and for rent, the tenant is entitled to set off unpaid rent against the sum so held by the landlord.

David Appuhamy v. Subramaniam (1953) 55 N. L. R. 397, distinguished.

A settlement in account may be equivalent to a receipt of a sum of money, although no money may pass.

APPEAL from a judgment of the Court of Requests, Colombo.

C. Ranganathan, with *S. C. Crossette-Thambiah*, for the defendant-appellant.

H. W. Jayewardene, Q. C., with *D. R. P. Goonetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

[1] *(1955) 56 N. L. R. 514 at 517–518.*

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September 25, 1956. T. S. FERNANDO, J.—

The facts giving rise to this appeal may be stated as follows :—

The plaintiff and her husband (since deceased) leased to the defendant the premises, the subject of this action, for a period of five years commencing from 1st April 1946 at a monthly rental of Rs. 125, each month's rent to be payable before the 10th day of the month following. On the day of the execution of the lease the defendant paid to his lessors a sum of Rs. 750 and it was a term of the lease that this sum was " to be taken and accounted as and for the rent of the last six months of the term " of the lease, i.e. 1st October 1950 to 31st March 1951. In spite of this term of the lease the sum of Rs. 750 referred to above was not accounted for as rent for the last six months of the lease, and the defendant paid and the lessors accepted rent for each month during the entire period of the lease so that on 31st March 1951 there remained in the hands of the lessors the sum of Rs. 750 which had been accepted by them to be accounted as rent.

No fresh lease was drawn up after the end of March 1951, but the defendant continued in occupation of the premises paying for each month the same rent of Rs. 125 before the 10th day of the month following. The learned Commissioner of Requests has inferred from the evidence—and this inference is not canvassed by the plaintiff—that there was an understanding between the parties that the sum of Rs. 750 should continue to remain as an advance to be set off against the last six months of occupation of the premises by the plaintiff. In August 1951 one of the lessors, the husband of the plaintiff, died but the defendant continued to pay to the plaintiff each month's rent as usual until he had paid the rent for April 1954. The sums payable as rental in respect of the months of May, June and July not having been received by the plaintiff, she caused to be sent to the defendant a letter of demand dated 4th August 1954 demanding the payment of rent for May to July 1954 and also requesting the defendant to quit the premises on or before 30th September 1954. The defendant thereupon sent a cheque for Rs. 375 which was accepted without prejudice to any rights of the plaintiff to pursue her legal remedy to obtain the ejectment of the defendant. This action was instituted in October 1954 on the allegation that the defendant was in arrears of rent for May, June and July 1954. The defendant pleaded in his answer that he was not in arrears within the meaning of section 13 (1) of the Rent Restriction Act, No. 29 of 1948 as at the time he became the tenant of the plaintiff the latter held in her hands a sum of Rs. 750 as six months' rent in advance, and that out of this sum he was in any event entitled to set off at least a sum of Rs. 375 against rent payable by him. The learned Commissioner held that the defendant was in arrears of rent for the month of May 1954 and that the plaintiff was therefore entitled to a decree ordering the ejectment of the defendant.

In reaching this finding the learned Commissioner has purported to apply to this case the decision of this Court in the case of *David Appuhamy v. Subramaniam*[1] in which it was held that, 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

[1] (*1953*) *55 N. L. R. 397.*

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are handed over to him, it is not open to the tenant to set off the rent, as it fell due each month, against the deposit held by the landlord. If he does so set off, he is liable to be held in arrears of rent. This decision is clearly inapplicable to the facts in the case now under appeal as we are not here concerned with a sum of money *agreed to be received as a deposit* but with a sum of money accepted to be accounted as and for rent. An examination of the judgment of Pulle J. in *David Appuhamy v. Subramaniam* (*supra*) will reveal that there were two sums of money which the tenant claimed could be used for setting off the rent, viz.—(i) a sum of money being two months' rent in advance, and (ii) a sum of Rs. 500 being a deposit to be returned on the vacation of the premises, and that the learned Judge only stated that the rent could not be set off against the sum agreed on as a deposit which was to be returned to the tenant when the premises were handed back by the tenant and that he refrained from saying anything which could be interpreted as meaning that the rent could not be set off against the sum received as advance rent.

Even if the legal position at the date of the death of the plaintiff's husband in August 1951 was that a half of the sum of Rs. 750 which up to that date was in the hands of the lessors had to be treated as a debt owing from the estate of the plaintiff's husband to the defendant, it is undeniable that the plaintiff continued to hold the other half, viz., a sum of Rs. 375, on the same terms as were set out in the lease of 1946. Mr. Jayewardene argued that on the expiry of the lease there was no money of the defendant with the plaintiff, and all that existed was a debt owing from the plaintiff to the defendant which could have been recovered by action. This argument is not entitled to weight in the face of the finding of the learned Commissioner that on the 1st of April 1951 and again in August 1951 the parties had agreed that the sum of Rs. 750 should continue to remain as advance rent to be applied as stated in the written lease which had expired.

In support of an argument that there could be no set-off as the sum of Rs. 750 or Rs. 375 (whichever may be the sum considered) was never received by the plaintiff within the meaning of section 8 of the Rent Restriction Act, Mr. Jayewardene next contended that, there being no physical passing of money in April or August 1951, an agreement between the plaintiff and the defendant that money in the hands of the plaintiff should continue in her hands does not constitute a receipt of the money by the plaintiff. I am unable to agree that I should take such a narrow and technical view as that which Mr. Jayewardene invites me to take. If I were to accede to his argument I would be transforming the true nature of the agreement reached between the parties. On the other hand, applying some of the tests indicated in the following observations of Lord Lindley in *Gresham Life Assurance Society, Ltd. v. Bishop*[1] to determine whether there has been a *receipt* of a particular sum of money, I find no difficulty in agreeing with Mr. Ranganathan that a sum of Rs. 375 was "received" by the plaintiff from the defendant:—

"First, let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of

[1] *L. R.* (*1902*) *A. C. 296.*

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money may be received in more ways than one, e.g. by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass ; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which Your Lordships have to interpret."

As a final argument, Mr. Jayewardene contended that the defendant, not having pleaded a set-off is not entitled to defeat the plaintiff's claim. In regard to this, it must be observed that the plea of set-off has been taken in the answer, although not specifically raised as an issue, and it seems to me is embraced in Issue No. 1 which raised the question whether rent was in arrear for May 1954. But even if no plea of set-off had been taken, as the finding of the learned Commissioner is that the sum of Rs. 750 was accepted " as and for rent ", the defendant can invoke in his aid the judgment of this Court in *Wijemanne & Co., Ltd. v. Fernando*[1] in the course of which Soertsz S. P. J. dealing with an argument that the tenant had not pleaded a set-off or a counter claim and was, consequently, debarred from asking that the overpaid amount be applied in payment of the rent alleged to be still due, said that the answer to that argument is that the overpaid amount in the hands of the respondent overpaid as *rent*, and not for any other purpose, extinguished *pro tanto* by operation of law, the rent as it fell due. In other words, the law secured for the appellant what, in other circumstances, the appellant would have had to achieve for himself. The principle so enunciated by Soertsz S. P. J. has been followed recently by De Silva J. in the case of *Munidasa v. Richard Appuhamy*[2]. This argument also therefore fails.

For the reasons set out above, I am of opinion that the defendant was not in arrears of rent and, therefore, the appeal must be allowed and the plaintiff's action dismissed with costs in both courts.

Appeal allowed.

1956 *Present :* **H. N. G. Fernando, J.**

A. H. M. ABDUL CADER, Appellant, *and* MRS. B. MUNASINGHE, Respondent

S. C. 253—C. R. Colombo, 42,697

Paulian action—Decree setting aside alienation in fraud of creditors—How far it extinguishes title of transferee.

The setting aside of a deed of transfer in consequence of a decree entered in a Paulian action does not revest the property, which was the subject of the transfer, in the transferor. The fraudulent deed is not annulled but is only declared void so far as it is necessary to make the property available for execution. The title to so much of the property as is not required to be sold in execution remains in the transferee.

[1] *(1946) 47 N. L. R. 62.* [2] *(1955) 57 N. L. R. 110.*

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APPEAL from a judgment of the Court of Requests, Colombo.

E. B. Wikramanayake, Q.C., with *M. Somasunderam*, for the plaintiff-appellant.

A. Nagendra, for the defendant-respondent.

Cur. adv. vult.

November 2, 1956. H. N. G. FERNANDO, J.—

The property which is the subject of this action belonged at one time to a Doctor Ferdinando, now deceased. By his last will he devised a life interest in this and other properties to his widow subject to a condition that the widow should pay a sum of Rs. 150 a month plus any such medical expenses as may be incurred, to the deceased's sister.

In action No. 18,650 D. C. Colombo, instituted in 1947, the sister sued the widow for monies due under the terms of the last will, and decree was entered on 1st September 1949 ordering the widow to pay to the sister a sum of Rs. 1,885 odd together with costs of the suit. Two days later the widow transferred her life interest in all the properties to the present appellant by deed No. 2,322 and when the property in question was seized in execution of the decree in that action, it was successfully claimed by the present appellant. In consequence the sister had to file a Paulian action combined with an action under section 247 of the Civil Procedure Code, (No. 386-Z) for an order setting aside the deed No. 2,322 as having been executed in fraud of the sister as judgment creditor, and for a declaration that the property was liable to be seized and sold under the writ in the action No. 18,650. For obvious reasons the sister was successful in this second action, and decree was entered setting aside the deed No. 2,322 as having been executed in fraud of creditors and ordering that all the lands and premises described in the schedule to the plaint are liable to be seized and sold under the writ in case No. 18,650. Some time after the decree was entered the present plaintiff deposited in Court to the credit of case No. 18,650 the amount decreed to be due to the plaintiff (the sister of the deceased) in that case and the amount so deposited was subsequently withdrawn by the sister.

While action under 386-Z was pending, the sister instituted another action (D. C. 24,925) against the widow claiming a further sum of Rs. 5,000 odd from the widow as being due under the terms of the last will of Doctor Ferdinando, and decree was entered in favour of the sister for that sum and costs in September 1954. Subsequently writ was issued in execution of that decree and the premises now in suit were seized and sold under the writ to one Mr. Mendis.

In the present action the plaintiff (who had purchased the premises in suit by deed No. 2,322 on October 2nd 1949) has sued the defendant for rent and ejectment on the ground that the defendant is the tenant of the plaintiff and failed to pay rent for the months of October and November 1952. The defendant had attorned to the present plaintiff

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after his purchase of the property and was clearly the tenant of the plaintiff. In the ejectment action consent decree was entered, one term of which was that the defendant would pay rent to the plaintiff in accordance with the consent order. She failed however to pay rents after November 1953 and, in terms of the consent decree, the plaintiff has asked for writ against the defendant on the ground of non-compliance with the consent decree. In her objections to the application for writ the defendant takes up the position that the sale to Mr. Mendis in D. C. No. 24,925 and the declaration in the Paulian action No. 386-Z have extinguished the title of the present plaintiff. The defendant accordingly claims that she can now deny the title of the plaintiff and is paying the rent to Mr. Mendis. The learned Commissioner has agreed with this contention and held that the defendant now rightly claims to occupy the premises as the tenant of Mr. Mendis.

In my opinion the decision of the learned Commissioner is based on a misconception of the effect of the decree in the Paulian action. It was decided by de Sampayo J. in *Gunawardene v. Bilindahamy* [1] that " a fraudulent deed is not annulled but is only declared void so far as it is necessary to make the property available for execution ". Citing this dictum with approval in *Punchi Banda v. Perera et al.* [2] Fischer C. J. held that the title to so much of the property as is not required to be sold in execution remains in the transferee. Applying these principles to the present case it will be seen that the decrees in the Paulian action No. 386-Z only rendered the transfer to the present plaintiff void in so far as it was necessary to make the property available for execution of the decree in fraud of which the transfer took place, that is of the decree in action No. 18,650. If, therefore, the property had been sold in execution of that decree, the title in the property would have passed from the present plaintiff to whoever may have purchased it at the execution sale. But in fact this property was not required to be taken in satisfaction of the decree because the plaintiff paid the amount of the decree into Court, and because in any event no further proceedings have been taken to execute that decree. All that has happened is that *another* action (24,925), to which the present plaintiff was not even a party, was instituted by Doctor Ferdinando's sister against his widow for the recovery of further arrears due from the widow. Although decree was entered in that action in favour of the sister, the deed of transfer in favour of the plaintiff was never set aside *quoad* that decree ; and indeed I do not see how that transfer could, in law, have been set aside for the purpose of satisfying a claim which had not accrued due at the time of the transfer. In any event what was sold in execution of the decree in Case No. D. C. 24,925 and purchased in execution by Mr. Mendis was the right, title and interest of the widow, and what was precisely held in the case of *Punchi Banda v. Perera* was that the setting aside of the deed in a Paulian action does not revest the property in the person who originally conveyed in fraud of creditors. That being so, the widow did not at the time of the execution sale under D. C. 24,925 enjoy any interest in the premises in suit nor also did any such interest pass to Mr. Mendis, the execution purchaser.

[1] *1 C. W. R. 95.* [2] *(1928) 30 N. L. R. 355.*

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The order appealed from must therefore be set aside and the case will be remitted to the Court of Requests for writ to be issued in terms of the plaintiff's application therefor. The defendant will pay to the plaintiff the costs of this appeal and the costs of the proceedings in which the order appealed against was made.

Appeal allowed.

1956 *Present:* **Basnayake, C.J., and K. D. de Silva, J.**

HEEN BANDA, Petitioner, *and* W. H. BUS COMPANY LIMITED, Respondent

S. C. 424—Application for Conditional Leave to appeal to the Privy Council in S. C. 23/D. C. Kandy, 3,656

Privy Council—Application for conditional leave to appeal—Respondent a Company—Mode of service of notice of application—Companies Ordinance, s. 351—Appeals (Privy Council) Ordinance, Schedule, Rule 2.

When a limited liability company is the respondent to an application for conditional leave to appeal to the Privy Council, notice as required by Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance can only be given to the Company in the manner prescribed by section 351 of the Companies Ordinance, i.e., by being left at or sent by post to the registered office of the Company. Notice left at or sent by post to an address which is given in the pleadings as the place where the business of the Company is carried on, but which is not the registered office of the Company, is not sufficient.

APPLICATION for conditional leave to appeal to the Privy Council.

S. Sharvananda, with *J. V. C. Nathaniel*, for Defendant-Appellant.

H. V. Perera, Q.C., with *H. D. Thambiah*, for Plaintiff-Respondent.

Cur. adv. vult.

May 15, 1956. BASNAYAKE, C.J.—

This application for conditional leave to appeal to the Privy Council was opposed on the ground that notice, as required by Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance, has not been given. That Rule reads 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."

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It was contended on behalf of the respondent, a limited liability company registered in Ceylon, that notice of this application has not been given in the manner prescribed by section 351 of the Companies Ordinance. That section reads :—

> " A document may be served on a company by leaving it at or sending it by post to the registered office of the company. "

It is admitted that the appellant sent the notice to No. 52 Malabar Street, Kandy, which is the address given by the respondent in the plaint and is the place where the business of this Company is carried on ; but it was not the registered office of the Company at the relevant date. Learned counsel for the respondent contended that whatever may be the real business place of the Company, a notice can only be given to a limited liability company by being left at or sent by post to the registered office of the Company.

A Company derives its legal status from the statute regulating the registration of Companies. When that statute prescribes a mode of service of documents on a Company that procedure should be followed. In the instant case the notice under Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance has not been left at or sent by post to the registered office of the respondent Company. The objection must therefore be upheld.

The application is refused with costs.

K. D. DE SILVA, J.—I agree.

Application refused.

1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

A. P. FERNANDO, Appellant, *and* C. T. ANTHONY, Respondent

S. C. 74 — D. C. Gampaha, 4,165/L

Appeal—Abatement—Application for typewritten copies—Failure to furnish the necessary fees along with it—Fatal irregularity—Civil Appellate Rules, 1938, Rules 2 (1) and 4—Payment into Court Order, 1939, Clause 1 (5).

The provision of Rule 2 (1) of the Civil Appellate Rules, 1938, that an application for typewritten copies " shall be accompanied by the fees prescribed in the schedule hereto " is an imperative, and not merely a directory, provision of law. Failure to comply with it is fatal to the reception of the appeal.

Under Clause 1 (5) of the Payment into Court Order, 1939, the date of the receipt given by an authorised Treasury officer is deemed to be the date of a payment into Court of any money required by any written law to be paid in connection with any action or proceeding.

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APPEAL from a judgment of the District Court, Gampaha.

A. H. C. de Silva, Q.C., with *N. U. Weerasekera*, for the defendant-appellant.

Walter Jayawardene, with *M. Sanmuganathan*, for the plaintiff-respondent.

Cur. adv. vult.

November 20, 1956. T. S. FERNANDO, J.—

A preliminary objection to the hearing of this appeal has been raised on the ground that the appeal has abated in terms of rule 4 of the Civil Appellate Rules, 1938, on the appellant failing to make application for typewritten copies of the record in accordance with the requirements of rule 2 (1) of the same Rules.

Rule 2 (1) requires that an application for typewritten copies "shall be accompanied by the fees prescribed in the schedule hereto". The application was made on 27th January 1956 at the time the petition of appeal was itself filed in court, but the fees prescribed were paid to the Treasury officer specially stationed at Gampaha only on 2nd March 1956. There was therefore a failure to comply with the requirements of rule 2 (1), and the question that now arises is whether this provision of law embodied in the rule is an imperative or mandatory provision or one which is merely directory.

In dealing with the construction of enabling Acts of Parliament, it is stated in Craies on Statute Law, 5th ed., at page 242, that

> "It being, then, well settled that the neglect of the requirements of an Act which prescribes how something is to be done will invalidate the thing being done, if the enactment is absolute, but not if it is merely directory, we have now to consider whether there is any general rule as to when an enactment is to be considered absolute and when merely directory".

After adverting to a dictum of Grove J. to which I shall now refer, it is further stated that, except as to time, there is no general rule as to when enabling Acts are absolute and when directory. In the case of *Barker v. Palmer* [1], Grove J., in interpreting a certain rule of the County Court Rules, 1875, which required a plaintiff to deliver the summons to the bailiff within a stated number of days, said that "in construing Acts of Parliament provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held directory. The rule is that provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court". It is of interest in this connection to observe that, whereas in the Civil Appellate Rules of 1913 there was express provision (in rule 5) enabling the Court, where it appeared to the Court to be reasonable, to allow an extension of time for an application to be made for typewritten copies, in the present Civil Appellate Rules which superseded the 1913 Rules the provision relating to extension of time has been omitted. There is therefore a further

[1] *L. R.* (1881) 8 *Q. B. D.* 10.

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indication of the intention of the framers of the Rules as to the consequences of the failure to make the application in accordance with the Rules. Moreover, it may be mentioned that Pulle J. has already held in the course of the decision in *Abdul Cader v. Sittinisa* [1] that that part of the rule 2 (1) which states that the application shall be accompanied by the fees prescribed in the schedule is clearly fundamental. I am in respectful agreement with that view and would hold that rule 2 (1) embodies an imperative or mandatory provision of the law and that the failure to comply with that provision is fatal to the reception of this appeal.

Learned Counsel for the appellant urged that it is not now possible to comply with the provisions of rule 2 as the Secretary of the District Court of Gampaha does not accept payment in cash and that administratively payment has to be made to a Treasury officer specially stationed at Gampaha. It appears to have been assumed in the course of an argument that took place in the District Court of Gampaha that, whereas the rule requires the appellant to make payment for the copies in cash to the Secretary of the District Court, an administrative practice exists in the District Court whereby everybody acts contrary to rule 2 by making payment to the Treasury officer referred to above. In making this assumption, the learned District Judge appears to have lost sight of The Payment into Court Order, 1939, made under section 49 of the Courts Ordinance and published in *Gazette* 8,526 of 13th October, 1939. An examination of this Order will show that the practice referred to by the learned District Judge as merely an administrative practice is entirely legal, and indeed the only procedure now authorised by law for payment into Court of money required by any written law to be paid in connection with any action or proceeding. By clause 1 (5) of this Order, the date of the receipt given by the authorised Treasury officer is to be deemed to be the date of payment into Court.

Learned Counsel for the appellant also invited us to follow the course adopted by the learned judges who decided the case of *Abdul Cader v. Sittinisa* (*supra*) and hear by way of revision argument on the merits of the questions raised by the appellant in his petition of appeal. It should be remembered that in that case the Court heard argument by way of revision purely as a matter of indulgence, Pulle J. observing that the Court had the satisfaction of knowing that it has interfered (in revision) with the judgment of the District Judge substantially on a point of law only. It is quite unnecessary to go into the question as to when this Court will exercise its powers of revision. Learned Counsel conceded that there is no substantial question of law which he seeks to raise in this Court ; on the other hand, he hopes to convince us that a review of the facts should result in a reversal of the decision reached by the learned District Judge. I do not consider that there is any good ground for dealing with the case in revision.

The preliminary objection is upheld and the appeal is dismissed with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

[1] *(1951) 52 N. L. R. 536 at 546.*

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1955 *Present :* **Gratiaen, J., and Fernando, J.**

R. W. PATHIRANA, Appellant, *and* R. E. DE S. JAYASUNDARA, Respondent

S. C. (Inty.) 144—D. C. Kurunegala, 9,003

Pleadings—Amendment of plaint—Lessor and lessee—Action against overholding lessee—Plea of prescriptive title raised by defendant—Right of plaintiff to amend plaint so as to alter action into one of rei vindicatio*—Distinction between tenancy action and vindicatory action.*

A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action *rei vindicatio* if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title.

Plaintiff sued the defendant on the basis that the defendant was an overholding lessee by attornment. Defendant admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land in question. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment upon the footing that his rights of ownership had been violated.

Held, that the plaintiff was not entitled to amend the plaint if the amendment would cause prejudice to the defendant's plea of prescriptive possession by him.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *L. Mututantri*, for the plaintiff-appellant.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for the defendant-respondent.

Cur. adv. vult.

June 15, 1955. H. N. G. FERNANDO, J.—

The plaint in this action which was filed on 17th September, 1952 contained averments :—

(1) that at the material time certain persons were the owners of the land described in the Schedule.

(2) that those persons had let the land to the Defendant on 21st February, 1942.

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(3) that those persons sold the land to the Plaintiff on the 6th February, 1950, and that the Defendant as lessee attorned to the Plaintiff.

(4) that the Defendant is estopped from denying the title of the Plaintiff.

(5) that the Defendant failed and neglected to deliver possession of the land notwithstanding the determination of that lease on 21st February, 1952, and

(6) that the Plaintiff has sustained damages consequential to the Defendant's unlawful possession. The plaint then prayed for a declaration of title to the land, for the ejectment of the Defendant and for damages.

The Defendant in his answer admitted the bare execution of the lease, but stated that the lessors were unable to give him possession of the land and denied the alleged attornment. He averred that, on the same day (21st February, 1942) on which the lease was executed, the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. He however further stated that in the event of the Plaintiff obtaining a declaration of title he claims a sum of Rs. 27,000 as compensation for *bona fide* improvements.

The Plaintiff then sought to amend his plaint by setting out precisely the title of the persons who had leased the land to the Defendant and had subsequently sold the land to the Plaintiff, and by adding an averment that he and his predecessors had acquired title by prescription as well. The objections of the Defendant to this amendment have been upheld by the learned District Judge on the ground that it " alters the entire scope of the action and converts a purely tenancy action into an action for declaration of title ". Although the Defendant had pleaded that he had entered into possession under a deed of 21st February, 1942, and the dating back of the amendment to the date of the plaint, i. e., 17th September, 1952, would not *prima facie* prejudice the Defendant's plea of prescriptive possession, the Judge thought that the amendment would cause prejudice to the Defendant if he could only prove possession as from some later time than February 1942.

Mr. Jayawardene argues in appeal that the cause of action pleaded in the plaint was not purely the Defendant's refusal to fulfil an obligation arising from the alleged contract of tenancy and was in addition a denial by the Defendant of the Plaintiff's title to the land, and that accordingly the action upon the original plaint was an action *rei vindicatio* in which an issue as to the Plaintiff's title could properly have been raised. I shall try to deal *seriatim* with the arguments relied upon for the appellant.

The plaint in general terms recites that the Plaintiff's vendors were the owners of the land at the material time, and it is said that the object of the amendment is merely to set out in detail the source of vendor's title. But this recital was in any event necessary for the purposes of the tenancy action, because the Plaintiff's title as lessor was derivative

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and he had therefore to state and prove from whom he derived it. While a recital that certain persons had let the land to the Defendant and that the Plaintiff had subsequently acquired the rights of the original lessors would have been a sufficient exposition of the derivation of title, I do not see how the express reference to the fact that the Plaintiff's vendors were owners can put in issue the question of their title, any more than the question of a Plaintiff-landlord's title would be put in issue by an averment that " the Plaintiff was the owner of the land and leased the premises to the Defendant ". The recital in paragraph 2 of the plaint is so clearly referable to the need to prove the derivative title that it is of little significance in determining whether the main question arising upon the original plaint would have been the proof of the Plaintiff's title.

Mr. Jayawardene then points to a statement in paragraph 7 that the Plaintiff has sustained damages consequential to the Defendant's *unlawful possession*, from which he seeks to argue that his action was for a vindication of property which the Defendant possessed in denial of the Plaintiff's rights as owner. Here again, the statement follows immediately after the averment in paragraph 6 that " the Defendant has failed and neglected to deliver possession of the said lands notwithstanding that his rights as lessee thereof were duly determined on the 21st February, 1952 ". The two paragraphs constituted together the statement of the Plaintiff's first cause of action and it is clear that the unlawful possession of which the Plaintiff complained was the overholding by the Defendant after the cessation of his contractual rights.

There is however the further point that the Plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a *rei vindicatio* for which strict proof of the Plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant is by law precluded from denying. If the essential element of a *rei vindicatio* is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the Plaintiff can automatically obtain a declaration of title through the operation of a rule of estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a *rei vindicatio*. But this choice can I think be properly exercised only by pleadings clearly setting out the claim of title and sounding in delict. I am unable to agree with Mr. Jayawardene that the pleadings here indicate a proper exercise of that choice.

Take for instance the case where a person alleges that he had leased his land for a twenty-year term with rent paid in advance, but subject to forfeiture for breach of covenant. If he purports to terminate after 12 or 15 years for such a breach, and then comes into Court averring that he is owner and that the Defendant has failed to deliver up possession despite the termination of the lease by forfeiture and asks for a declaration

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of title and ejectment, can he, after answer is filed to the same effect as in the present case, seek to maintain that he had in the plaint put his title in issue in an action *rei vindicatio* ? If he can, then it would seem that although the plaint conceded by implication that rent was duly paid until the date of termination, he may nevertheless add by amendment a claim for damages for the 3 year period before action on the footing of a wrongful possession. I think the true position in such a case too would be that the owner originally decided to proceed upon a cause of action arising from a breach of the contractual obligation and cannot alter the nature of the proceeding to an action *rei vindicatio* if such a course would prevent or prejudice the setting up by the Defendant of a plea of prescription.

Upon the question of amendment of pleadings generally, Withers J. said in *Ratwatte v. Owen* [1] :—" After the plaint has once been accepted, I think as a general rule that it should not be amended till after the issue has been settled. The office of an amendment will generally be at that stage to square the plaint with the issue,if necessary ", thus indicating that the discretionary power to permit an amendment of the plaint should not be exercised unless firstly, a particular issue does arise upon the original plaint and secondly, further pleadings are necessary in order to explain or clarify matters relevant to the particular issue. Subsequent decisions show that the general rule as so stated is not to be regarded as inflexible and that relaxation is permissible in order to secure the more expeditious termination of disputes. But no such relaxation is proper if it would be prejudicial to a plea of prescription available to a Defendant.

The Defendant's attempt in this case to deny the operation against him of the rule of estoppel and to set up possession adverse to the Plaintiff and his predecessors constitutes merely a denial relevant to the issue of letting and attornment arising upon the plaint. It is argued that the inclusion by the Defendant of a claim for *bona fide* improvements in the event of the Plaintiff obtaining a declaration of title indicates that the Defendant understood the Plaintiff's action to be one of *rei vindicatio.* Even if the Defendant's state of mind at the time he filed the answer is of assistance in determining the character of the action earlier instituted by the Plaintiff, there is in this case the further consideration that such a claim is not necessarily out of place in an action between landlord and tenant . . . (Wille ; Landlord and Tenant, 4th Ed. Ch. 22).

For these reasons I think that the order of the learned Judge was right and that the appeal must be dismissed with costs.

GRATIAEN, J.—

I agree. In a *rei vindicatio* action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. " The plaintiff's ownership of the thing is of the very essence of the action ". *Maasdorp's Institutes* (7th Ed.) Vol. 2, 96.

[1] *(1896) 2 N. L. R. 141.*

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The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (*conductor*) cannot plead the *exceptio dominii*, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship . . . ." *Voet 19.2.32.*

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief *either* in a *rei vindicatio* action proper (which is in truth an action *in rem*) *or* in a lessor's action against his overholding tenant (which is an action *in personam*). But in the former case, the declaration is based on proof of ownership ; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

As to procedure, Section 35 of the Code permits the joinder of certain forms of relief in an action (either *in rem* or *in personam*) for the recovery of immovable property and/or for the declaration of title. For instance, in a *rei vindicatio* action proper, the plaintiff may ask for (*a*) mesne profits and (*b*) damages consequential on the trespass. Similarly, in the lessor's action *in personam* against the overholding lessee, he may claim (*a*) arrears of rent and (*b*) damages for breach of the contract of lease.

Analysed in the light of these simple rules, the plaintiff's original plaint had very clearly asked for relief against the defendant on the ground of an alleged contractual relationship created by attornment. Paragraphs 2, 3 and 4 contain averments which, if true, establish (1) the original contract of lease between the plaintiff's vendors and the defendant (2) the subsequent purchase of the property by the plaintiff pending the duration of the lease, and finally (3) an attornment in 1950. Paragraph 5 in effect relies on *the contractual relationship thus established* as giving rise to an estoppel against denying the lessor's title, and it is this averment which forms the foundation of the prayer for a declaratory decree as to title.

The rest of the plaint pleads three causes of action each of which is unambiguously based on an alleged breach of a contractual obligation, namely, (*a*) failure to restore the property upon the termination of the lease (*b*) failure to maintain the property in good condition during the

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pendency of the lease and (c) failure in terms of the lease to improve the property. Upon these causes of action, the plaintiff has claimed restoration of the property, ejectment and damages.

It is therefore quite apparent that the action as originally constituted was not a *rei vindicatio* action proper in which any issues as to rights of ownership could properly arise for adjudication. Nothing that the defendant has since alleged by way of defence can by itself alter the scope of the real issues relevant to the granting of the relief prayed for in the plaint.

The defendant has denied attornment. If this be true, the entire foundation of the plaintiff's claim is destroyed. If it be false, the plaintiff's claim for a declaration of title (based on the legal consequences of a contractual relationship) and for ejectment must necessarily succeed. In the latter event, the defendant's claim for compensation could only arise on proof of special circumstances in which a lessee, as opposed to a *bona fide* improver who possessed *ut dominus*, could be compensated under our law.

In the situation which has now arisen, the plaintiff has sought to amend his plaint so as to ask, in the alternative, for the same relief as he had originally sought *but on entirely different grounds*. In other words, he claims a declaration of title and ejectment upon the footing that his alleged rights of ownership had been violated even if his original averment as to privity of contract by attornment be untrue. Similarly, his alternative claim for damages would stand on an entirely different footing.

To allow the amendment at this stage would be to convert an action *in personam* into an action *in personam* (founded on contract) coupled in the alternative with an action *in rem* (founded on ownership). I do not think that it would be proper to allow the scope of the action to be subjected to a fundamental alteration of this kind, because the addition of the alternative cause of action would potentially prejudice the defendant on the issue as to the plaintiff's prescriptive title if the date of the averment is to relate back (as it necessarily must) to the date of the original plaint. *Waduganathan Chettiar v. Sena Abdul Cassim* [1].

The Court should always refuse a party's application to amend his pleadings by asking for relief (even the same relief as he had originally claimed) upon a fresh cause of action which may have become prescribed in the interval. I am aware that in *Noorbhoy v. Mohideen Pillai* [2], the plaintiff, having originally sued the defendant on a promissory note, was permitted to amend his plaint by asking alternatively for a money decree for a like amount upon a cause of action for goods sold and delivered. But in that case the possibility of prejudice to the defendant on the issue of prescription was not raised. I do not doubt that *Noorbhoy's case* would have been differently decided if, at the date of the proposed amendment, the cause of action on the alternative count had already become barred by limitation.

Appeal dismissed.

[1] *(1952) 54 N. L. R. 185.* [2] *(1929) 31 N. L. R. 3.*

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1956 *Present :* **Gunasekara, J., and Sinnetamby, J.**

THE QUEEN *v.* L. B. KOLUGALA

S. C. Application 297—M. C. Kandy 7,535/D. C. 613

Application to set aside the order of the Additional District Judge, Kandy, releasing the accused on bail and to direct that the accused be arrested and committed to custody

Bail—Order made by District Judge granting bail—Remedy of Crown.

Where an order admitting an accused to bail is made by a District Judge without objection on the part of the Crown although the Crown is represented, the fact that no objection was taken is relevant to the question whether the Supreme Court would interfere with the order by way of revision and direct the accused to be arrested and committed to custody.

Where the Crown is dissatisfied with an *ex parte* order for bail made by a District Judge in the absence of the prosecution, its proper remedy is to make an application to the District Judge himself to set aside his order.

APPLICATION for the revision of an order made by the District Court, Kandy.

A. C. Alles, Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, and *E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General, in support.

Colvin R. de Silva, with *B. S. C. Ratwatte* and *S. Rajaratnam*, for the accused, respondent.

August 3, 1956. GUNASEKARA, J.—

This is an application for the revision of an order made by the District Court of Kandy admitting the accused-respondent to bail. The accused, who is a proctor, was committed for trial before the District Court of Kandy on charges of two offences punishable under Section 403 of the Penal Code, in respect of payment orders for Rs. 11,727 and Rs. 29,318·25, respectively, and two offences punishable under Section 459 of the Penal Code read with Section 456 of that Code. The trial was fixed for the 2nd July and several succeeding dates. The accused, who had entered into a personal bond to appear for trial, failed to appear on the 2nd July and sent no excuse to the court. The district judge issued a warrant for his arrest returnable forthwith, but later extended the returnable date to the 17th July. The warrant was not executed by the 17th July and it was reissued, returnable on the 5th September 1956. On the 25th July the accused surrendered to the court and his counsel made an application for bail. The district judge made order admitting him to bail in a sum of Rs. 25,000 with one surety. It is this order that we are now asked to revise.

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The order also refers to an application by the crown proctor to have the case fixed for trial on the 30th and 31st July. The district judge heard a submission made by the accused's counsel on that application and directed that the accused should appear on the 30th July. The application was one that had been filed by the crown proctor on the 20th July. He stated there that he had been instructed by the Attorney-General to move that this case be fixed for trial on the 30th and 31st July because a connected case had been fixed for those two dates and the witnesses in both cases were the same. The order made upon that application was " Submit to A.D J. when accused surrenders ". The learned crown counsel states from the Bar that the crown proctor was present in court when the accused surrendered on the 25th July and that the circumstances in which he came to be there were that the district judge ha l sent him a message asking him " to be present in court in connection with the motion that he had presented on the 20th July ".

When the accused surrendered to the court, his counsel tendered a document purporting to be a medical certificate to the effect that the accused had been ill with acute gastritis on the 1st and 2nd of July and was under the treatment of a doctor who had advised him to rest on those two days. The medical certificate is dated the 14th July. The ground on which this court is asked to revise the district judge's order is that the Crown had no opportunity of making its submission on the accused's application for bail or his representation that he had been ill on the 1st and 2nd of July. The learned crown counsel contends that the fact that the crown proctor was present in court on the 25th July " in connection with his application of the 20th July " does not imply that the Crown had an opportunity of opposing the application for bail.

When a criminal case is fixed for trial the court must also make an incidental order as to whether or not the accused is to be committed to custody. I should have thought therefore that when the crown proctor made an application on behalf of the Crown that the case should be fixed for trial on the 30th and 31st July he also had authority to speak for the Crown on the question whether the accused should be remanded to custody. If he had no sufficient instructions on that point he could have asked for an adjournment of the hearing of the application for bail. Although he was present for the express purpose of assisting the court when his application regarding the fixing of a date of trial was considered, he made no submission on the question whether the accused should be admitted to bail.

If the crown counsel is right in his contention that the order for bail was an *ex parte* order, then it seems to me that the proper procedure for the Crown to adopt would be to make an application to the district judge himself to set aside his order. If it was not an *ex parte* order, then it was one which was made without objection on the part of the Crown although the Crown was represented, and the fact that no objection was taken is relevant to the question whether this court should

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interfere with it by way of revision. What the learned judge has done is to require bail from an accused person who was not on bail but had merely entered into a personal bond undertaking to appear at the trial. The accused has now been required to enter into a recognizance in a sum of Rs. 25,000, which is an unusually large sum, and to find a surety. I am unable to say that the learned district judge has failed to give his mind to any question that ought to have been considered or that there has been such a gross error in the exercise of his discretion that this court ought to revise his order. I would therefore refuse the application.

SINNETAMBY, J.—I agree.

Application refused.

[IN THE COURT OF CRIMINAL APPEAL]

1956 *Present:* **Basnayake, C.J. (President), Gunasekara, J., and Pulle, J.**

D. D. WEERASINGHE, Appellant, *and* THE QUEEN, Respondent

Appeal No. 51 of 1956

S. C. 16—M. C. Badulla, 3,983

Court of Criminal Appeal—Sentence—Grounds for reduction.

The Court of Criminal Appeal will reduce a sentence when it is excessive, if the sentence does not give effect to the jury's verdict or if the accused has not been given the benefit of any doubt as to the view of the facts upon which the jury have based their verdict.

APPEAL against a sentence.

Colvin R. de Silva, with *S. B. Lekamge* and *M. L. de Silva*, for the accused-appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 10, 1956. GUNASEKARA, J.—

This is an appeal against a sentence.

The appellant was tried at an assize held at Bandarawela on an indictment charging him with the attempted murder, at Buttala, of one Mahasoof whom he had stabbed with a knife. The jury, by a unanimous verdict, found him guilty of attempted culpable homicide not amounting

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to murder, punishable under section 301 of the Penal Code, and he was sentenced to rigorous imprisonment for 7 years, which is the maximum term of imprisonment for the offence.

The appellant had inflicted six wounds on Mahasoof which were described by a medical witness as follows :

" (1) an incised wound ¾ " deep and scalp deep over the right side of the vertex about 4 " above the right ear.

(2) an incised wound ¾ " in length ¾ " wide 1 " deep over the back of right side of the chest about 2 " below the neck and 3½ " lateral to the mid-line of the chest.

(3) an incised wound 1¼" in length, ½ " wide, 1 " in depth over the back of right shoulder.

(4) an incised wound 3 " in length, 1¼ " wide over the back of right side of chest just below the arm pit placed more or less vertically penetrating into the chest cavity.

(5) an incised wound 1¼ " long, ½ " wide, 1½ " deep over the upper part of right buttock about 4 " from the mid-line of the body.

(6) an incised wound 1 " long, ¼ " wide and skin deep over the back of left side of chest 2½ " from mid-line at about the level of the 4th rib ".

The doctor who gave this evidence also stated that the wound which penetrated the chest cavity was one that was sufficient in the ordinary course of nature to cause death. The appellant's case was that these wounds had been inflicted by him in the exercise of a right of private defence. According to him, he had been set upon by Mahasoof and several other men and in the course of a struggle with his assailants he had struck at them with a knife that he held in his left hand.

The trial judge addressed the appellant in the following terms when he passed sentence :

" I have taken into account the number of the injuries you inflicted, it does not matter with which hand, on Mahasoof. The story of your left hand is merely a red herring across the trail. A good number of injuries have been inflicted and one of the injuries at any rate was a grievous one and without medical attention the man would have died. I am of the opinion that you should be prevented as long as possible from returning to Buttala where neither the air nor the environment, if I may say so, is so healthful as that of this place. The sentence is seven (7) years R. I. "

It is contended in support of the appeal that the jury's verdict implies acceptance of the appellant's version coupled with a finding that he had exceeded the power given to him by law, and that in this view of his conduct the sentence is grossly excessive.

We are unable to agree with the contention that the verdict implies that the jury were satisfied that the appellant acted in the exercise of a right of private defence. In accordance with the directions that had been given to them in the learned judge's summing up a juror could have based the verdict on any one of four grounds : that it was not proved that the acts which caused the injuries were done by the appellant with the

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intention of causing death (or with an equivalent intention) but it was proved that they were done with the knowledge that he was likely by those acts to cause death ; or that they were done with such an intention but in circumstances that brought the case within one of the exceptions relating respectively to exceeding the right of private defence, provocation and sudden fight. While the verdict may well have been based on any one of those grounds by all the jurors, it is not impossible that it was based by some jurors on one ground and by others on others. Nor is it impossible that there was such a divison of opinion that there was no majority in favour of any one of the four grounds.

The remarks made by the presiding judge suggest that his own view was that there was no truth in the version that the injuries were inflicted in circumstances that brought the case within any of the exceptions. It appears, therefore, that he has assessed the punishment that he imposed on the appellant upon the footing that the offence was one committed without any intention to cause death or an equivalent intention. In such a case the maximum term of imprisonment that he could have imposed for the completed offence, if the appellant had actually caused the death of the injured man, was only ten years. Viewed in the light of this consideration in the circumstances of the case the sentence of seven years' rigorous imprisonment for the attempt appears to the court to be palpably excessive.

Our attention has been drawn by the learned counsel for the appellant to the case of *R. v. Fernando* [1], where it was held that the sentence must give effect to the jury's verdict, and by the learned crown counsel to the case of *R. v. Ponnasamy* [2], where it was held that the accused should be given the benefit of any doubt as to the view of the facts upon which the jury have based their verdict. In the latter case this court reduced the term of a sentence of imprisonment for attempted culpable homicide not amounting to murder from seven years to five years on the ground that although the trial judge was of the view that the accused had the intention to cause death it was possible that the jury held that he had no such intention but merely had the knowledge that what he was doing was likely to result in death. In the present case it is contended for the appellant that the view most favourable to him is that his offence is reduced from attempted murder to the lesser offence by reason of circumstances that bring the case within the exception relating to exceeding the right of private defence. In a case falling within that exception the maximum term of imprisonment for the completed offence of culpable homicide not amounting to murder would be twenty years, as in a case of culpable homicide falling within any of the other special exceptions to the definition of murder ; but it is difficult, if not impossible, to conceive circumstances in which an offence of culpable homicide falling within this exception should be punished with the maximum term of imprisonment. Viewed in the light of the principle laid down in *R. v. Ponnasamy* [2], too, the sentence passed in the present calls for reduction.

We reduce the sentence to one of rigorous imprisonment for four years.

Sentence reduced.

[1] *(1946) 47 N. L. R. 261.* [2] *(1942) 43 N. L. R. 359.*

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[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Gunasekara, J. (President), Pulle, J., and Weerasooriya, J.**

REGINA *v.* V. P. M. MUNIDASA

APPEAL 11, WITH APPLICATION 16, OF 1955

S. C. 33—M. C. Colombo, 1,648

Evidence—Indictment containing two counts—Acquittal on one count—Effect on verdict on the other count—Sentence—Penal Code, s. 478 D.

Acquittal of an accused person on one count owing to the rejection of the evidence of a particular witness for the prosecution is not necessarily a bar to his being convicted at the same trial on a second count for a similar offence on separate and independent evidence.

Sentence reduced on the ground that it had been imposed on an erroneous basis.

APPEAL against a conviction in a trial before the Supreme Court.

R. R. Crossette-Thambiah, Q.C., with *V. K. Palasuntheram*, for the accused appellant.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 21, 1955. PULLE, J.—

The appellant was tried on an indictment which charged him on the first count with having had, in or about July or August, 1952, in his possession five etched metal blocks for the purpose of being used or knowing or having reason to believe that they were intended to be used for forging or counterfeiting rupees-ten currency notes, an offence punishable under section 478 D of the Penal Code. The second count charged him under the same section with having had in his possession in or about March, 1953, five etched metal blocks for the purpose of being used for forging or counterfeiting rupees-ten currency notes. On the first count he was acquitted. On the second count he was convicted and sentenced to fifteen years' rigorous imprisonment. Of the grounds taken in the petition only two were pressed at the argument, namely, that the verdict of the jury was unreasonable and that, in any event, the sentence was excessive.

On the first point learned counsel for the appellant submitted that once the evidence of the witness W. Gerrard Perera called by the prosecution to prove the first charge is excluded, either on the ground that it was irrelevant to the second charge or that it had been rejected by the jury,

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the rest of the evidence bearing on the second count was not even sufficient for the case to go to the jury, and that, therefore, the verdict of guilty was unreasonable.

The evidence connected with the second charge is as follows: The appellant who was an ayurvedic physician had a dispensary at Nagalagam Street. He lived with a woman in one of a row of houses at Sedawatta. One Gabriel Perera and his wife were occupying a house a short distance away. On the night of the 12th February, 1953, in the course of a quarrel with a woman in a neighbouring house the appellant used obscene language. When Gabriel Perera remonstrated, the appellant turned round and abused both him and his wife in foul language. He made a complaint to the Police on the following day and thereafter they ceased to be on speaking terms. The case for the prosecution is that the appellant out of revenge attempted on the 6th March, 1953, to implicate Gabriel Perera on the grave charge of being in possession of instruments for counterfeiting currency notes by introducing into his house the five etched metal blocks which are the subject matter of the second count in the indictment. On the evening of the 5th March, 1953, the appellant and one Ansari called on the witness E. S. Candappa who was living in a house at Nagalagam Street and invited him for a drink at a restaurant in Layard's Broadway. When they were at the restaurant the appellant told Candappa that Gabriel Perera had given him a parcel to be delivered at his house, but that as he, the appellant, was angry with Gabriel Perera's wife he wanted it to be delivered by Candappa the next morning. He consented. The appellant again called at Candappa's house on the 6th March in the company of Ansari between 7.30 and 8 a.m. and took him to the dispensary. The appellant gave Rs. 2 to a servant boy to bring some vegetables from the market. After the boy returned with the vegetables the appellant went with Ansari to the upper floor of the dispensary, brought down a box wrapped in paper and tied with a piece of twine and handed it to Candappa along with the parcel of vegetables to be put into appellant's car. Candappa having placed the parcels in the car got into the rear seat and Ansari sat by the appellant who drove the car to Sedawatta and near the turn off leading to the house of Gabriel Perera the car was halted and the appellant instructed Candappa to deliver the parcels to the wife of Gabriel Perera whose house he indicated was the sixth in the row. He took the parcels and delivered them to Mrs. Perera and the party returned to Nagalagam Street. Mrs. Perera felt uneasy about the parcels and having taken advice from a Police constable who was living in the same row she awaited the return of her husband. When he came she informed him of what had happened. He denied that he had sent any parcels and promptly informed the Wellampitiya Police who took action immediately. They proceeded to the house of Gabriel Perera and found the parcel of vegetables and a cardboard box containing five etched metal blocks which undoubtedly could have been used for counterfeiting Rs. 10 currency notes.

It was contended on behalf of the appellant that the evidence of Candappa was consistent with the five blocks having been made not for the purpose of counterfeiting notes but only for implicating Gabriel Perera in a false charge of possessing instruments for counterfeiting. The

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question then arises whether the prosecution has discharged the burden resting on it to prove affirmatively that the appellant possessed the blocks " for the purpose of being used or knowing or having reason to believe that they were intended to be used for forging or counterfeiting ". To decide this question one has to examine certain other incidents which occurred towards the end of February and on the 5th and 6th March and also the evidence of the Government Analyst and the Government Printer.

On the 26th February the appellant communicated to Police constable Gunapala that he had received information that Gabriel Perera was in possession of some blocks for printing currency notes and promised to get more information in a few days. On the 5th March the appellant again met constable Gunapala and informed him that Perera had brought the blocks to his house and was preparing to dispose of them. The constable took the appellant to a C. I. D. Inspector who wanted further information. Early on the 6th March the appellant again met constable Gunapala and stated definitely that Perera had made arrangements to remove the blocks and wanted a search to be made before 1 p.m. that day. A police party was deputed to accompany the appellant presumably to surprise Perera in the act of removing the blocks but the plan miscarried. By the time the police party were lying in wait for Perera, the etched blocks had already passed into the custody of the Wellampitiya Police. It is reasonable, therefore, to infer from constable Gunapala's evidence that at least a week prior to the 6th March the etched blocks were under the appellant's control, if not actually in his possession.

The evidence of the Government Analyst was that the five blocks represented different aspects of a ten-rupee currency note all of which would be required to produce a complete note. He added,

> " I found traces of blue, green and purple colours on the blocks and they suggested the possibility of ten-rupee notes having been printed by them ".

The Government Printer's evidence was also to the same effect.

It remains now to consider the evidence of W. Gerrard Perera on whom the prosecution depended largely to prove the first charge. According to this witness—who was employed at the Caxton Printing Works as a stereocaster—he was approached by the appellant about the month of May, 1952, to have certain deficiencies in five blocks used for counterfeiting Rs. 10 currency notes rectified. He informed him that he was unable to undertake the work nor was he in a position to name a process block maker who could make good the deficiencies. He did not see any of the metal blocks but was shown by the appellant five metal block proofs of a Rs. 10 currency note. The appellant also told him that " he had those blocks and that the proofs had been taken out from them ".

In the absence of any explanation by the appellant we are of the opinion that the jury had sufficient evidence upon which they could properly find a verdict against the appellant on the second count. Indeed, the presence of traces of blue, green and purple colours on the blocks spoken to by the Analyst and the Government Printer could by itself have led them reasonably to the inference that the blocks had been made for

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purposes of counterfeiting Rs. 10 currency notes or that the appellant knew or had reason to believe that they were intended to be used for such counterfeiting.

It has been submitted to us that if the jury had acted on the evidence of Gerrard Perera as well in reaching a verdict on the second count they acted unreasonably in view of their finding of acquittal on the first count. We are unable to speculate as to the reasons which led the jury in finding the verdict on the first count. That count fixed the date of the offence as " in or about July or August, 1952 " whereas Gerrard Perera who made a statement to the Police on the 13th January, 1953, said that he was approached by the appellant to have the blocks rectified " about eight months " previously, thereby fixing the date of the offence in April or May, 1952. It is quite possible that the jury acquitted the appellant on the ground that the first offence was not committed " in or about July or August 1952 " in the sense that possession of etched blocks in those months had not been brought home to the appellant. We are unable to accept the argument that the acquittal on the first count necessarily involved the rejection by them of the whole of Gerrard Perera's evidence or that the jury were precluded thereby from acting on such parts of his evidence as were relevant to the proof of the mental elements necessary to constitute the offence as charged in the second count.

It is urged that the acts which formed the subject matter of the two counts were not committed in the course of the same transaction and that, therefore, the evidence of the incidents spoken to by Gerrard Perera were irrelevant to the second count. In our opinion the relevancy of Gerrard Perera's evidence to issues arising on the second count was not conditioned solely on proof that the offence alleged in both counts were committed in the course of the same transaction. To prove any of the ingredients of the offence charged in the second count the prosecution was entitled to rely on any fact relevant to such proof, even though such fact would have been equally relevant to establish any of the ingredients of the offence charged in the first count.

Lastly, after judgment had been reserved, a submission was made to us in writing based on the decision of the Privy Council in *Sambasivam v. Public Prosecutor, Federation of Malaya* [1] that the verdict on the first count so operated as *res judicata* that " the Crown cannot at this stage seek to impute a guilty mind to the prisoner in respect of any matter referred to in count 1 of the indictment ". In the case cited there was a trial on two counts on the second of which the prisoner was acquitted. Owing to a disagreement as to whether the first count was proved there was a second trial on that count when the prosecution proved a confessional statement a part of which amounted to an admission of the charge on which the prisoner was acquitted at the first trial. The Privy Council said in the course of its judgment at p. 479 :

" The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the

[1] *(1950) A. C. 458 at 479.*

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adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other. "

The answer to this submission is that no question of *res judicata* can arise because the appellant was tried at one trial on both counts and the Crown has not sought, in supporting the verdict on the second count, to challenge the correctness of the verdict on the first count. All that the Crown has done is to maintain that there was evidence relevant to the second count on which the jury would have been entitled to find a verdict against the appellant and that, even if one assumed that the entirety of Gerrard Perera's evidence was rejected, there was still the evidence of the Analyst, the Government Printer and constable Gunapala on which the jury would have been justified in convicting the appellant.

The maximum sentence of imprisonment provided by section 478 D is twenty years. In sentencing the appellant to fifteen years the learned Commissioner said,

" This is a very serious offence. I know of two such cases, one many years ago in which the accused was given the maximum sentence of twenty years for having an instrument like this for counterfeiting currency notes. Some years later there was another case and there also the accused was given twenty years imprisonment ".

Section 478 D was added to the Penal Code by the Penal Code (Amendment) Ordinance, No. 19 of 1941 replacing similar provisions in the Paper Currency Ordinance (Cap. 291). We have not been referred to any case decided since 1941 in which the maximum sentence had been awarded under section 478 D. The Commissioner had apparently in mind two cases decided prior to 1941. His impression does not appear to be correct that in those cases the accused persons were convicted of being in possession of instruments which could have been used for counterfeiting currency notes. Section 18 of the Paper Currency Ordinance provided a maximum penalty of twenty years imprisonment for counterfeiting notes, while section 20 which penalised the possession of an instrument for counterfeiting provided for a maximum of only five years' imprisonment.

The assessment of sentence by a trial Judge is essentially a matter of discretion. We are, however, satisfied in this case that that discretion has been exercised on an erroneous basis and accordingly reduce the sentence to ten years' rigorous imprisonment. Subject to this variation the application for leave to appeal is refused and the appeal dismissed.

Sentence reduced.

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1954 *Present :* **Sansoni, J., and Fernando, A.J.**

M. KRISHNAPILLAI, Appellant, *and* A. S. MANICAM, Respondent

S. C. 349—D. C. Batticaloa, 553/L

Fideicommissum—Gift to bride and bridegroom and the children of the bride's womb for ever—Construction—Prohibition against alienation out of the family.

When A was about to marry B, A's father donated certain lands to them "by way of dowry" and the deed further provided that they shall "take charge of their properties and their rights and they and their children by her (A's) womb shall enjoy the possession of these properties according to their wish for ever."

Held, that the deed did not create a fideicommissum in favour of the children of A and B. There was no implied prohibition against alienation out of the family.

APPEAL from a judgment of the District Court, Batticaloa.

S. Nadesan, Q.C., with *S. Sharvananda* and *C. Manohara*, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *T. Velupillai*, for the plaintiff respondent.

Cur. adv. vult.

September 16, 1954. SANSONI, J.—

The only question for decision on this appeal is whether the dowry deed of gift P1 dated 14th December, 1915, created a fideicommissum in favour of the plaintiff-respondent. He is the only child of his mother Thangapillai and his father Arulapapillai. When his parents were about to get married Thangapillai's father donated certain lands to them "by way of dowry" and the deed further provided that they shall "take charge of their properties and their rights and they and their children by her (Thangapillai's) womb shall enjoy the possession of these properties according to their wish for ever". Arulapapillai died after the marriage; his widow then married the defendant-appellant; thereafter she died in 1948. The plaintiff-respondent brought this action claiming the entirety of the lands donated in the deed P1 on the basis that the deed created a fideicommissum in his favour.

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The learned District Judge decided that the deed created a fideicommissum because, in his opinion, " the intention of the donor was that these properties should never go out of the family and hence there was an implied prohibition against alienation out of the family and the fidei commissarii had been clearly designated as the donees' children and their descendants from generation to generation ". His attention does not appear to have been drawn to the case of *Kurunathappillai v. Sinnapillai* [1], which was also a case heard in the District Court of Batticaloa. In that case a deed of gift containing the following clause was considered : " The garden, house, well and plantations of this value shall for ever from this day be possessed and enjoyed by them and the children of the womb of the said Sinnatankachi from generation to generation as dowry ". Middleton, J. and Grenier, J. held that these words did not create a fideicommissum. Middleton, J. said in the course of his judgment " In a case decided by Mr. Justice Withers on the 26th September, 1898, (171 C. R. Batticalca 1150), almost identically the same words were employed and that learned judge, who must have had considerable experience in construing documents of this description, said that he could find there no words of prohibition or precatory words indicating that those to whom the gift first came should hand it over to those who came after. In the present case the same observations, it seems to me, apply ". He also quoted with approval the words of Wendt, J. in *Ibanu Agen v. Abeyasekara* [2] : " Where the intention to substitute another for the first taker is expressed or is to be gathered by necessary implication from the language of the will, a fideicommissum is constituted ". Grenier, J. said : " It seems clear to my mind on a careful consideration of the words in this deed that there was absolutely no intention on the part of the grantor to impose any kind of burden on the property which he had dowried to the plaintiff. Indeed it seems to me that the fact of the property in question being dowried property rendered it highly improbable that the grantor would have imposed a fideicommissum on it ". With respect, I think that these reasons are quite sufficient to justify a finding that the deed in question did not create a fideicommissum, in view of the similarity of the wording of the two deeds.

Mr. Chelvanayakam argued that there was a clear indication of a gift over to the children of the donees but I am unable to agree with him. While mention is made of the children, they are not mentioned as beneficiaries whose rights are to accrue in succession to the immediate donees, for I cannot find a clear indication of a fideicommissary obligation having been imposed by the donor upon the donees for their benefit; nor is it reasonably clear when their rights, if any, are to vest in them—see *Pabilina v. Karunaratne et al.* [3]. Both these requirements are essential to the existence of a valid fideicommissum. The children might well have been referred to merely to indicate the motive for the gift, seeing that the contemplated marriage was the consideration for the gift.

I do not think it is necessary to refer in detail to the authorities cited by Mr. Chelvanayakam. It is sufficient to say that in my opinion the

[1] (*1907*) *3 Balasingham 194.* [2] (*1903*) *6 N. L. R. 344.*
[3] (*1948*) *50 N. L. R. 169.*

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wording of the documents construed in the cases of *Sitti Kadija v. de Saram* [1] and *Noordeen v. Badurdeen* [2] is not comparable with the wording of the deed in this case. As so often happens in these cases the difficulty lies not in ascertaining the principles, but in applying the principles to the particular document under consideration.

For these reasons I would set aside the judgment of the learned District Judge and hold that the deed P1 did not create a fideicommissum.

The plaintiff-respondent is therefore declared entitled only to an undivided one fourth share of the lands in dispute. He is not entitled to ejectment of the defendant-respondent or to damages. He must pay the defendant-respondent the costs of this action in both Courts.

FERNANDO, A.J.—I agree.

Appeal allowed.

1956 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

A. KASIPILLAI *et al.*, Appellants, *and* THEIVANAPILLAI, Respondent

S. C. 561—D. C. Jaffna 1,108/T

Administration of estates—" Legal personal representative "—Ordinary meaning of the expression—Thesavalamai—Gratuity paid to public servant—Thediathetam.

A sum of Rs. 4,464 was paid to the credit of the present case by the Government of Malaya. It represented a gratuity which was payble by the Government of Malaya under Rule 19 of the Malayan Pensions Ordinance. Rule 19 reads :—

" Where an officer holding a pensionable office, who is not serving on probation or agreement, dies while in the service of the Federated Malay States, it shall be lawful for the High Commissioner to grant his legal personal representative a gratuity of an amount not exceeding one year's pensionable emoluments. "

Held, that when Rule 19 provided that a gratuity was payable to an officer's " legal personal representative ", it made the sum payable to the executor or administrator of the officer's estate, and it became part of the assets of the estate to be paid out to his heirs at law only. The widow, therefore, who was not an heir of the deceased, was not entitled to any part of the money for her own use and benefit, even if she was administratrix of the estate of the deceased.

Held further, that a gratuity paid to a public servant on retirement from service is not thediathetam.

[1] (1946) *47 N. L. R. 171.* [2] (1944) *45 N. L. R. 203.*

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APPEAL from an order of the District Court, Jaffna.

H. W. Jayewardene Q.C., with *V. Thillainathan*, for the respondents-appellants.

C. Chellappah, with *A. Sambandan* and *S. Sharvananda*, for the administratrix- respondent.

Cur. adv. vult.

February 9, 1956. SANSONI, J.—

Two sums of money, namely, a sum of Rs. 4,464 and a sum of Rs. 828·30 were paid to the credit of this case by the Government of Malaya. The latter sum represents the unpaid salary and cost of living allowance due to the deceased Arumugam Nagesapillai whose estate is being administered in these proceedings. It is not disputed that this latter sum should be divided between his widow (who is also his administratrix) and the 1st to 13th respondents (who are his brothers and sisters and their children), the widow taking a half share and the others taking a half share.

The sum of Rs. 4,464 represents a gratuity which was payable by the Government of Malaya under Rule 19 of the Malayan Pensions Ordinance (Cap. 23). That Rule reads :

> " Where an officer holding a pensionable office, who is not serving on probation or agreement, dies while in the service of the Federated Malay States, it shall be lawful for the High Commissioner to grant his legal personal representative a gratuity of an amount not exceeding one year's pensionable emoluments ".

Before the District Judge, at the stage of judicial settlement of her accounts, the deceased's widow claimed the entirety of this amount as a dependant of the deceased, while the respondents claimed that they were entitled to the entirety as the heirs of the deceased, since if this sum is not thediathetam property the widow has no right to any share of it. In view of the decision in *Seethanganiammal v. Eliyaperumal* [1] where it was decided that a gratuity paid to a public servant on retirement from service is not thediathetam, the widow cannot claim any share of this money on that basis.

Can it be said that as a dependant of the deceased she is entitled to this sum ? It seems to have been argued that although the deceased died in 1948 the devolution of this sum must be governed by the terms of s. 17 of the Pensions Ordinance No. 1 of 1951 of Malaya, under which the gratuity is payable to such of the dependants of the deceased public officer as the Chief Secretary or Resident Commissioner may think fit. This argument found favour with the learned District Judge who held that the entire gratuity was payable to the widow. But as this Ordinance

[1] (1936) 39 N. L. R. 86.

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was not in operation at the time of the deceased's death, its terms cannot in any way control the operation of Rule 19 of the Pensions Enactment which was the relevant enactment in force when the deceased died.

It seems to me that when Rule 19 provided that the gratuity was payable to the officer's legal representative it made the sum payable to the executor or administrator of his estate, and it became part of the assets of the estate to be paid out to his heirs at law. The interpretation of a similar enactment was considered by the Privy Council in the case of *Arbuthnot v. Norton* [1]. Under the Act 6 Geo. IV., c. 85, when a Judge in India died in office the East India Company was required to pay to the legal personal representatives of such a Judge a sum equal to the amount of six calendar months salary. The Privy Council decided that the words "legal personal representative" in that Act meant the executor or administrator of the Judge deceased, and that the money was to be taken as part of his general assets and to be administered as such. I think that this decision governs the point in dispute in this appeal.

It is true that the words "legal personal representative" have been interpreted in different ways when wills and settlements inter vivos have been construed, but the primary meaning of the phrase, when it is unaccompanied by explanatory or controlling words, is "executor or administrator, in that capacity". In *Smith v. Barneby* [2] Shadwell V. C. said: "I apprehend that the words 'personal representative' or the words 'legal personal representative' mean ordinarily, and must prima facie be taken to intend, an executor or administrator, that is, a representative in law as to personal estate; not a kinsman or kinswoman, not a wife or husband, not a person entitled by statute to claim distribution. Generally, also, and prima facie, as I suppose, a bequest made to a 'personal representative', when the expression is so interpreted, must be understood as made to that representative not for his or her own benefit necessarily, but for the purposes, whatever they may be, for which he or she holds, or would hold, the general personal estate of the individual whom he or she is described as personally representing."

This expression of opinion also meets the argument put forward in appeal on behalf of the widow that the gratuity should be paid to her as legal representative or administratrix, but for her own use and benefit. If that submission were to be upheld, the gratuity would benefit any person who happened to be appointed administrator even though he is not an heir and is not even remotely related to the deceased. Such a strange result could not have been intended by those who enacted this Ordinance.

I would therefore hold that the widow is not entitled to any part of this money, and that it is payable to the 1st to 13th respondents as heirs of the deceased. The order under appeal is therefore set aside. Under the circumstances I would direct that both parties should have their costs of the inquiry in the District Court and of this appeal paid out of the money in question.

H. N. G. Fernando, J.—I agree.

Order set aside.

[1] *3 M. I. A. 435.* [2] *(1846) 63 E. R. 936.*

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1956 *Present :* **T. S. Fernando, J.**

ANGAMUTTU, Appellant, *and* THE SUPERINTENDENT OF TANGAKELE ESTATE, Respondent

S. C. 398—M. C. Hatton, 7787

Criminal trespass—Misconduct of estate labourer—Refusal to quit estate after dismissal—Estate Labour (Indian) Ordinance (Cap. 112), ss. 2, 4, 5—Service Contracts Ordinance (Cap. 59), ss. 3, 4—Penal Code, s. 433.

The provisions of section 5 of the Estate Labour (Indian) Ordinance set out below :—

> " and every such contract shall be deemed and taken in law to be so renewed (from month to month) unless one month's previous notice be given by either party to the other of his intention to determine the same at the expiry of one month from the day of giving such notice. "

are not inconsistent or in conflict with the provisions of section 4 of the Service Contracts Ordinance relating to the determination of a contract on the grounds of misconduct. There is nothing " otherwise expressly provided " in the Estate Labour (Indian) Ordinance which could make the provisions of section 4 of the Service Contracts Ordinance inapplicable to the case of an Indian estate labourer.

When an estate labourer who has been dismissed for misconduct remains on the estate contumaciously in circumstances which cannot but annoy the Superintendent, he would be guilty of criminal trespass.

APPEAL from a judgment of the Magistrate's Court, Hatton.

N. D. M. Samarakoon, with *J. C. Thurairatnam*, for the accused-appellant.

S. J. Kadirgamar, with *P. Somatillekam*, for the complainant-respondent.

Cur. adv. vult.

July 17, 1956. T. S. FERNANDO, J.—

The appellant, a labourer within the meaning of the Estate Labour (Indian) Ordinance (Cap. 112), who was employed on Tangakele Estate, Lindula, was summoned to the office of the Superintendent on 28th October 1955 and was requested by the latter to leave the service of the estate. He was offered on that day his discharge certificate and the balance of the wages due up to that day. The cause of this summary discontinuance of the services of the appellant is not clear, but it would appear from the evidence that the appellant had had some trouble with the conductor of the estate resulting in a prosecution and a conviction of the appellant in a court of law. Although not so put in express words in the evidence, the discontinuance appears to have been occasioned by his misconduct. The appellant refused to accept his discharge

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certificate or the balance of his wages and refused also to leave the estate. Having waited exactly one month in the hope that the appellant would receive better advice and leave the estate, the Superintendent made a complaint to the Magistrate's Court on 28th November 1955 that the appellant continues unlawfully to remain on the estate with intent to annoy him, thereby committing the offence of criminal trespass punishable by Section 433 of the Penal Code. After trial the Magistrate convicted the appellant and sentenced him to six weeks' rigorous imprisonment.

The appellant in the course of his evidence at the trial which took place on 1st February 1956 stated that even if he is given his discharge ticket, his pay, his wife's discharge ticket and her pay, he will not leave the estate. Subject to the consideration of a point of law advanced on behalf of the appellant at the hearing of the appeal, I am of opinion that the learned Magistrate was clearly right in convicting the appellant on a charge of criminal trespass because the answers reproduced above given in evidence by the appellant are as clear an indication as possible that he is remaining on the estate contumaciously in circumstances which cannot but annoy the Superintendent.

I did not understand Counsel for the appellant as arguing that the services of a person coming within the meaning of a labourer under the Estate Labour (Indian) Ordinance cannot be discontinued summarily for misconduct. Indeed, there are many cases in the law reports which show that a right of an employer to dismiss Indian estate labourers summarily for misconduct has been recognised. One such case is that of *Marimuttu v. Wright* [1], and the observations of Canekeratne J. in that case appear to indicate that a labourer's services can be so discontinued. I understood Counsel's argument to be that even if the Superintendent dismissed the labourer summarily for misconduct, the labourer was entitled to remain on the estate for one month by reason of the operation of Section 5 of the Estate Labour (Indian) Ordinance.

The Service Contracts Ordinance (Cap. 59) recognizes the right of an employer to dismiss or discontinue for misconduct a labourer whose employment is governed by that Ordinance. In the event of discontinuance for misconduct, the Ordinance recognizes that the employer is not liable to give a month's notice to the labourer or to pay him wages for any period beyond the day of such discontinuance, i.e., the last day of his employment—vide Section 4. Section 2 of the Estate Labour (Indian) Ordinance provides that the Ordinance shall, so far as is consistent with the tenor thereof, be read and construed as one with the Service Contracts Ordinance, and Section 4 extends certain provisions of the Service Contracts Ordinance to labourers and employers under the Estate Labour (Indian) Ordinance.

Counsel for the appellant seeking to make use of the expression "except as in this Ordinance otherwise expressly provided" occurring in Section 4 of the Estate Labour (Indian) Ordinance argues that Section 4 of the Service Contracts Ordinance can extend to the case of Indian

[1] *(1947) 48 N. L. R. 253 at 256.*

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labourers employed on estates only if express provision otherwise has not been made in respect of their contracts of service by the Estate Labour (Indian) Ordinance. He states that such express provision is contained in the following words occurring in Section 5 of the Estate Labour (Indian) Ordinance :

> " and every such contract shall be deemed and taken in law to be so renewed (from month to month) unless one month's previous notice be given by either party to the other of his intention to determine the same at the expiry of one month from the day of giving such notice. "

Quite apart from the fact that the very same words appear in Section 3 of the Service Contracts Ordinance, it is sufficient to say that that part of Section 5 of the Estate Labour (Indian) Ordinance reproduced above is not in my opinion a provision inconsistent or in conflict with the provisions of Section 4 of the Service Contracts Ordinance relating to the determination of a contract on the grounds of misconduct. There is therefore in my opinion nothing " otherwise expressly provided " in the Estate Labour (Indian) Ordinance which could make the provisions of Section 4 of the Service Contracts Ordinance inapplicable to the case of an Indian estate labourer. Moreover, it seems to me that if a contract has been determined by an employer, whatever the grounds for such determination may be, there is no contract in existence capable of renewal. The contracts that are deemed to be renewed as contemplated in Section 4 of the Estate Labour (Indian) Ordinance are contracts which are in existence up to the moment of renewal. I am therefore of opinion that the point of law raised on behalf of the appellant fails.

It should be noted that in the case before me the appellant, though not entitled thereto, has had one month's time to quit the estate. If the appellant is advised that he has been wrongfully dismissed, it is open to him to pursue any civil remedy he may have. He cannot be heard to say that he is entitled to remain on the estate defying the Superintendent. His appeal is therefore dismissed.

Appeal dismissed.

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1956 *Present :* **Basnayake, C.J., Gunasekara, J., Pulle, J., de Silva, J., and Sansoni, J.**

SILVERLINE BUS CO., LTD., *et al.*, Petitioners, *and* KANDY OMNIBUS CO., LTD., *et al.*, Respondents

S. C. 649—Application for Conditional Leave to Appeal to the Privy Council from the Judgment of the Supreme Court in S. C. Application No. 596/1952

Privy Council—Conditional leave to appeal—Certiorari—"*Civil suit or action*"—*—Courts Ordinance, s. 42—Civil Procedure Code, ss. 5, 6—Appeals (Privy Council) Ordinance, s. 3.*

Held (SANSONI, J., dissenting), that an appeal to the Privy Council does not lie from a decision of the Supreme Court in an application for a writ of *certiorari*. Such an application does not fall within the ambit of the expression "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance, even when the application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction.

The words "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings.

In re Goonesinha (1942) 44 N. L. R. 75 and *Kodakan Pillai v. Mudanayake* (1951) 54 N. L. R. 350, overruled.

APPLICATION for conditional leave to appeal to the Privy Council.

The Kandy Omnibus Company Ltd. complained to the Commissioner of Motor Transport that the Silverline Bus Company Ltd. and certain other omnibus Companies were picking up passengers and setting them down within the limits of Kandy town in violation of its own rights under its route licence. When the Commissioner of Motor Transport made order in favour of the Kandy Omnibus Company Ltd., the Companies aggrieved by the order appealed to the Tribunal of Appeal constituted under the Motor Traffic Act, No. 14 of 1951. In the appeal, the Tribunal of Appeal set aside the order of the Commissioner of Motor Transport. The Kandy Omnibus Company Ltd. then applied for a writ of *certiorari* to quash the order of the Tribunal of Appeal. The Supreme Court quashed the order on the ground that the Tribunal of Appeal had acted without jurisdiction. Thereupon the present application for leave to appeal to the Privy Council was lodged.

H. W. Jayewardene, Q.C., with *G. T. Samerawickrame*, *D. R. P. Goonetilleke*, and *M. R. M. Daluwatte*, for Petitioner.

H. V. Perera, Q.C., with *C. G. Weeramantry* and *G. Barr Kumarakulasinghe*, for 1st Respondent.

E. F. N. Gratiaen, Q.C., Attorney-General, with *V. S. A. Pullenayegum*, Crown Counsel, for the Crown (with permission).

Cur. adv. vult.

2——J. N. B 62764—1,593 (1/57)

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December 14, 1956. BASNAYAKE, C.J.—

This is an application for leave to appeal to the Privy Council under the Appeals (Privy Council) Ordinance (hereinafter referred to as the Ordinance) from an order made by a single Judge of this Court granting a mandate in the nature of a writ of certiorari under section 42 of the Courts Ordinance quashing the decision of a Tribunal of Appeal constituted under the Motor Traffic Act, No. 14 of 1951.

The application is opposed on the ground that the proceedings in which the mandate was granted do not fall within the ambit of the expression "civil suit or action" in section 3 of the Ordinance. The matter was first argued before my brother Weerasooriya and myself and as we failed to agree on the order that should be made it was set down for hearing before a Bench of five Judges constituted under section 51 of the Courts Ordinance.

The Attorney-General appeared at the present hearing and asked that he be permitted to make his submissions on the questions involved as our decision might affect certain Crown appeals pending before the Privy Council although those appeals are not appeals from decisions on applications for writs of certiorari.

It will be convenient if I were to state, as briefly as possible, the facts which led to the application, for a mandate in the nature of a writ of certiorari, by the respondent to the present application for leave to appeal, the Kandy Omnibus Company Limited (hereinafter referred to as the respondent).

The respondent was the holder of eight route licences granted under the Omnibus Service Licensing Ordinance, No. 47 of 1942, all operative within the town of Kandy. In the year 1945 it complained to the Commissioner of Motor Transport that the Silverline Bus Company Limited, the P. S. Bus Company Limited, the Singhe Bus Company Limited, the United Bus Company Limited, the Parakrama Bus Company Limited, the W. H. Bus Company Limited, the Sri Lanka Omnibus Company Limited, and the Madhyama Lanka Bus Company Limited (hereinafter collectively referred to as the applicants) who had route licences to ply for hire between Kandy town and places outside it were picking up passengers and setting them down within the limits of Kandy town to its prejudice and in violation of its rights under its route licence.

On 29th September 1950 the Commissioner of Motor Transport after notifying and hearing the other Companies made order that they should not pick up and set down passengers within the limits of Kandy town. The applicants appealed to the Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938, against the Commissioner's order, but one of them—the Madhyama Lanka Bus Company Limited—withdrew its appeal at the hearing. The appeals were heard on 18th November 1950 and 9th and 15th December 1950 by a Tribunal consisting of Messrs. S. J. C. Kadirgamar, S. Pararajasingham and T. W. Roberts, but the hearing remained unfinished on 1st September 1951 when the Motor Traffic Act, No. 14 of 1951, which repealed the Motor Car Ordinance, No. 45 of 1938, was brought into operation.

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On 26th August 1952 the Minister of Transport and Works made the following order :—

" Motor Car Ordinance, No. 45 of 1938,

and

Motor Traffic Act, No. 14 of 1951

It is hereby notified that the Honourable the Minister for Transport and Works has been pleased, under section 4 of the Motor Car Ordinance, No. 45 of 1938, read with paragraph (*c*) of the proviso to section 243 (1) and section 246 (4) (*a*) of the Motor Traffic Act, No. 14 of 1951, to appoint the following to form a panel from which Tribunals of Appeal shall be constituted for the purpose of disposing of the appeals which have been duly preferred under the Motor Car Ordinance, No. 45 of 1938, and the Omnibus Service Licensing Ordinance, No. 47 of 1942 :—

1. Mr. T. W. Roberts
2. Mr. S. Pararajasingham
3. Mr. S. J. C. Kadirgamar, J.P.
4. Mr. P. C. Villavarayan
5. Mr. Fred J. de Saram
6. Mr. M. Shums Cassim, M.B.E.
7. Mr. J. L. M. Fernando
8. Mr. A. E. Christoffelsz, C.M.G.
9. Mr. S. P. Wickremasinha
10. Mr. E. W. Kannangara, C.B.E.

Sgd. J. N. Arumugam,
Permanent Secretary,
Ministry of Transport and Works.

Colombo, August 26, 1952 ".

Of the abovenamed the first three members, who heard the appeal under the repealed law, continued the hearing purporting to do so by virtue of the above order, and on 10th October 1952 made order setting aside the order of the Commissioner of Motor Transport. The respondent thereupon applied for a mandate in the nature of a writ of certiorari to quash the order of the Tribunal, on the ground that the members of the Tribunal who continued the hearing of the appeal under the old law had no jurisdiction to do so. After a hearing which lasted a number of days the order of the Tribunal was quashed on the ground that it had acted without jurisdiction. Thereupon the present application for leave to appeal to the Privy Council was lodged.

As stated at the very outset of this judgment, this application is opposed on the ground that certiorari proceedings do not fall within the ambit of the expression " civil suit or action " in section 3 of the Ordinance.

In order to ascertain whether a writ of certiorari can aptly fall within the ambit of the expression " civil suit or action ", it is necessary first to ascertain the nature and scope of the writ which in our law is in the form of

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a mandate and in England, since the abolition of the prerogative writ by section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, is in the form of an " order ".

According to Bacon's Abridgment, Volume II, page 9, a certiorari is—

" . . . . . an original writ issuing out of Chancery, or the *King's Bench*, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause."

Though the 1938 statute abolished the writs, nevertheless the nature and scope of the orders which took their place remained unchanged. In the words of Scrutton, L.J., in *R. v. The London County Council, Ex parte The Entertainments Protection Association Ltd.* [1]—the writ of certiorari is

" . . . . a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction ; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court."

It is a writ which can be availed of both in civil and in criminal proceedings. As was observed by Lord Sumner in *R. v. Nat Bell Liquors Ltd.*[2]—

" The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and therefore would not have been available as a reason for quashing the proceedings."

The certiorari jurisdiction, if I may so call it for the sake of convenience, of the High Court in England and indeed of this Court in this country is, again in the words of Lord Sumner (page 156)—

" . . . . to see that the inferior Court has not exceeded its own (jurisdiction), and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, *not of review*, is confined. That supervision goes to two points : one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise ; the other is the observance of the law in the course of its exercise."

[1] *(1931) 2 K. B. 215 at 233.*

[2] *(1922) 2 A. C. 128 at 154–155 .*

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These principles have recently been re-stated by Denning, L.J., in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1]—

> ". . . . the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had."

The dicta I have cited go to show that proceedings in certiorari do not fall within the category of proceedings known as suits or actions. In certiorari the Court exercises its supervisory functions in order to determine whether the inferior tribunal has exceeded its jurisdiction or committed an error of law apparent on the face of the proceedings, and is not called upon to pronounce judgment on the merits of the dispute between the parties before the inferior tribunal.

In support of the contention that certiorari falls within the scope of the expression " civil suit or action " learned counsel relied on the cases of *Abbot v. Sullivan & others* [2], *Lee v. Showmen's Guild of Great Britain* [3], and *O'Connor v. Isaacs & others* [4].

The first of these cases was an action for damages by the plaintiff, a corn porter employed in the London docks, who was a member of a committee formed to protect the interests of corn porters. On account of an incident in which the plaintiff was involved his name was removed from the register of corn porters by the committee. The plaintiff's action for damages was against two members of the committee for wrongfully removing him from the register and against another for procuring his removal. It was held that the resolution by which the plaintiff's removal was decided was ultra vires of the committee, and was invalid ; but as the defendants were not actuated by malice or wrong motive the majority of the Court did not award damages.

The second case was an action by a member of the Showmen's Guild of Great Britain against the Guild for a declaration that the decisions of the Committee—

(*a*) that the plaintiff was guilty of " unfair competition ", and
(*b*) imposing a fine on him, and
(*c*) that he had ceased to be a member as he did not pay the fine,

were *ultra vires* and void. The Court held that the Committee had acted *ultra vires* and that their decision to expel the plaintiff was void.

[1] *(1952) 1 A. E. R. 122 at 127.*
[2] *(1952) 1 A. E. R. 226.*
[3] *(1952) 1 A. E. R. 1175.*
[4] *(1956) 2 W. L. R. 585.*

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In the third case the plaintiff sued the Justices of the Peace of the Petty Sessional Division of Kingston-upon-Thames, Surrey, fourteen in number, claiming damages for false imprisonment and for acts done by them without jurisdiction while sitting as Justices of the Peace.

All these three cases were regular actions and not proceedings in certiorari. There can be no doubt that these cases would fall within the ambit of our expression " civil suit or action ". But the fact that an action for trespass lies, where a Magistrate or any Judge of an inferior Court assumes jurisdiction, where he has no jurisdiction, as a result of a mistake of law does not afford ground for holding that proceedings in certiorari to have the illegal assumption of jurisdiction examined by the High Court are an action against the Magistrate or Judge.

In the cases cited above the aggrieved parties sought the remedy for the wrong done by suing the wrong doers. If, instead of suing them, they chose to take proceedings in certiorari, it would not be correct to say that the aggrieved parties sought the remedy for the wrong done. But it would be correct to say that they invoked the aid of the High Court to have the errors committed by the authorities concerned corrected. The above cases therefore afford no authority for saying that proceedings in certiorari come within the ambit of the expression " civil suit or action ".

I shall now proceed to examine the meaning and content of the expression " Civil Suit or Action " in section 52 of the Charter of 1833 and in section 3 of the Ordinance. But before I do so I shall briefly refer to the origin and scope of our legislation on the subject of appeals to the Privy Council.

The right of establishing Courts is a branch of the prerogative of the Crown [1]. The Sovereign has the right, by virtue of the prerogative, to review the decisions of all the Courts outside England, except where such right has been expressly parted with [2].

It is open to the Crown to part with its prerogative right to receive appeals either altogether or in respect of certain matters only. It may also regulate the right of appeal by conferring on the local courts the right to grant leave to appeal to the Sovereign in certain classes of cases. It may even grant a statutory right of appeal and regulate the exercise of that by express enactment. In the case of *Queen v. Alloo Paroo* [3] Lord Brougham observed :—

> " It might be reasonably contended that the Crown may point out the manner in which the general common-law right of Appeal to it from colonial sentences shall be exercised, by a particular mode of enactment in the Charter. It may say, there is a right to appeal to the Crown generally. That Appeal shall be in civil cases at all times, but that Appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below, the right (the Crown may say) to refuse or to grant it, as they see fit . "

[1] *Re Lord Bishop of Natal, (1864) 3 Moo. (N. S.) 115 at 152.*
[2] *The Falkland Islands Co. v. The Queen, (1863) 1 Moo. (N. S.) 299 at 312. In re Abraham Mallory Dillet (Brit. Hond.), (1887) 12 A. C. 459 at 466. Therberge v. Laudry (Quebec), (1876) 2 A. C. 102 at 106.*
[3] *(1847) 5 Moo. P. C. 296 at 303.*

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No reference to the development of the jurisdiction of the Privy Council would be complete without a citation from the judgment of Viscount Cave, L.C., in *Nadan v. The King*[1] wherein the matter is admirably set out.

" The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law ; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords ; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases : see *Reg. v. Bertrand* (L. R. 1 P. C. 520). It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict., c. 69). The Act of 1833 recites that ' from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council ', and proceeds to regulate the manner of such appeal ; and the Act of 1844, after reciting that ' the Judicial Committee, acting under the authority of the said Acts (the Act of 1833 and an amending Act) hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and expedient also to extend its jurisdiction and powers ', enacts (in s. 1) that it shall be competent to Her Majesty by general or special Order in Council to ' provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad '. These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed. "

In the case of Ceylon, South Africa, and some other countries, the right of appeal to the Sovereign in civil cases was expressly granted and regulated by Charter. The first Ceylon Charter was in 1801. It established a Court of Record called " The Supreme Court of Judicature in the Island of Ceylon " and defined its powers and jurisdiction, and granted a right of appeal to the Privy Council to any person—

" . . . . aggrieved by any interlocutory Sentence, or Determination having the Effect of a Definitive Sentence, or by any Definitive Sentence, of the said Supreme Court of Judicature in the Island of Ceylon, in any Civil Cause, Matter, or Thing whatsoever ",

[1] *Nadan v. the King* (1926) *A. C. 482 at 491.*

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where the matter in dispute exceeds five hundred Pounds. After the annexation of the Kandyan Provinces the Charter of 1801 was replaced by the Charter of 1833, a more comprehensive instrument. It established a Supreme Court and District Courts. The latter were empowered to hear and determine—

> " . . . . all Pleas Suits and Actions in which the Party or Parties Defendant shall be resident within the District in which any such Suit or Action shall be brought or in which the Act Matter or Thing in respect of which any such Suit or Action shall be brought shall have been done or performed within such District. "

The Supreme Court was given an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the respective District Courts. By section 52 a conditional right of appeal to the Privy Council was also granted to—

> " . . . . a Party or Parties to any Civil Suit or Action depending in the said Supreme Court . . . . against any final judgment, Decree or Sentence or against any Rule or Order made in any such Civil Suit or Action, and having the effect of a final or definitive Sentence. "

The conditions are almost the same as those in force today except for the fact that the decision had to be brought up in review before a Collective Court before the application for leave. It is clear from the Charter itself that the right of appeal granted thereby does not exhaust the Sovereign's right to admit appeals, for, section 53 reserves the right to admit any appeal, " from any Judgment, Decree, Sentence or Order " of the Supreme Court subject to such conditions as may be imposed by the Sovereign. The succeeding legislation did not materially alter the right of appeal granted by the Charter of 1833. In 1889 the Courts Ordinance and the Civil Procedure Code made provision for appeals to the Privy Council. The former Ordinance made the following provision which was repealed in 1909 when the Appeals (Privy Council) Ordinance was enacted—

> " Nothing herein contained shall be held to affect the appeal to Her Majesty in Her Privy Council, graciously granted by the Royal Charter of 1833 to any person or persons being a party or parties to any civil suit or action depending in the Supreme Court, against any final judgment, decree, or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definitive sentence, and which said appeal shall continue to be subject to the rules and limitations by the said Charter prescribed and hereinafter set out, as follows : . . . . "

Chapter LXIII of the Civil Procedure Code (sections 779 to 789), also repealed by the Ordinance, while declaring that it shall be lawful for any party or parties to a civil suit or action, to appeal to the Privy Council against any final judgment, decree or sentence or against any rule or order made in any such civil suit or action, prescribed the procedure to be followed in bringing a judgment in review before the collective court prior to obtaining leave to appeal to the Privy Council.

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The expression " civil suit or action " is one that occurs in the instruments granting a similar right of appeal from the decisions of the Courts of other countries which were under the Sovereignty of the British Crown. One such country is South Africa, where the very question has been decided. It will be helpful to examine the view taken by the Courts of that country in dealing with this matter. The first reported decision is *Gillingham v. Transvaalsche Koelkamers, Beperkt*[1]. In that case the applicant's estate had been finally sequestered by order of a Judge in Chambers. From that order he appealed to the Supreme Court, which dismissed the appeal. He then applied for leave to appeal to the Privy Council. It was argued for the applicant that a decree in insolvency was a final and definitive sentence given in a civil suit or action. Innes, C. J., in dealing with the matter says at page 966 :—

> " Our jurisdiction in regard to the present petition is contained in section 39 of Proclamation 14 of 1902, and we cannot grant leave unless we are empowered to do so by its terms. The section says that it shall be lawful for any person or persons, being a party or parties to any civil suit or action depending in the court, to appeal to His Majesty the King in His Privy Council ' against any final judgment, decree or sentence of the said court, or against any rule or order made in any such civil suit or action having the effect of a final or definite sentence '. Clearly, therefore, the only persons to whom this Court can grant leave to appeal are those who are ' parties to a civil suit or action ' here depending. The sequestration proceedings were not an ' action ', and ' suit ' seems to me to be synonymous, or nearly so, with ' action '. ' To sue ' is to bring an action, to demand something— either a declaration of rights or an order that the opposing party shall do something or give something to the plaintiff. The order against which leave to appeal is now sought is not an order in a suit or action. "

In the same case Solomon J. said :—

> " I agree that there should be no order, on the simple ground that the applicant was not ' a party to any *civil suit or action* ' depending in this Court. We must give those words their ordinary meaning, and if we do it is clear that sequestration proceedings are not a civil suit or action. "

The same view was taken by Kotze J.A. in the subsequent case of *Collier v. Redler & another* [2], where he says :

> " It follows, as I mentioned at the outset, that in order to arrive at the meaning of the words ' any suit or action ', occurring in section 50 of the Charter of Justice, we must consider not merely the usual and ordinary meaning of the words in question, but go a step further and inquire into the nature of the subject-matter and the object of the Charter as well. The nature of the Charter is easily ascertainable from a perusal of its various provisions, while two of its main objects are to establish a Supreme Court of Justice for the Colony of the Cape of Good Hope, and to provide for an appeal to the King-in-Council.

[1] (*1908*) *Transvaal Law Reports Supreme Court 964.*
[2] (*1923*) *A. D. 640 at 649.*

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In section 50 of the Charter such an appeal is allowed, not in every case or instance, but only in certain instances, namely, from any final judgment or sentence, or from any rule or order having the effect of a final definite sentence, in any civil suit or action above the value of £500. An appeal is here given as of right, provided the final judgment or order has been made in a civil suit or action of the prescribed value. There is nothing in this section, nor in the context contained in other sections, to show that we are to construe the words 'suit or action' in a sense different from their usual ordinary meaning, as denoting instances where the proceedings commence with the issue of a writ of summons. The section does not speak of every case or proceeding, but only of any suit or action; and there appears to be no further provision of the Charter indicating that we are here to depart from the recognized rule of construction and are not to assign the ordinary and common meaning to the words employed, in order to arrive at their intention. I find nothing in the Charter, nor in its object, leading to such a conclusion. On the contrary, the object of the Charter is evidently to limit the right of appeal, not merely as to the amount involved in the suit or action, but also in regard to the nature of the cause or dispute. It is clear there is to be no appeal in simple interlocutory or provisional proceedings; and similarly, I do not think that any right to appeal is intended in any matter brought before the Supreme Court by way of motion, petition or application, or in any other manner than by means of a suit or action, however final or definite an order made therein may be. If the intention had been otherwise, it is by no means unreasonble to suppose that language clearly manifesting such an intention would have been used. If we refer to section 51 of the Charter, we find other and wider language employed than in section 50. While section 50 limits the right of appeal to *any civil suit or action*, section 51 reserves the right of the Sovereign in His Privy Council to give leave of appeal to any one '*aggrieved by any judgment or determination* of the said Supreme Court'. It is difficult to hold that the right here reserved is likewise limited to a judgment or determination in a civil suit or action, and has not a wider meaning.

"At the time of the granting of the Charter (1832), the ordinary distinction between a suit or action, that is the procedure commenced by writ of summons, as opposed to matters commenced by motion, application or petition, was well recognised in England, as it still is at the present day, and also prevails in our practice, as we may ascertain from the various Rules of Court, which have been framed by the judges and promulgated under the power conferred by section 46 of the Charter and subsequent Acts, and also from the statute law itself."

Later on, in the course of the same judgment, Kotze J. A. says :—

"No doubt the word petition may, like the term suit or action, have more than one meaning, and the word suit, again, may be used in a sense different from an action at law. Thus we could, with propriety speak of a suit in chancery, where the procedure was by means of a bill, and of a suit in the Matrimonial Court, where the proceedings take place by means of a petition. But that is not the case in the presen

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instance. The word suit occurring in section 50 of the Charter is synonymous with the word action, and excludes an application by means of a petition. "

In the later case of *Collett v. Priest* [1] in which this very same question came up for consideration, De Villers, C. J., after reviewing the previous decisions says at page 298 :—

" And we are therefore of opinion that the Cape Provincial Division, while freely giving its reasons for holding a different view, should have followed the *ratio decidendi* of *Collier v. Redler*, *The Master v. van Aardt* and *Bulawayo Municipality v. Roberts*, namely, that the essential feature of a ' suit or action ' under section 50 of the Charter of Justice or under section 39 of Transvaal Proclamation 14 of 1902, or of a ' suit ' under section 24 of Cape Act 35 of 1896, is that it is a proceeding in which one party sues for or claims something from another, and that no proceeding which lacks this feature, such as sequestration proceedings, an application for winding up of a company etc., can be properly described as a ' suit or action ' or as a ' suit ' under any of these sections. "

This matter was further considered in *Solomon v. Law Society of the Cape of Good Hope* [2], where the question whether an application by the Law Society to have an attorney struck off the roll was a civil suit or action came up for decision and Wessels C. J. held that it was not. He said at page 408 :—

" It is difficult to see what the civil suit or action is, in the case of an application by the Law Society which sets before the Court certain facts and asks the Court to strike the Attorney off the roll. The fact that by section 3 of Act 20 of 1916 the Court may order that any question of fact shall be tried by pleadings cannot make the application a civil suit or action. The pleadings are only a means to define the question of fact to be tried by the Court. "

As the South African Reports are not available in most of our law libraries I have cited more extensively than I would otherwise have done.

It is clear from the South African decisions I have examined that in that country the words " civil suit or action ", in a context such as the one we have here, have been consistently understood in their ordinary meaning, viz., a proceeding in which one party sues for or claims something from another.

I shall now examine our decisions on the point. In the earliest of our cases, *In re Ledward* [3], a decision of the collective Court, it was held that section 52 of the Charter of Justice gave no right of appeal to the Privy Council against a judgment of this Court affirming a judgment of the District Judge that an insolvent had not committed a fraudulent preference within the meaning of section 58 of the Insolvency Ordinance. It was argued in that case that the proceedings in which the matter was decided was a regular " suit " between a creditor and the assignees of the

[1] *(1931) A. D. 290.*

[2] *(1934) A. D. 401.*

[3] *(1859) 3 Lorenz 234.*

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debtor ; and that though the matter was discussed in insolvency proceedings it was none the less a " civil suit or action " within the meaning of those words in the Charter of 1833. It was also urged that there was a regular dispute between the two parties regarding certain property, in which evidence was heard, and a judgment given thereon, as in any ordinary suit. In the course of the argument Rowe C.J. observed :

> " The only question is whether this is a ' matter ' or a ' suit or action '. The 52nd section of the Charter limits the appeal to ' suits or actions' only. "

The application for leave was rejected on the ground that the Charter gave no right of appeal in a case such as that before the Court.

This decision was followed in the case of *Keppel Jones & Co.* [1]. That was also a decision of the collective Court in proceedings under the Insolvency Ordinance in which this Court affirmed an order of the District Court in which the assignee was directed to deliver one half of certain goods found in possession of the inslvent.

Next we have the case of *H. W. de Vos* [2]. In that case the District Judge refused to grant a certificate of insolvency on the ground that the insolvent had not made a full disclosure of his affairs, and that judgment having been affirmed by this Court the insolvent sought to appeal to the Privy Council. He asked for a certificate under section 781 of the Civil Procedure Code · that the case fulfilled the requirements of section 42 of the Courts Ordinance. The certificate was refused by the two Judges who heard the case ; Lawrie J. based his decision on the ground that the matter at issue was not of the value of Rs. 5,000, and Brown A. J. on the ground that no case had been submitted to the Court in which the right of appeal to the Privy Council had been recognised in the matter of the refusal of a certificate of conformity.

The next case that is relevant is *Sockalingam Chetty v. Manikam et al.* [4]. That was also a case under the Insolvency Ordinance. This Court held following the previous decisions I have cited above that there was no right of appeal. Drieberg J. observed :—

> " Section 52 of the Charter of 1833 gives a right of appeal against any final judgment, decree, sentence, rule or order in any civil suit or action, and it has been held by the Collective Court in appeal that an insolvency proceeding is not a civil suit or action and that there is no right of appeal against the judgment or order of the Supreme Court made in it.

Next in order of time is the case of *Soertsz v. Colombo Municipal Council* [5]. The question was whether there was an appeal to the Privy Council as of right from the decision of the Supreme Court on a case stated under section 92 (now 94) of the Housing and Town Improvement Ordinance. After referring to the relevant provisions of the Charter of 1833, and the Courts Ordinance, Fisher C. J. went on to say :

> " In dealing with the matter under consideration the Supreme Court was not acting in exercise of the appellate jurisdiction vested in it by

[1] (*1877*) *Ramanathan 379.*
[2] (*1899*) *2 Browne 331.*
[3] (*Repealed by Ordinance No. 31 of 1909.*)
[4] (*1930*) *32 N . L. R. 65.*
[5] (*1930*) *32 N. L. R. 62.*

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the Courts Ordinance, 1889, nor was the District Court acting in exercise of any jursidiction vested in it by that Ordinance. The District Court was not in fact acting as a Court of law at all but was performing a function vested in it because the alternative tribunal under section 83 of Ordinance No. 19 of 1915 has not been brought into existence, and in the performance of that function it is a final tribunal except when a question of law is involved and the provisions of section 92 (now 94) are put into operation.

" In my opinion, therefore, our decision on the point of law submitted to us was not a judgment or order in ' a civil suit or action '. "

In the case of *RM.AR.AR.RM. v. The Commissioner of Income Tax* [1], it was argued that a case stated under the Income Tax Ordinnce was " a civil suit or action " within the meaning of that expression in section 3 of the Ordinance. But that argument was not upheld by this Court. In the case of *Settlement Officer v. van der Poorten et al.* [2], it was held that proceedings under the Waste Lands Ordinance did not fall within the ambit of the words " civil suit or action " in section 3 of the Ordinance. The earlier view that civil suits or actions that fell within the ambit of section 3 were only those civil suits or actions which the District Court had jurisdiction to hear and determine, when exercising the jurisdiction conferred on it by the Courts Ordinance, was upheld. Although in *van der Poorten v. The Settlement Officer* [3] the Privy Council set aside the decision of this Court, that an appeal did not lie from the District Court against a dismissal of a petition under section 20 of the Waste Lands Ordinance, No. 1 of 1897, it did not hold that such a proceeding was a " civil suit or action " within the meaning of that expression in the Ordinance.

As against this long line of decisions of this Court which hold that section 3 applies only to civil suits or actions properly so called, we have the decision of *In re Goonesinha* [4] which takes a different view. It was there held that an application for a mandate in the nature of a writ of certiorari constituted an action and therefore came within the ambit of section 3. In that case this Court refused to grant a mandate in the nature of a writ of certiorari to bring up before it the proceedings taken before an election Judge. Moseley J. while conceding that the word " suit " implies the existence of two parties went on to hold that the same cannot be said of an action and based his decision on section 6 of the Civil Procedure Code which reads :—

"Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action. "

He summed up his decision thus :—

" I have little difficulty in arriving at the conclusion that an application for a writ of *certiorari*, being an application for relief or remedy

[1] *(1935) 37 N. L. R. 447.*
[2] *(1942) 43 N. L. R. 436.*
[3] *(1946) 47 N . L. R. 217.*
[4] *(1942) 44 N. L. R. 75.*

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obtainable through the Court's power or authority, constitutes an action, and therefore comes within the compass of section 3 of Cap. 85."

With great respect I find myself unable to agree with the conclusion of the learned Judge. A writ of certiorari is not a means of obtaining any relief or remedy through the Court's power or authority. It is a purely supervisory function of the Court, while section 6 of the Civil Procedure Code contemplates an entirely different function. In my view it would be wrong to read section 6 by itself without reference to the other provisions of the Civil Procedure Code. To my mind section 6 when read with the other sections of the Civil Procedure Code leaves no room for the view that a writ of certiorari falls within the definition of action in the Code. Moseley J. relied on the case of *Subramaniam Chetty v. Soysa* [1]. That was a case in which this Court allowed an appeal from an order of the District Judge under section 282 (2) of the Civil Procedure Code refusing to set aside a sale in execution on the ground of a material irregularity in conducting the sale. That section provides that the purchaser at an execution sale shall be made respondent to the petition filed by the applicant under sub-secton (2) thereof seeking to have the sale set aside. It is clear from the section that the proceeding thereunder is an application to the District Court for relief or remedy obtainable through the exercise of the Court's power or authority, and section 6 declares that such an application constitutes an action. When an application for leave to appeal to the Privy Council was made it was contended that the proceeding was not a civil suit or action and that there was no final judgment. Bertram C.J. in dealing with the objections stated :—

"Was this proceeding a suit or action? In determining that question, we must have regard to the nature of Ordinance No. 31 of 1909. It is intended to supplement our Code of Civil Procedure. It would be highly inconvenient if the word 'action' in this Ordinance were given a different meaning from that which is given to it in our Code of Civil Procedure. But there is a further reason. The principal sections of this Ordinance replaced and re-enacted certain repealed sections of our Code of Civil Procedure, and there is a very strong inference that the words used in an enactment so passed should have the same meaning as they bore in the sections which the enactment replaced.

"Now, in our Code of Civil Procedure, a very wide meaning is given to the word 'action'. In section 5 an action is defined as a proceeding for the prevention or redress of a wrong. In section 6 it is said that every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action. It seems clear to me, therefore, that this application to the Court to set aside the sale instituted by a petition to the Court was an action within the meaning of section 4."

In my opinion *Subramaniam Chetty v. Soysa* (*supra*) is not an authority which supports the view that a writ of certiorari is a civil suit or action. In the case of *Controller of Textiles v. Mohamed Miya* [2] an application for

[1] (*1923*) *25 N. L. R. 344.*

[2] (*1948*) *49 N. L. R. 105.*

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leave to appeal to the Privy Council was granted by this Court from an order quashing the decision of the Controller of Textiles who had revoked the licences granted to Mohamed Miya. In that case, however, the question whether the proceeding in which the writ was granted was a civil suit or action did not arise for decision. But the question was raised in the subsequent case of *Kodakan Pillai v. Mudanayake* [1]. In that case Nagalingam J. rested his decision on the following definitions of the term " action " in Justinian and Bracton :

> " *Actio autem nihil aliud est, quam jus persequendi in judicio, quod sibi debetur.* "—An action is nothing else than the right of suing before a Judge for that which is due to us.
>
> " *Actio nihil aliud est quam jus prosequendi in judicio quod aliquo debetur.* "—An action is nothing else than the right of suing in a Court of justice for that which is due to someone. "

After citing these definitions he proceeded to say :

> " ' That which is due to us or someone ' is wide enough to include the case of a declaration of status.
>
> " Even on the basis of these general concepts of the term ' action ' the order made upon the application for a Writ of Certiorari cannot but be regarded as one relating to an action. "

With great respect I am unable to agree with the learned Judge's conclusion or reasoning. When this Court granted a mandate in the nature of a writ of certiorari quashing the order of the Revising Officer it did not make a declaration of status. The conclusion of Nagalingam J. that proceedings for the grant of a writ of certiorari are an action is based on the wrong assumption that it did make such a declaration.

It is clear from what has been said above that the one thing a petitioner does not do in a petition for a mandate in the nature of a writ of certiorari is to ask " for that which is due to him ". On a close reading of the decision of Nagalingam J., I am unable to regard his judgment as holding that an applicant for a writ of certiorari is a party to a civil suit or action. He does not go beyond holding that the order made upon the application for a writ of certiorari can be regarded as one *relating* to an action.

I now come to the decision of Gratiaen J. in *Attorney-General v. Ramaswami Iyengar* [2]. It is of little assistance to the petitioner in the instant case. That was a decision under the Estate Duty Ordinance wherein under section 34 an appeal lies to the District Court from an assessment to estate duty. Section 40 provides that—

> " Upon the filing of the petition of appeal and the service of a copy thereof on the Attorney-General, the appeal shall be deemed to be and may be proceeded with as an action between the appellant as plaintiff and the Crown as defendant, and the provisions of the Civil Procedure Code and of the Stamp Ordinance, shall, save as hereinafter provided, apply accordingly.

[1] *(1951) 54 N. L. R. 350.*

[2] *(1954) 55 N. L. R. 572.*

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" Provided that no pleading other than the petition of the appellant shall be filed in any action unless the court by order made in that action otherwise directs ;

" Provided further, that the decree entered in any action shall specify the amount, if any, which the appellant is liable to pay as estate duty under this Ordinance. "

It is evident from the section I have quoted that an appeal to the District Court is not an action, for, if it were, it would be unnecessary to declare by statute that it shall be deemed to be and proceeded with as an action between the appellant as plaintiff and the Crown as defendant.

The Privy Council case of *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan* [1] relied on by Gratiaen J. as a decision in point cannot be regarded as an authority on the question arising in the case, not only because the matter was not fully argued as the Privy Council granted special leave to appeal, but also because the expression which the Privy Council was called upon to interpret was " civil cause " and not " civil suit or action ". On this point this is what Lord MacMillan who delivered the Judgment of the Board says at page 392 :—

" Passing to what has been designated the procedure appeal, their Lordships have to consider whether it was within the competency of the Court of Appeal to grant leave in this case to appeal to His Majesty in Council. In holding the contrary, the learned Chief Justice stated that he did so ' reluctantly and against his own opinion ' in deference to a previous decision of his Court in a case of *The King on the Prosecution of the Income Tax Commissioner v. The Firms of A. R. A. M. and P. A.* in 1922, which he felt himself constrained ' from courtesy rather than conviction ' to follow. Thorne J. shared the reluctance of the Chief Justice, while Sproule S.P.J. alone championed the soundness of the authority so manifestly distasteful to his colleagues.

" Their Lordships did not have the advantage of a full argument on the question, as the respondents, not having any interest in the matter, in view of the special leave to appeal granted by order of His Majesty in Council, did not feel called upon to contest the appellant's submission. The whole ground, however, is adequately explored in the judgment of the learned Chief Justice, whose convincing argument against the decision which he reluctantly reached appears to their Lordships really unanswerable. It is true that the Ordinance in section 80 which deals with appeals from decisions of the Commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial Charter of 1855 provides for leave to appeal being granted by the Court of the Colony from ' all judgments, decrees, or determinations made by the said Court of Judicature in any civil cause '. And section 1154 of the Civil Procedure Code provides that subject to certain conditions ' an appeal shall lie from the Court of Appeal to His Majesty in Council— (*a*) from any final judgment or order. ' Wider language it would be

[1] (*1933*) *A. C. 378.*

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difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of section 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council."

It would appear from the decisions of this Court referred to above that for over a hundred years this Court had consistently interpreted the words "civil suit or action" in section 3 of the Ordinance in their ordinary sense of a proceeding in which one party sues for or claims something from another. The current of authority in South Africa where similar words in enactments such as our Charter of Justice were interpreted has been the same as in Ceylon till 1942. Even where the proceedings were in the nature of an action the Privy Council in the *Rangoon Botatoung Company Ltd. v. The Collector, Rangoon* [1] refused to give leave to appeal because the proceedings were in the nature of an arbitration and lacked the characteristics of an action as ordinarily understood.

In my opinion the correct approach to the interpretation of the expression "civil suit or action" is to be found in the decisions of this Court prior to *Goonesinha's* case. It is a rule of construction of statutes that the meaning which is to be given to an expression in any particular enactment will depend upon such circumstances as the occasion or purpose for which it is used, the nature of the subject matter, the context of the enactment in which it occurs, and the like. The word "action" has been used by different writers commencing with Justinian down to the present day in so many different senses that it would be unsafe to consider the words "civil suit or action" in the abstract. The meaning given to it in Roman Law or by early Roman, Roman-Dutch, and English writers cannot be applied without regard to the intention of the legislature and the object for which the statute was enacted together with, in the instant case, the previous history of legislation on the subject.

Goonesinha's case not only goes against the current of decisions of this Court from the time of the Royal Charter of 1833, but also goes against the well-known rules of interpretation of statutes. The words "civil suit or action" have been used in legislation regulating appeals to the Privy Council since the earliest times here as well as elsewhere, and by 1907 the year in which the Ordinance was enacted their meaning was well established by judicial interpretation. It is a rule of construction of statutes that when words in an earlier enactment which have been judicially interpreted are used in a subsequent enactment *in pari materia* it must be presumed that they have been used in the sense in which they

[1] *(1912) 39 L. R. I. A. 197.*

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have been judicially interpreted. There is nothing in the Ordinance which rebuts that presumption. Besides, where the meaning of a word in an earlier legislative instrument has been well established by judicial interpretation, I do not think that it would be correct to extend it by reference to a definition of that same word in a later enactment not *in pari materia*.

I have stated above why I am unable to agree with *Goonesinha's* case and the subsequent case of *Kodakan Pillai*. I make no mention here of *Mohamed Miya's* case because it does not deal with the particular matter under consideration.

I think I should not omit to refer to the case of *Bradlaugh v. Clarke* [1] especially as Nagalingam J. has relied upon it in his judgment in the case of *Kodakan Pillai*. In that case the Court had to interpret the word " action " in section 5 of the Parliamentary Oaths Act, 1866 (29 and 30 Vict. c. 19) in the context " to be recovered by action in one of Her Majesty's Superior Courts at Westminster ". The plaintiff as a common informer claimed that he was entitled to sue for the penalty. His action was opposed on the ground that all penalties imposed by statute belong to the Crown alone unless given in precise terms to an individual. In dealing with this argument Lord Selborne after referring to the authorities stated at page 361 :—

> " These authorities appear to me to prove that a suit to recover such a penalty as that incurred by the appellant might, in and after 1866, have been brought by the Crown in any one of the Superior Courts at Westminster, and consequently that the option given to sue in any one of those Courts cannot be a sufficient reason for letting in a common informer under a statute by which a right of action is not otherwise given to him. I am also satisfied after full consideration that the word ' action ' is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and, therefore, not furnishing any sufficient ground for implying a right of action in a common informer. That it is used as " nomen generalissimum " *in this particular statute* seems probable, from the fact that it stands there alone, without having superadded to it a number of other technical terms, which are usually found associated with it in earlier statutes. "

The words I have underlined clearly indicate that the meaning given to the word " action " in that case was meant for the particular context in which it occurred. The learned Law Lord did not attempt to lay down a definition for all purposes. In fact the judgment of Lord Blackburn recognises that the word " action " has more than one meaning depending on the context in which it occurs and that in its ordinary sense an action denotes a mode of procedure commenced by writ of summons.

The learned Attorney-General argued that each application for certiorari should be examined, and if it has the characteristics of a civil

[1] *(1883) 8 A. C. 354.*

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suit or action, an appeal would lie; if it has not, there would be no appeal. He also invited our attention to the cases of *Secretary of State for India v. Chelikani Rama Rao* [1], *Rangoon Botatoung Company Ltd. v. The Collector of Rangoon* [2] and *Tata Iron & Steel Co. Ltd v. Chief Revenue Authority of Bombay* [3].

The first of these cases deals with claims to land by two Zamindars under the Madras Forest Act (V of 1882). The claim was rejected by the Forest Settlement Officer. The Zamindars appealed to the High Court which remanded the appeal to the District Judge to determine whether the Crown had a subsisting title at the date of the notification. On the finding of the District Judge the High Court allowed the appeals and decrees were passed excluding the lands from the reserved forest area. The Secretary of State for India then appealed to the Privy Council. Objection was taken to the appeal being entertained by the Privy Council. That objection was over-ruled. The reason is thus stated by Lord Shaw at page 197 :

> "It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench in *Kamaraju v. Secretary of State for India in Council* (I. L. R. 11 Madras 309), a decision which was given in 1888 and has been acted on in Madras ever since."

Referring to the *Rangoon Botatoung Company* case which the respondents relied on, Lord Shaw said at page 198 :—

> "The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land ; and if the ordinary Courts of the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

I have already referred to the *Botatoung* case and shall therefore make no further reference to it. The *Tata Iron & Steel Company* case is of some assistance. There it was held that an appeal to the Privy Council does not lie under Clause 39 of the Letters Patent of the Bombay High Court from a decision of the High Court upon a case stated and referred to the Court by the Chief Revenue Authority under section 51 of the Indian Income Tax Act, 1918.

[1] *(1916) 43 L. R. I. A. 192.* [2] *(1912) 39 L. R. I. A. 197.*
[3] *(1923) A. I. R. P. C. 148.*

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Lord Atkinson who delivered the Judgment of the Board dealt with the matter in this wise at page 150 :—

" In order therefore that the appeal in this case should be held to be competent, the decision and order of the High Court under section 51 of the Income Tax Act must come within Clause 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. Now what is a final judgment as understood in English litigation ? In *Ex parte Moore* (1885) 14 Q. B. D. 627, 632), Lord Selborne laid down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits.

" In *Onslow v. Commissioners of Inland Revenue* (1890) 25 Q. B. D. 465 it was determined on high authority what it is that amounts to a final judgment. . . .

" Lord Esher delivered the judgment of the Court. After quoting the opinions of several authorities, which as the judgment is printed it is not easy to distinguish from portions of his own judgment, he refers particularly to opinions expressed by Cotton L.J. in *Ex parte Chinery*—(1884) 12 Q. B. D. 342—with which Bowen and Kay, L. JJ. had concurred. He said :

' I think we ought to give to the words " final judgment " in this sub-section their strict and proper meaning i.e. a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained and established, unless there is something to show an intention to use the words in a more extended sense . '

He proceeds—

' Brown, L. J. says there is an inherent distinction between judgments and orders, and that the words " final judgment " have a professional meaning, by which expression I think he meant to say as Cotton L. J. had previously said, that a judgment is a decision obtained in an action, and if that was his meaning, both these learned Lords Justices gave judgment to the same effect, and Fry L. J. agreed with him. A " judgment ", therefore, is a decision obtained in an action, and any other decision is an order. . . . That in my opinion is a proper distinction, and, therefore in the present case the decision is an order and not a judgment, and the appeal should have been brought within 21 days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing. '

" This decision clearly establishes that the decision and an order made by the Court under the 51st S. of the Income Tax Act cannot be held to be a ' final judgment ' within the meaning of the 39th clause

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of the Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense."

The above decisions of the Privy Council confirm me in the opinion I have formed that the words "civil suit or action" in section 3 of the Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings and that an application for a writ of certiorari does not fall within the ambit of those words in the context in which they occur.

The objection therefore succeeds and the application is refused with costs.

GUNASEKARA, J.—I agree.

PULLE, J.—

I agree that the application for leave to appeal to the Privy Council should be refused. At one stage of the argument I was inclined to accept as correct the decision of a bench of two Judges in *In re Goonesinha*[1] that an application for a writ of *certiorari* constitutes an action which falls within the ambit of section 3 of the Appeals (Privy Council) Ordinance. This case was followed by a single judge in *Kodakan Pillai v. Mudanayake*[2]. Upon further consideration of the nature of a writ of *certiorari* and the decisions from South Africa cited by my Lord, the Chief Justice, I am convinced that the proceedings taken to quash by *certiorari* the order of the Tribunal of Appeal dated the 10th October, 1952, do not constitute a civil suit or action within the meaning of section 3 of the Ordinance. In my opinion section 3 cannot be read to include a right of appeal to the Privy Council from every judgment or order of the Supreme Court in what may be described as a civil cause or matter satisfying the requirements in Rule 1 of the Schedule to the Ordinance.

There are undoubtedly features in common between a "civil suit or action" and proceedings in *certiorari*. It may happen, in certain instances, that a decision given on an application for *certiorari* would finally dispose of the litigation before the tribunal whose jurisdiction is challenged. But that is not a result that flows necessarily from the exercise of the jurisdiction of the court to grant a writ of *certiorari*. In its essence this jurisdiction is of a limited character the exercise of which does not in the least diminish or take away from an inferior tribunal the power to adjudicate on a matter within its proper jurisdiction.

[1] *(1942) 44 N. L. R. 75.*

[2] *(1951) 54 N. L. R. 350.*

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I fully concur in the observations made by my Lord on *Subramaniam Chetty v. Soysa* [1], *Abbot v. Sullivan* [2], *Lee v. Showmen's Guild of Great Britain* [3] and *O 'Connor v. Isaacs and others* [4].

DE SILVA, J.—I agree.

SANSONI, J.—

I should have preferred to wait until I had seen the judgments of the other members of the Court, for such a course may have rendered it unnecessary for me to write a separate judgment. But as I shall be going away on long leave in a few days I am compelled to state my views without delay, and I shall do so very briefly.

Mr. Perera's submission was that no application for a writ of certiorari can ever be a suit or action because on such an application the Court does not adjudicate on the legal rights of parties and it does not therefore decide whether a legal right has been infringed or a wrong committed. He stressed that the petitioner for the writ did not claim that it had a legal right solely to pick up and set down passengers within the Municipal limits of Kandy. He submitted that the only matter which the petitioner had to establish in order to obtain the writ was that it had an interest which went beyond the interests of the public in general, in that it had suffered damage, and that the tribunal had exceeded the limits of its jurisdiction.

The Attorney-General submitted that each application for a writ of certiorari must be examined in order to ascertain whether it was a civil suit or action, and he pointed out that a stranger who applies for the writ on the ground that a Court had exceeded its jurisdiction would not be in the same position as a party aggrieved, in the sense of one who has suffered some damage from the usurpation of jurisdiction.

Mr. Jayawardene submitted that the infliction of damage (which Mr. Perera's client had complained about) coupled with the usurpation of jurisdiction by the tribunal, which were the two elements on which the application for this writ was based, constituted a wrong done to the party complaining. In this case these two elements formed the basis of the petitioner's application, and the proceeding fell within the phrase " civil suit or action ".

An action in the narrowest sense is a proceeding, founded upon a legal right, brought by one person against another for the enforcement of that right. But in a broader sense an action may be defined as a proceeding instituted by a person in order to obtain the intervention of a Court of law, when such person is seeking relief through that Court. It is in this sense that I would include this certiorari application within the term action. I think that an ultra vires decision of a statutory tribunal which tries something which it has no jurisdiction to try, or again a decision

[1] *(1923) 25 N. L. R. 344.*
[2] *(1952) 1 All E. R. 226.*
[3] *(1952) 1 All E. R. 1175.*
[4] *(1956) 2 W. L. R. 585.*

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made by such a tribunal in contravention of the principles of natural justice, where such a decision causes damage to a person, constitutes a wrong for which that person can seek his remedy by Certiorari, and the application for the writ is an action.

It matters not whether the remedy is sought by injunction or by a declaratory action or by Writ of Certiorari : each such proceeding would be an action. In this matter the petitioner expressly claims to be a party who has suffered damage through an usurpation of jurisdiction by the tribunal, and that is enough to give a Court jurisdiction to hear his complaint and give relief.

I therefore take the view that an application for certiorari falls within the meaning of the word " action " provided such application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction. In Volume 2 of Wood Renton's Encyclopaedia of the Laws of England (Second Edition) at page 619 there appears the following passage in the article on certiorari : " Though the writ of certiorari is *a means of preventing the infliction or continuance of any wrong by an unwarranted assumption of jurisdiction*, the granting of the writ at the instance of a private person is a matter of discretion, and not *ex debito justitiae.* " In *Abbott v. Sullivan* [1] Denning, L. J., said " In the case of statutory tribunals which depend for their jurisdiction on a statute, it is an actionable wrong for them to usurp more than the statute gives them". After citing certain cases the learned Lord Justice said: " These cases all show that *an invalid usurpation of jurisdiction which causes damage is itself a wrong* ". See also *R. v. St. Edmundsbury* [2] where the allied writ of prohibition was considered and it was referred to as a remedy for the injury of encroachment of jurisdiction.

It would therefore seem that damage combined with excess of jurisdiction constitutes a wrong for which the remedy lies in certiorari, and it is not necessary in a case where such damage has been caused that there should also have been a previously existing legal right which has been infringed.

It is true that in an application for certiorari there are not two or more adversaries involved in a dispute over their legal rights, such as one finds in a regular action. In certiorari, one may find that the only parties are the petitioner and the tribunal whose jurisdiction is in question, though other persons whose interests are involved may be added (as Mr. Jayawardene's clients were added). The substantial question to be answered in deciding whether it is an action or not remains the same.

Even if an action be regarded as " a proceeding in which one party sues for or claims something from another " a petitioner in certiorari claims as against the tribunal a declaration that it has exceeded its jurisdiction and that its order should be quashed. The object of the writ is to demolish the order made without, or in excess of, jurisdiction. It

[1] *(1952) 1 A. E. R. 226.* [2] *(1947) 2 A. E. R. 170.*

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is put out of the way " as one which should not be used to the detriment of any of the subjects of Her Majesty " per Lord Cairns L. C., in *Walsall Overseers v. L. & N. W. Ry C.* [1].

As I think it is essential that in an action the plaintiff or petitioner must seek some relief and should be in the position of a person who has a grievance, I consider that an application for certiorari by a person who is not a party grieved is not a suit or action, because in such a case the applicant cannot be said to be claiming any relief for himself. If the petitioner in this matter had not been a party who was adversely affected by the tribunal's order, in my opinion it would not have been a party to a civil suit or action.

Mr. Perera submitted that an action needs a cause of action. I think in this case the cause of action comprised the damage suffered by the petitioner taken together with the alleged unlawful exercise of jurisdiction, and it is the combination of these two things which constitutes the wrong for the relief of which the petitioner came into Court.

I would therefore grant this application for leave to appeal, with costs.

Application refused.

[1] *(1879) 4 A. C. 30 at 39.*

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[In the Privy Council]

1956 *Present :* **Earl Jowitt, Lord Oaksey, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

MOHAMEDALY ADAMJEE and others, Appellants, *and* HADAD SADEEN and others, Respondents

Privy Council Appeal No. 24 of 1955

S. C. 72—D. C. Colombo, 5,951

Partition action—Decree for sale—Fraudulent collusion between the parties—Effect on conclusive nature of decree—Investigation of title by Court—Effect of defective investigation—Partition Ordinance, No. 10 of 1863 (Cap. 56), ss. 2, 4, 8, 9.

Prescription—Immovable property—Claim against fideicommissarii*—Burden of proof—Evidence Ordinance, s. 106—Prescription Ordinance, ss. 3, 13.*

(i) A decree entered under section 8 or section 9 of Partition Ordinance No. 10 of 1863 is conclusive against all persons whomsoever, and a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages (even though the property is still in the sole possession of the parties whose fraud is set up.)

(ii) Although a partition decree entered without any investigation of title does not have the conclusive effect provided by section 9 of the Partition Ordinance, a decree entered after a defective or inadequate investigation of title is conclusive, as long as it has not been set aside on an appeal in the same action. Once it appears that the court did hold an investigation into title, although the investigation was not sufficiently exhaustive to prevent the fraud which was perpetrated by the parties in regard to the title of a person who had not been made a party to the action, any defect in the method of investigation would not vitiate the decree. The person so defrauded is not entitled to seek by separate action to set aside the decree or in a separate action to challenge its conclusive effect. The fact that lack of proper investigation of title may be sufficient for an appeal court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 of the Partition Ordinance when the decree is being considered in a separate case.

Obiter : On an appeal in a partition action if it appears to the court of appeal that the investigation of title has been defective it should set aside the decree and make an order for proper investigation. When investigating title the following matters should be attended to by the court in the generality of cases :—

" The Trial Judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Cap. 101). They may reveal registered instruments suggesting the possible existence of

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title in persons other than the parties before the court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in court or not, the effect of such instruments upon the title set up by the parties before the court should be examined. The Trial Judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony specifying by name the persons actually in possession and satisfy himself that they are some or all of the parties before the court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He should also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given . . . . If it appears to the Supreme Court when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision."

(iii) The proviso to section 3 of the Prescription Ordinance reads as follows :—

> " Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

Held, that once a party relying upon prescription has brought himself within the body of section 3 the onus rests on persons relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession within the period of ten years. Thus, if a *fideicommissarius* claims the benefit of the proviso as a party defendant the burden is on him to prove not only that he is a *fideicommissarius* but also that his right of possession accrued to him within the period of ten years possession by the plaintiff. *Chelliah v. Wijenathan* (1951) 54 N. L. R. 337, considered.

APPEAL from a judgment of the Supreme Court reported in *56 N. L. R. 345.*

The dispute between the parties in this case related to certain immovable property. The property belonged at one time to one Savia Umma as a *fiduciarius* under a will which created a *fideicommissum*. Neither the probate of the will nor the executor's conveyance in favour of Savia Umma had been registered. The plaintiffs claimed the property under a duly registered Fiscal's Conveyance executed in consequence of a hypothecary action instituted by their predecessor in title against Savia Umma. The Fiscal's Conveyance did not set out the restrictions on Saiva Umma's power to deal with the property. The defendants, who succeeded to Savia Umma's title as *fideicommissarii*, claimed the property by virtue of a decree entered in a partition action in which some of them were the plaintiffs and the others were the defendants. They had fraudulently and collusively failed to make the present plaintiffs parties to the partition action, the plaint in which was lodged on July 15, 1949. In the present case the plaintiffs who had, by themselves and through their predecessors in title, been in possession from March 29, 1916, relied, *inter alia*, on

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their prescriptive possession of the entire property, and claimed as follows :—

(*a*) An order that the court do set aside or vacate the decree in the Partition proceedings.

(*b*) A declaration that the said decree was null and void and of no force or effect in law, and in the alternative

(*c*) damages in the sum of Rs. 100,000.

Sir Lynn Ungoed-Thomas, Q.C., with *Raymond Walton, E. S. Amerasinghe* and *L. Kadirgamar*, for the plaintiffs appellants.

Ralph Milner, with *Miss J. Bisschof*, for respondents 1–8, 12, 14 and 21.

Cur. adv. vult.

December 11, 1956. [*Delivered by* LORD COHEN]—

The dispute between the parties relates to immovable property situate at Kollupitiya within the Municipality and District of Colombo, Western Province. Their Lordships will refer to it hereafter as " the property ". The property formerly belonged to one Idroos Lebbe Marikkar (hereinafter referred to as " Marikkar "). He died in 1876, probate of his will being granted on the 29th May, 1876. In accordance with directions contained in the will the estate was divided amongst those who would have been Marikkar's intestate heirs in such a manner that each received the equivalent in value of what would have been his or her share upon an intestacy. In that division the property was conveyed by the surviving Executor by a Deed No. 2575 of the 14th September, 1888, to Savia Umma, a daughter of the testator. The conveyance was made subject to the conditions imposed by the will, including a provision that the said Savia Umma or her issues or heirs should not sell, mortgage or alienate the property but should hold the same in trust for " the grand-children of my children and the grand-children of my heir and heiresses " as therein mentioned.

On the 15th July, 1949, a Partition Action was started in the District Court of Colombo by seven of the present respondents against the other thirty-six respondents, the forty-three respondents, grandchildren of Savia Umma, between them claiming to be all the persons interested in the property. To these proceedings the appellants were not made parties. In the plaint in the Partition Action the plaintiffs allege in paragraph 19 that the parties to the Partition Action and their predecessors in title had been in undisturbed and uninterrupted possession of the property. The plaintiffs asked for sale under the Partition Ordinance (No. 10 of 1863) and for division of the proceeds.

At this point it is convenient to refer to the relevant provisions of the Partition Ordinance. Section 2 provides that " when any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property,

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or, should such partition be impossible or inexpedient, . . . to apply for a sale thereof, and in either case to file in any court of competent jurisdiction a libel . . . " as therein mentioned.

Section 4 gives direction as to investigation of the title of the plaintiffs (*a*) in the event of default of appearance by any defendant (*b*) after appearance if there is a dispute as to title or if any defendant shall claim a larger share than the plaintiffs have stated to have belonged to him. The Section goes on to provide that the court shall try and determine any material question in dispute between the parties and shall decree a partition or sale according to the application of the parties or as to the court shall seem fit. Sections 5, 6 and 7 deal with what is to be done in the event of a decree of partition being made. With these Sections their Lordships are not concerned in the present case. Section 8 gives directions as to the carrying out of a decree for sale. Once the decree has been made no further decree is necessary, and it is provided that a certificate under the hand of the Judge of the court that the property has been sold under order of the court and setting forth the name of the purchaser thereof and that the purchase money has been paid into court by him shall be evidence in any court of the purchaser's title without any deed of transfer from the former owners.

Section 9, which is the most important Section requiring consideration on the present Appeal, provides as follows :—

> " The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever whatever right or title they have or claim to have in the said property although all persons concerned are not named in any of the said proceedings nor the title of the owners nor of any of them truly set forth and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty.
>
> Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act whether of commission or omission such damages had accrued. "

Returning now to the Partition Action, on the 29th March, 1950, the District Judge made a decree in the course of which he declared the shares of the various parties to the Action and ordered and decreed that the property should be sold as therein mentioned and the proceeds be brought into court to abide by the further order of the court.

It is to be noted that the present appellants had not been made parties to that Action. They claim to be entitled to the whole of the property as descendants of one Adamjee Lukmanjee who had acquired the property from one Leonora Fonseka. She had acquired it under a Fiscal's Conveyance executed as the result of mortgage proceedings in the District Court of Colombo against the said Savia Umma and her husband. The Fiscal Conveyance did not set out the restrictions on Savia Umma's power to deal with the property which were contained in the 1888 Conveyance under which she acquired title.

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At this point their Lordships must observe that all the deeds and documents on which the appellants rely for their title were duly registered in accordance with the provisions of the Registration Ordinance but that neither the probate of Marikkar's will nor the Deed of 1888 were so registered. The appellants argued that the relevant sections of the Land Registration Ordinance gave them priority over the title of the respondents under the will and the conveyance of 1888.

The relevant Section of the Registration Ordinance at the time of the execution of the conveyance to Mr. Adamjee Lukmanjee was Section 17 of Ordinance No. 14 of 1891. This Ordinance was repealed by Ordinance No. 23 of 1927, and Section 7 of the repealing Ordinance provided that an instrument executed or made on or after the 1st January, 1864, whether before or after the commencement of the repealing Ordinance should unless it was duly registered under the Ordinance be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which might be duly registered under the Ordinance. For reasons which will appear hereafter their Lordships do not find it necessary to deal with the argument based upon the Registration Ordinance.

From the decree of the District Judge in the Partition Action certain respondents appealed to the Supreme Court on the question whether they had received their proper shares under the decree of the District Judge. Before that appeal could be heard in the Supreme Court the appellants, who had become aware for the first time of the Partition proceedings petitioned on the 20th May, 1950, for an injunction restraining sale of the property. In paragraph 16 of their Petition they pleaded that they should have been made parties to the action and should have had and should have been given notice thereof, and they asked by way of relief for an injunction restraining any sale of the property, for an order setting aside or vacating the decree in the Partition Action and for a declaration that the decree in the Partition Action was null and void and of no force or effect in law.

What happened on that Petition does not appear clearly from the Record. Their Lordships are left in doubt whether the attention of the Supreme Court at the hearing of the appeal from the Partition decree was ever called to this Petition for injunction and other relief. Had the attention of the Supreme Court been directed to this matter it is possible that they would have considered carefully whether there had been sufficient investigation of the respondents' title and if there had not been sufficient investigation they might have directed a new trial under the powers referred to later in this judgment.

On the 20th May, 1950, the appellants also lodged their plaint in the proceedings which have now reached their Lordships ' Board. In clause 14 thereof they pleaded that by themselves and through their predecessors in title they had been in the sole and uninterrupted and undisturbed possession of the property to the exclusion of all others from at least the 26th day of March, 1916, and that they had prescribed to the property. That pleading was directed to the Prescription Ordinance

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No. 22 of 1871. Section 3 of that Ordinance so far as material provided as follows :—

"Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or Plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any othr act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the Defendant to a decree in his favour with costs. And in like manner when any Plaintiff shall bring his action . . . proof of such undisturbed and uninterrupted possession as hereinbefore explained by such Plaintiff . . . or by those under whom he claims, shall entitle such Plaintiff . . . to a decree in his favour with costs.

"Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

Returning now to the plaint the relief claimed by the appellants was, so far as relevant, as follows :—

(*a*) An order that the court do set aside or vacate the decree in the Partition proceedings.

(*b*) A declaration that the said decree was null and void and of no force or effect in law, and in the alternative

(*c*) damages in the sum of Rs. 100,000.

Answers were put in by some of the defendants and issues were settled. In due course the action came on for trial before District Judge L. B. de Silva. He answered the various issues, his findings so far as material to the present appeal were as follows :—

(1) the respondents had acted wrongly, unlawfully, fraudulently and collusively in failing to make the appellants party to the Partition Action or in giving them any notice thereof ;

(2) the value of the property at the date of the action was Rs. 100,000 ;

(3) the appellants had not acquired a prescriptive title to the premises since they had not discharged the onus which the District Judge held rested on them of establishing when the respondents' right to possession as *fidei commissarii* accrued to them. Therefore

(4) the appellants could only claim such rights as accrued to them by virtue of the priority conferred on them by the Registration Ordinance.

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He held further that the effect of that Ordinance was that the will being void, Savia Umma could only have vested in Leonora Fonseka and through her in the appellants' predecessors in title such interests as she had in the property on an intestacy and that such interest was only 1/16th of the value of the property, i.e., Rs. 6,250. He added, however, the value of the improvements which he found the appellants and their predecessors in title to have effected on the property and accordingly awarded to the appellants by way of damages under the proviso to section 9 of the Partition Ordinance the sum of Rs. 29,687/50. He rejected their claim to set aside the decree or to have it declared null and void on the ground that the effect of section 9 of the Partition Ordinance was that the decree was final and binding and that the only remedy of any person including a person who had been defrauded by the action of the parties who obtained the decree was limited to a claim in damages.

The plaintiffs appealed to the Supreme Court who affirmed the decision of the District Judge, and it is from that decision that the appellants, with the leave of the Supreme Court, now appeal to their Lordships.

Having regard to the finding of the trial Judge as to the fraud and collusion issue and the confirmation of that finding by the Supreme Court, it is plain that the appellants were entitled to some relief, and the questions for their Lordships' decision are :—

(1) Whether the plaintiffs can now insist on having the decree in the Partition Action set aside or are limited by section 9 of the Partition Ordinance to their claim for damages, and

(2) whether, if they are so limited, they must accept the figure of Rs. 29,687/50 awarded to them by the trial Judge or are entitled to receive Rs. 100,000 which the parties agree would be the correct figure if the appellants were entitled absolutely to the property at the date of commencement of the proceedings.

The appellants support their claim to have the decree set aside on two grounds. First, they say that notwithstanding the wide language of secton 9 fraud is something outside the ambit of that section, and that on general principles a decree obtained by fraud is both under English law and under the law of Ceylon always liable to be set aside in independent proceedings. Their Lordships heard an interesting argument on this point from Sir Lynn Ungoed-Thomas on behalf of the appellants, and despite the wide language of the Ordinance they might have been persuaded to accept it had there not been a long succession of authority in the Courts of Ceylon establishing the principle, for which justification can be found in the language of the secton, that " a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages. " The citation which their Lordships have made was from the decision of Sir Alexander Wood Renton in *Jayawardene v. Weerasekera*[1]. That decision followed on a continuous

[1] *(1917) 4 C. W. R. 406 at p. 407.*

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series of decisions dating back as far as 1891, see *Nono Hami v. De Silva* [1]. Prior to that year there had been some conflict of decision, but in the case last cited Burnside, C.J., said at p. 199 that section 9 " makes a partition decree obtained under the Partition Act final and conclusive in all respects, save as to the right contained in the proviso of any party prejudiced by it to his action for damages. " He went on : " It was urged that it was a principle of law that fraud vitiated everything obtained by it. That is too general a proposition. It is true that the law abhors fraud, and equity had an undoubted jurisdiction to relieve against every species of fraud ; yet when adequate relief can be had at law, where in fact there is a full, perfect, and complete remedy otherwise, it is not the course to interfere. (*Deere* v. *Guest*, 1 M. & C. 516, and per Lord Hardwicke, " Smith's Manual of Equity, " p. 51.) Now, looking at the very distinct declaration contained in the 9th section, and to what must have been the object which the Legislature had in view, I can come to no other conclusion than that the proviso was meant to conserve the only remedy, except by way of appeal, which could be sought against a decree already pronounced, namely, one which sounded in damages ; if it were not so, the operation of the Ordinance must be disastrous. No single decree could escape a litigious spirit to reopen it on the ground of fraud, and no date would exclude such contests. The object of the partition act was to quiet the title to land, and leave persons prejudicially affected by any such decree, by reason of any cause whatever, to their remedy in damages at law, and this to my mind is a full and perfect remedy, and it is unfortunate if any mere dicta should have led to any uncertainty on the point. "

Since that date there has been no decision conflicting with the principle laid down as stated by Sir Alexander Wood Renton in the passage already cited, and their Lordships, whatever their view might otherwise have been as to the correctness of the decision, would not be prepared to disturb a principle so long recognised and on the basis of which many titles may have been established.

Since Sir Alexander Wood Renton gave his judgment in 1917 there has been no decision to the contrary. Sir Lynn referred to a dictum of Ennis, J., in the case of *Fernando v. Marsal Appu* [2] in which the learned Judge said that he did not consider it necessary to go into the question of whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up, the court could not on proof of fraud take away the property from them. Sir Lynn said that the present was such a case and that it was still open to their Lordships to say that as the decree for sale had not actually been carried out and as the fraud had been proved they could take away the property from the respondents. Their Lordships' attention was not called to any case where the possible exception suggested in the passage stated had been recognised. Bearing in mind that section 9 expressly provides for the binding nature, not of the sale but of the decree for sale, and that section 8 does not contemplate any decree subsequent to that decreeing that sale should take place, their Lordships do not think it right to recognise the alleged exception to the general rule.

[1] (*1891*) *9 S. C. C. 198.* [2] (*1922*) *23 N. L. R. 370.*

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Alternatively the appellants submitted that there had been no proper investigation of title in the present case and that consequently the decree was not a decree within the terms of section 9 of the Partition Ordinance. The Supreme Court have laid it down that it is the duty of the court before entering a decree to satisfy itself that the parties to the case have title to the land. The District Judge in the present case referred to a decision of the full bench reported in *6 N. L. R. 246* where it was held that a paramount duty is cast upon the court by the Partition Ordinance to ascertain who are the actual owners of the land sought to be partitioned before entering up a decree which is good and conclusive against the world. Layard, C. J., went on to say at p. 250 " As collusion between parties to a partition action is always possible, and as in such a suit the parties get their title from the decree of the court awarding them a definite piece of land, and as a decree for partition under section 9 of the Ordinance is good and conclusive against all persons whomsoever, whatever their rights may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a Judge by which he can avoid performing the duty cast expressly upon him by the Ordinance. " Their Lordships find themselves in complete agreement with what was said by Layard, C. J., in that case. The facts of each case will indicate the manner in which the Judge can best carry out his duty and their Lordships would not attempt to lay down a complete course of procedure for the Trial Judges to follow in every case. Their Lordships think however that the following matters should be attended to in the generality of cases.

The Trial Judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Chapter 101). They may reveal registered instruments suggesting the possible existence of title in persons other than the parties before the court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in court or not, the effect of such instruments upon the title set up by the parties before the court should be examined. The Trial Judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony specifying by name the person actually in possession and satisfy himself that they are some or all of the parties before the court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He shoud also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given. The fraud which has been established in the Partition Action under consideration could not have taken place if the steps indicated by their Lordships had been taken.

It is to be observed, however, that Chief Justice Layard did not go on to say what would be the effect if a decree was made and was either not appealed from or was confirmed on appeal. Their Lordships do not think it permissible for a court in a subsequent action to disregard the decree merely because they come to a different conclusion from that of

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the trial Judge as to what were the appropriate steps to take in the particular case in the investigation of the title. The decree which is " good and conclusive against all persons whomsoever " under section 9 is a " decree for partition or sale given as hereinbefore provided. " Their Lordships are of opinion that the words " as hereinbefore provided " has reference to section 4 which requires the court to investigate title. Once it appears that the court has done so then any defect in the method of investigation would not vitiate the decree any more than an error of law or of fact by a judge would in the generality of cases vitiate a decree duly entered and not appealed from or confirmed on appeal. It has been held by the Supreme Court of Ceylon that a decree entered without any investigation of title, has not the conclusive effect provided by section 9. Thus *Gooneratne v. The Bishop of Colombo* [1] was decided on the basis that there was nothing to show " that the judge made any enquiries into title " and that " the decree was passed on the defendant's admission. " It was held that the decree for sale had not a conclusive effect under section 9 of the Ordinance. The basis of the decision in *Umma Sheefa v. Colombo Municipal Council* [2] which was strongly relied upon by the appellant, was that " in the result apart from the consent of parties there was no evidence that the parties to the action or any of them were co-owners of the premises " so that it could not have been said that there had been any investigation of title. It was held that the decree for sale did not have a conclusive effect. With these decisions their Lordships agree, but they have no application to the present case. In the Partition case under consideration the District Judge did hold an investigation into title although his investigation has not been sufficiently exhaustive to prevent the perpetration of the fraud which has taken place.

What their Lordships have said in the preceding paragraph is applicable when it is sought by separate action to set aside a decree in a partition action or in a separate action to challenge the conclusive effect of a partition decree. On an appeal in a partition action if it appears to the court of appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation. Nothing in the partition action can be final or conclusive until the appeal is concluded. But the fact that lack of proper investigation may be sufficient for an appeal court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 when the decree is being considered in a separate case. Their Lordships would add that if it appears to the Supreme Court when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision.

For the reasons their Lordships have given they are unable to accept the submission on behalf of the appellants that the partition decree should be set aside. They turn therefore to the question of damages. The appellant based his claim to the Rs. 100,000 on two grounds. First he said that he had acquired title by prescription and for that reason alone must be entitled to recover the Rs. 100,000 as being the value of the property as a whole at the material date. Alternatively he pleaded that

[1] *(1931) 32 N. L. R. 337.*

[2] *(1934) 36 N. L. R. 38.*

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he had a valid title by reason of the provisions of the Registration Ordinance to which their Lordships have already referred. Their Lordships do not find it necessary to go into the question raised under the Registration Ordinance, since they are satisfied that under the Prescription Ordinance the appellants have acquired a good title to the property for the value of which they now ask to be compensated. It was common ground between the parties that the onus of proving the ten years undisturbed and uninterrupted possession adverse or independent to the title of the respondents rested in the first instance on the appellants. But it was said on behalf of the respondents that once they had established that they had an interest as *fidei commissarii* under the last will of Marikkar the onus of proving the date on which their right to possession accrued to the respondents rested on the appellants. As the trial Judge put it " Once the defendants established that they are *fidei commissarii* it is for the plaintiffs to establish that as against them *qua fidei commissarii* plaintiffs have acquired a title by prescription. To do so, the plaintiffs must prove the burden under Section 3 of the Prescription Ordinance that they have acquired a title by prescription subsequent to the accrual of the rights of the defendants as *fidei commissarii.*"

Their Lordships are unable to agree with the Courts in Ceylon on this point. Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years. The view which their Lordships have reached as a matter of construction seems strongly supported by the provision of section 106 of the Ceylon Evidence Act No. 14 which reads " when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. " In the case under consideration knowledge of the date of the death of Savia Umma and her children would be especially within the knowledge of the respondents and the dates might well be unascertainable by the appellants.

It was suggested that the opinion which their Lordships have reached on the construction of the section with the assistance of the Evidence Act is in conflict with the decision of the Supreme Court under section 13 of the Prescription Ordinance in the case of *S. K. Chelliah v. Wijenathan*[1]. This section modifies the operation of section 3 of the Prescription Ordinance in the case of disabilities referred to in the section, namely infancy, idiocy, unsoundness of mind, lunacy, or absence beyond the seas. In that case Gratiaen J. said at p. 342 :

> " Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish that, by reason of

[1] (1951) 54 N. L. R. 337.

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some disability recognised by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years. "

The language of section 13 is so different from that of the proviso to section 3 that their Lordships would not be prepared to hold that even if the decision in the case cited were correct it was applicable to the very different language to the proviso used in section 9. They are not prepared in giving their decision in the present case to overrule the decision in Chelliah's case, but they desire to point out that so far as can be gathered from the judgments in that case, the attention of the Supreme Court was not directed to section 106 of the Evidence Act. Should a similar case ever come before this Board they would like the assistance of observations of the Supreme Court as to the application of that section. They stress this point because the knowledge, e.g., of duration of absence beyond the seas must as a rule be within the cognisance of the party relying on such absence, and it might well be impossible for the opposite party to ascertain when the absence ceased.

For the reasons their Lordships have given they will humbly advise Her Majesty to allow the appeal and increase the damages awarded to Rs. 100,000. The respondents must pay the plaintiffs' costs of this appeal as well as their costs of the appeal to the Supreme Court. The order of the District Court as to costs will stand.

Appeal allowed.

[IN THE COURT OF CRIMINAL APPEAL]

1956 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Weerasooriya, J.**

THE QUEEN *v.* H. G. HARAMANIS

APPLICATION 160 OF 1955

APPEAL 113 OF 1935 (WITH LEAVE OBTAINED)

S. C. 35—M. C. Matale, 5,265

Court of Criminal Appeal—Sentence—Application for leave to appeal—Formalities necessary—Enhancement of sentence—Court of Criminal Appeal Rules, 1940, Rule 4.

An application for leave to appeal against the sentence passed on a conviction must be expressly made and must be in conformity with Rule 4 of the Court of Criminal Appeal Rules, 1940. In the absence of such an application the Court of Criminal Appeal has no power to increase the sentence.

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APPLICATION for leave to appeal on sentence.

J. C. Thurairatnam, for accused-appellant.

V. T. Thamotheram, Crown Counsel, for Attorney-General.

Cur. adv. vult.

June 5, 1956. BASNAYAKE, C.J.—

This is an application for leave to appeal by the accused who was tried on an indictment containing five charges of attempted murder committed in the course of the same transaction and sentenced to undergo a term of ten years' rigorous imprisonment on each of the first four charges and to a term of six months' rigorous imprisonment on the fifth charge, the sentences to run concurrently.

The grounds urged by the appellant are :—

(1) that the trial Judge misdirected the Jury in his summing-up ;

(2) that though there were several houses at the scene of this incident no one came forward with any evidence ;

(3) that the lawyer who acted in place of the one retained by the appellant failed to cross-examine the complainant.

Learned counsel who appeared in support of the application indicated to us that he sought leave to appeal only on the ground of sentence. Before perusing it we granted leave to appeal on the assumption that the application signed by the applicant contained that ground.

The sentence passed on the appellant is utterly inadequate. He has committed a number of very grave offences. He invaded the house of his victims, four of whom are women, armed with a gun and shot them despite the fact that they made every endeavour to escape from his attack. Earlier he had threatened to shoot the Village Headman who was on his way to investigate a complaint made against the appellant in regard to an offence involving violence committed by him against one of the female inmates of the house whom he shot later. The appellant enacted a " reign of terror " that night for his unfortunate victims. Having fired through gaps in the wooden shutters and having injured them he went on banging at the doors of the house and at the same time he kept on shouting " Are you fellows all dead ? " " Why don't you fellows open the door ? " " Are you fellows all dead or finished ? ". When he was arrested by the Police he had sixteen live cartridges in his pocket and the gun was loaded with another cartridge. Another grave circumstance against the appellant is that the cartridges he used in shooting the injured persons were S. G. cartridges.

Leave was granted with a view to enhancing the sentence because of the gravity of the appellant's crime ; but when the appeal was taken up

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for hearing learned counsel moved to withdraw it. He relied on Rule 22 of the Court of Criminal Appeal Rules, 1940. That rule reads :—

> " An appellant at any time after he has duly served notice of appeal, or of application for leave to appeal, or of application for extension of time within which under the Ordinance such notices shall be given, may abandon his appeal by giving notice of abandonment thereof in the Form III to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal. "

The form referred to in the rule is as follows :—

Form III

IN THE COURT OF CRIMINAL APPEAL

Criminal Appeal No.—— of 19——

Rex *v.* ————

(Supreme Court, —— Circuit, 19——, Case No. —— of 19——)

Notice of abandonment of Appeal

I, ————, having been convicted of ———— at the Assizes at ———— and having been desirous of appealing and having duly sent notice to that effect to the Court of Criminal Appeal against my said conviction (or the sentence of ———— passed upon me on my said conviction) do hereby give you notice that I do not intend further to prosecute my appeal, but that I hereby abandon all further proceedings in regard thereto as from the date hereof.

Sgd.————

Witness to signature :————

Dated this ———— day of ————, 19——.

To the Registrar of the Court of Criminal Appeal.

The appellant has in this case not given notice of abandonment in Form III, but counsel relies on a decision in the case of *Joseph Gibbon* [1]. It is unnecessary to discuss that case or the question whether an application for leave to appeal once granted can be withdrawn except in the manner provided in Rule 22, as in the instant case there is before us no proper application for leave to appeal on sentence. An application for leave to appeal against the sentence passed on a conviction must be expressly made and must be in conformity with Rule 4 of the Court of Criminal Appeal Rules, 1940. In the absence of such an application we have no power to increase the sentence.

As stated earlier counsel did not urge the other grounds of appeal.

The appeal is therefore dismissed.

Appeal dismissed.

[1] *31 Cr. App. R. 143.*

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1956 *Present:* **H. N. G. Fernando, J.**

O. L. M. MACKEEN, Appellant, *and* M. V. M. SALLIEH, Respondent

S. C. 80—C. R. Colombo, 58,773

Rent Restriction Act, No. 29 of 1948—Section 13—" Arrear of rent "—Informal written agreement between landlord and tenant—Deposit of sum to cover last two months' rental—Should it be set off against any unpaid rent ?—Prevention of Frauds Ordinance.

A tenant would be in arrear of rent within the meaning of section 13 of the Rent Restriction Act even if a small portion only of the rent due remains unpaid.

An informal written contract of monthly tenancy contained a recital that the tenant had deposited a certain sum of money to be taken as rent for the last two months " on the determination of the tenancy by consent or by process of law ".

Held, that the landlord was not bound, even without a request of the tenant in that behalf, to apply the deposited sum in satisfaction of unpaid rent for any two months. It could not be contended that the provision in the agreement regarding the deposit of two months' rent was unlawful as being in breach of the Prevention of Frauds Ordinance in that it purported to have the effect of creating a tenancy for a period longer than one month.

APPEAL from a judgment of the Court of Requests, Colombo.

C. Thiagalingam, Q.C., with *M. I. M. Cassim* and *T. Parathalingam*, for the defendant-appellant.

S. H. Mohamed, for the plaintiff-respondent.

Cur. adv. vult.

November 19, 1956. H. N. G. FERNANDO, J.—

This appears to be a hard case, but I do not think it should be allowed to make bad law. The learned Commissioner has found that the rent taken by the plaintiff for a certain period was in excess of the authorised rent. The amount of the excess at the end of March 1955 was found to be Rs. 27·60 ; rent at the authorised rate of Rs. 14·70 had not been paid for the months of April, May and June 1955, and but for the excess the tenant would at the time of the notice (8th July 1955) have been in arrears within the meaning of section 13 of the Rent Restriction Act No. 29 of 1948, in respect of the months of April and May 1955 ; if the amount of the excess was equal to or greater than the rent due for two months then the tenant would not have been in arrears withn the meaning of the Act. Unfortunately for him, the amount of the excess while fully covering the rent for April was insufficient, by Rs. 1·80, to cover also the rent for May. The Commissioner therefore had no option but to hold the tenant was in arrears of rent for May.

Counsel has argued that in the expression " the rent has been in arrear for one month after it has become due ; . . . . " the term rent means the full rent and not also a part of the full rent ; upon this argument what was in arrear was not the rent but only a part of it. I think the fallacy of the argument is exposed if one were to take the case of

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premises the authorised rent of which is say Rs. 500; the tenant cannot in my view plead that section 13 does not apply because he had made a payment of Rs. 50 against the rent. The rent should properly be said to be in arrear if the landlord has not in fact received the whole rent, and the landlord cannot be said to have received the whole rent if in fact he has only received a part of it.

Counsel has taken a further point which is of interest and perhaps of importance. The informal written agreement between the parties was for the tenant to take the premises on rent *at the monthly rent of Rs. 14·70 payable on the first day of each month* and was effective to create a tenancy from month to month. There was in addition a recital in the agreement that the tenant had deposited the sum of Rs. 29·40 " to be taken as the last two months rental on the determination of my tenancy of consent or by process of law. " Counsel's argument has been that this sum of Rs. 29·40 was a debt owing by the landlord to the tenant and that it was his duty even without a request of the tenant in that behalf, to apply that sum in satisfaction of unpaid rent for any two months. If this be correct then the appropriation of the sum of Rs. 29·40 in that manner would mean that the tenant in the present case was not in arrears at all.

In order to sustain his argument counsel had to contend that the provision in the agreement for the deposit of Rs. 29·40 was unlawful as being in breach of the Prevention of Frauds Ordinance in that it purported to have the effect of creating a tenancy for a period longer than one month. In my opinion, however, the deposit neither had that effect nor even purported to have that effect. The agreement itself did not provide for a deposit but merely recited that a deposit had been made and provided for the manner for the application of that deposit if a certain event occurred. The contemplated event was a possible one, namely " the determination of the tenancy by consent or by process of law. " If, for example, the landlord and the tenant had at any stage agreed that the tenancy should terminate on a specified future date, then the effect of the parol agreement would be that instead of the tenant paying any sum as rent for the two months ending on the date of termination the landlord would apply the deposit in satisfaction of the rent. The deposit would become returnable to the tenant only if the contemplated event became at any stage impossible—for instance if either party had given one month's notice of termination; in the latter case the landlord would be bound by the agreement to apply half the sum in satisfaction of the rent for the last month and would immediately on the giving of the notice become a debtor in respect of the other half.

The making of the deposit and the provision in the agreement as to the manner of its application was not, in my opinion, an agreement relating to land but merely an agreement providing for the manner in which the deposit would be applied if and when a particular situation arose in consequence of the operation of the parol agreement for a tenancy from month to month.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

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1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

A. ADDAICKALAM, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 138 of 1956—Application M6532

IN THE MATTER OF AN APPEAL UNDER SECTION 15 OF THE INDIAN AND PAKISTANI RESIDENTS (CITIZENSHIP) ACT, NO. 3 OF 1949

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for citizenship—Evidence of residence of children.

There is no warrant to take judicial notice that, among Indian estate labourers, children are taken to India by grand-parents or relatives and kept in India for long periods.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act.

S. P. Amerasingham, for the applicant-appellant.

J. W. Subasinghe, Crown Counsel, for the respondent.

Cur. adv. vult.

November 19, 1956. H. N. G. FERNANDO, J.—

This application for registration was refused by the Deputy Commissioner on the ground that the applicant failed to prove the residence in Ceylon of four of his children during certain periods as follows :—

(1) Antony (born June 1936) from 1.1.1939 to 8.2.1948.

(2) Thavasagayam (born December 1928) from 1.1.1939 to 13.3.1946.

(3) Mickel (born February 1941) from 3.2.1942 to 4.8.1948.

(4) Mariamma (born February 1944) from 12.2.1945 to 4.5.1951.

It was proved that these four children, as well as four younger children of the applicant were all born on an Estate in Ceylon in which the applicant was registered as a worker, and the Deputy Commissioner was satisfied that the applicant and his wife were " uninterruptedly " resident in Ceylon from January 1939 until the date of the application. In the case of the second and third children, the Investigating Officer's notes that they had been admitted to the estate school in March 1946, and August 1948 respectively, were accepted as evidence of their residence thereafter. In the case of the eldest child, however, the Investigating Officer had not traced any entry in the school register, and the only documentary evidence was that of the Check Roll which showed that the child had been *employed* on the estate from February 1948 ; there was however the oral evidence of the applicant that this child had continuously resided with his parents in Ceylon prior to 1948. There was similarly oral evidence

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of the applicant that the other children had also been resident in Ceylon during the specified periods. As I have pointed out in *Kumarasamy v. The Commissioner for Registration of Indian and Pakistani Residents*, [1] the fact that both parents resided in Ceylon all the time, and that other children were also born in Ceylon strongly supported the applicant's evidence. But according to the Deputy Commissioner, "it is often found, among Indian Estate labourers, children are taken to India by grand-parents or relatives and kept in India for long periods." There was no evidence whatever to establish this alleged custom or practice, nor is there any warrant in the Evidence Ordinance for the Deputy Commissioner to take judicial notice of such a matter. To hold that such a practice was followed in the present case is almost absurd, because it is a proved fact that the second and third children at any rate were admitted to school in Ceylon at the ages of eight and seven respectively ; it is quite unreasonable to suppose that they would have been removed from the custody of their mother during infancy and then brought back to Ceylon when they no longer needed a mother's care and attention.

The appeal is allowed with costs fixed at Rs. 105. The Commissioner will take the necessary steps on the footing that a prima facie case has been made out for the registration of the applicant and of his wife and children.

T. S. Fernando, J.—I agree.

Appeal allowed.

1956 *Present :* **Sinnetamby, J.**

A. J. H. A. WADOOD, Appellant, *and* M. J. S. COORAY (Chief Preventive Officer, Excise Striking Force), Respondent

S. C. 620—M. C., Avissawella, 19,917

Excise Ordinance (Cap. 42)—Section 55—Ayurvedic physician—Is he a "medical practitioner" ?—Medical Ordinance, No. 2 of 1905—Indigenous Medical Ordinance, No. 17 of 1941.

A qualified ayurvedic physician duly registered as a general practitioner in the Register kept by the Board of Indigenous Medicine is a medical practitioner within the meaning of section 55 of the Excise Ordinance.

APPEAL from a judgment of the Magistrate's Court, Avissawella.

H. W. Jayewardene, Q.C., with *A. C. M. Uvais*, for the accused-appellant.

K. V. S. Shanmuganathan, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1956) 57 N. L. R. 540.*

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November 9, 1956. SINNETAMBY, J.—

The accused-appellant was charged with manufacturing an excisable article without proper authority in breach of section 14 (*a*) of the Excise Ordinance and with possessing an excisable article consisting of over 108 gallons of liquor which was alleged to be unlawfully manufactured in breach of section 44 of the Excise Ordinance. The learned magistrate convicted him on both counts and sentenced him to pay a fine of Rs. 1,000 on each count. This appeal is against the conviction and sentence.

It would appear that the accused is an ayurvedic physician duly qualified to practice as such, having passed the examination held by the College of Indigenous Medicine. He has been duly registered as a general practitioner in the Register kept by the Board of Indigenous Medicine. The facts are not disputed. The accused admits that he did manufacture the liquid in question which, however, he says is a tonic manufactured according to particulars given in a standard book on ayurvedic medicine called "Aristaya Prakaraya" published by Dr. Jayasekera which is prescribed as a textbook in the College of Indigenous Medicine. The tonic is intended for abdominal troubles. The quantity of alcohol according to the Government Analyst is very small, much less than in such imported tonics as Waterbury's Compound, Ferelex and Vitamin B Complex. This is in itself a fact which supports the attitude taken up by the defence, namely,that section 55 of the Excise Ordinance is applicable and that the possession and manufacture was in respect of a bona fide medicated article for medicinal purposes by a medical practitioner. The learned magistrate has come to the conclusion that the article was not a bona fide medicated article but, in my view, he is mistaken and I think this matter is concluded by the fact that the tonic in question was manufactured in accordance with details given in a book dealing with the composition of ayurvedic medicines which is recognised and used as a standard book by the College of Indigenous Medicine. Despite, therefore, the various reasons the magistrate adduced in justifying the conclusion he reached that the article in question was not a bona fide medicated article for medicinal purposes, the fact that it was manufactured in accordance with particulars contained in such a book confirms me in the view I take, namely, that it was a bona fide medicated article. The accused's evidence that it was so manufactured stands uncontradicted. Furthermore, it is in evidence that he was once before charged for a similar offence in respect of manufacturing the same article and acquitted. This fact shows the bona fide of the accused.

The only question that therefore now arises is whether the possession and manufacture was that of a medical practitioner. The Crown relied upon the case reported in *17 N. L. R. 321* (*Amerasekera v. Lebbe*)[1] in support of its contention that the accused was not a medical practitioner within the meaning of section 55 of the Excise Ordinance [2]. In that case the majority of the Court held that the vedarala was not a medical practitioner within the meaning of that term as used in section 55 of the Excise

[1] (*1914*) *17 N. L. R. 321.* [2] *Excise Ordinance* (*Cap. 42*).

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Ordinance. It must, however, be remembered that vedaralas, though they practised eastern medicine, were not required to undergo any system of training, not required to pass an examination, and not required to be registered as vedaralas. But in the case of an ayurvedic physician like the accused in this case he has first to qualify before he can practise and he has also to be registered : on him are conferred certain privileges by the Ordinance creating the Board of Indigenous Medicine, and his certificates in regard to the health of a person are required to be accepted as evidence in Courts of Law. Learned Crown Council referred to a passage in *Maxwell*[1] to the effect that terms used in a statute are to be read in their meaning at the date of the passing of the Act. He argued that the only kind of medical practitioner, recognised when the Excise Ordinance was passed were those who were registered under the Medical Ordinance then in force, viz., No. 2 of 1905[2]. But it has been held this doctrine of " contemporanea expositio " cannot be applied in construing Acts which are comparatively modern (vide *Assheton Smith v. Owen*)[3].

The case of a qualified ayurvedic physician holding a diploma of the College of Indigenous Medicine is in my view different to that of a vedarala. Having regard to the fact that the State by registration regards them as qualified practitioners entitled to practise medicine and confers on them the privileges enumerated in section 10 of the Ordinance (No. 17 of 1941)[4], I fail to see how it can be contended that they do not come within the meaning of the general term " medical practitioner " as used in section 55 of the Excise Ordinance. In my opinion the accused has established facts which bring him within the exception created by section 55 of the Excise Ordinance and he is entitled to be acquitted. I accordingly set aside the conviction and sentence and acquit the accused-appellant.

Appeal allowed.

1955 *Present :* **Basnayake, A.C.J.**

IN RE JAYAKODY

S. C. 605—Application for Revision in M. C. Avissawella, 13,990

Summons to produce a document or thing—Duty of Court to hear evidence first—Criminal Procedure Code, s. 66 (1).

Where a Magistrate, purporting to act under section 66 (1) of the Criminal Procedure Code, issued summons on an accused person requiring him to produce a particular elephant before the Court—

Held, that before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court should be on the record. After such material is placed before the Court it should weigh such evidence and make the order.

[1] *Maxwell's Interpretation of Statutes (9th Ed.).*
[2] *Medical Ordinance, No. 2 of 1905.*
[3] *(1906) 1 Chancery 179.*
[4] *Indigenous Medical Ordinance, No. 17 of 1941.*

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APPLICATION to revise an order of the Magistrate's Court, Avissawella.

H. V. Perera, Q. C., with *M. M. Kumarakulasingham*, for 2nd Accused-Petitioner.

G. E. Chitty, with *A. S. Vanigasooriyar*, for Complainant-Respondent.

September 5, 1955. BASNAYAKE, A.C.J.—

This is an application for the revision of an order made by the learned Magistrate in proceedings for criminal breach of trust against two persons named L. Don Karthelis Appuhamy and W. H. Jayakody. The allegation in the plaint was that Karthelis Appuhamy, the 1st accused, committed criminal breach of trust of an elephant valued at Rs. 7,000 and that the 2nd accused aided and abetted the 1st accused in the commisson of that offence.

On the very day that the plaint was filed and summons ordered on the accused, the learned Magistrate made the following order regarding the production of the animal :—

> " Issue summons for 14.10.54 and notice 2nd accused under section 66 of the Criminal Procedure Code to produce animal on that day ".

As summons had not been served by 14th October it was re-issued and made returnable on 28th October. On that date the accused appeared and pleaded not guilty to the charge ; but the elephant was not produced. The learned Magistrate thereupon made the following order :—

> " Call case on 11.11.54 regarding custody of the elephant and question of security. Elephant to be produced on that date ".

On 11th November the Proctor for the accused contended that the learned Magistrate had no jurisdiction to order the elephant to be produced. After hearing Counsel for the prosecution the learned Magistrate made the following order :—

> " I do not think that I could go back on my earlier order even assuming that it was done without jurisdiction. My own view is that the case cited by Mr. Jacolyn does not apply in this case ".
>
> " For these reasons I direct that the animal be produced in Court on 25.11.54 ".

Learned Counsel for the petitioner submits that the learned Magistrate has no power to make the order he made.

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Section 66 (1) of the Criminal Procedure Code provides that whenever any Court considers that the production of any document or other thing is necessary or desirable for the purpose of any proceedings under the Code by or before such Court, it may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons.

It is clear from the sub-section that no order can be made thereunder unless the Court considers that the production of a particular document or thing is necessary. A Court can consider that the production of any document or thing is necessary or desirable only upon material properly placed before it.

Here there is no material on the record to show why it was necessary or desirable that the elephant should be produced for the purpose of trying the charges against the accused. In the absence of such material the order of the learned Magistrate cannot be sustained. Before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court should be on the record. After such material is placed before the Court it should weigh such evidence and make the order.

I set aside the order of the learned Magistrate directing the production of the elephant at the present stage of the proceedings leaving it open to him to make such an order should it become necessary or desirable to do so upon evidence placed before him at any future stage of the trial. The record should go back so that the proceedings which were interrupted by this application may now be continued.

Order set aside.

1956 *Present :* **L. W. de Silva, A.J.**

K. SUBRAMANIAM, Appellant, *and* ARIYA PERERA (S. I. Police), Respondent

S. C. 681—M. C. Jaffna, 8,438

Immigrants and Emigrants Act, No. 20 of 1948— Section 45 (1) (c), as amended by s. 20 (1) of Act No. 16 of 1955—Difference between " transports " and " causes to be transported. "

A person would be guilty of " transporting " an illegal immigrant within the meaning of section 45 (1) (c) of the Immigrants and Emigrants Act if, with guilty knowledge, he personally takes an illegal immigrant in a car, although the car is a borrowed one and the driver's services have been hired.

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APPEAL from a judgment of the Magistrate's Court, Jaffna.

Colvin R. de Silva, with *M. M. Kumarakulasingham* and *M. L. de Silva*, for the accused-appellant.

T. A. de S. Wijesundera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 21, 1956. L. W. DE SILVA, A.J.—

The appellant was charged with having committed an offence punishable under section 45 (1) (c) of the Immigrants and Emigrants Act No. 20 of 1948 as amended by section 20 (i) of the Act No. 16 of 1955 in that he had transported by car, on 23rd March 1956, at Navaly North, a certain Indian immigrant named Pichchai Kannu Devar, knowing or having reasonable grounds for knowing that the said Devar had entered Ceylon in contravention of these Acts. The amended section is as follows :—

> " Any person who conceals or harbours any other person in any place whatsoever, *or transports any other person or causes any other person to be transported* by any means whatsoever, or employs any other person, knowing or having reasonable grounds for knowing that such other person has entered Ceylon or is remaining in Ceylon in contravention of any provision of this Act or of any Order or regulation made thereunder, shall be guilty of an offence under this Act, " etc.

After trial, the Magistrate convicted the appellant and sentenced him to a period of three months rigorous imprisonment. At the hearing of this appeal, learned Counsel for the appellant accepted the findings of the Magistrate but sought to find a loophole of escape on a point which had not been raised in the court below. Shortly stated, learned Counsel drew a distinction between transporting a person and causing a person to be transported, and contended that the appellant was entitled to be acquitted since, according to the evidence, the appellant had not transported the Indian immigrant but had caused him to be transported by car, and the charge should have been framed accordingly.

There is no doubt that the section draws a distinction between a person transporting another and a person who is responsible for the transport. Two different relationships are contemplated and two different ways of committing the offence are indicated in the enactment. But one who provides another with means of transport cannot be said to " cause " that other to be transported. He merely enables him to transport. But, to cause a thing to be done is the same thing as to be its *causa causans*. In my opinion, it is in this sense that the expression " causes any other person to be transported " has been used in the Act. The facts established by the prosecution in this case show that the appellant had not only borrowed the car on a false pretext, but travelled in it himself and had it driven to the place where certain illegal immigrants were, including Devar. It was the appellant who pointed out the place to the car driver, and got

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the immigrants into the car at two different stages of the journey, and also pointed out the place to which they were taken. The various items of evidence, taken cumulatively, prove that the appellant, while being present at every stage, was the person who did in fact use the car with guilty knowledge to transport the illegal immigrant named in the charge. It was an occasion on which the car driver's services were hired by the appellant who did the transporting in person. The man who physically propelled the vehicle thus enabled the appellant to transport the illegal immigrant. This is not a case where the appellant caused him to be transported. I am of the opinion that the charge was correctly framed. The conviction and sentence are therefore affirmed, and the appeal is dismissed.

Appeal dismissed.

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1956 *Present :* **Basnayake, C.J., and Gunasekara, J.**

DAWITH APPUHAMY, Appellant, *and* (1) THE ASSOCIATED NEWSPAPERS OF CEYLON, LTD., (2) G. J. PADMANABHA (Editor, " Ceylon Daily News "), Respondents

S. C. 187—D. C. Colombo, 26,617/M

Defamation—Newspaper report—Privilege—Animus injuriandi.

In an action for defamation against a newspaper in respect of a report of certain remarks made by a Magistrate concerning the plaintiff in the course of an inquiry into a petition for a mandate in the nature of a writ of *habeas corpus* that had been presented to the Supreme Court, it was shown that the report was fair and substantially accurate and that it was published shortly after the remarks were made in open court.

Held, that the circumstances negatived *animus injuriandi* and that the report was privileged.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *F. R. Dias*, for the plaintiff-appellant.

H. V. Perera, Q.C., with *G. T. Samerawickreme*, for the defendant-respondents.

Cur. adv. vult.

May 11, 1956. GUNASEKARA, J.—

This is an appeal from a judgment and decree of the District Court of Colombo dismissing an action for damages for defamation. At the close of the argument we dismissed the appeal and said that we would give our reasons later.

The action arose out of the publication in a Colombo newspaper, the Ceylon Daily News, of which the respondents were the proprietor and the editor respectively, of an account of an inquiry held in the Magistrate's Court of Kandy into a petition for a mandate in the nature of a writ of *habeas corpus* that had been presented to the Supreme Court by one Heen Banda on the 5th November 1951. Heen Banda alleged in his petition that a young woman named Ram Menika, who he claimed was his sister, was being improperly detained in the custody of Muhandiram Dawith Appuhamy, the appellant. The petition was referred by a judge of this court to the magistrate for inquiry and report, under the provisions of section 45 of the Courts Ordinance (Cap. 6), and the magistrate made his report on the 24th March 1952. The action was brought in respect of an account of the proceedings before the magistrate that was published in the Daily News of the 31st March.

2——J. N. B 63917-1,593 (2/57)

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The cause of action is set out in the 6th and 7th paragraphs of the plaint in the following terms :

"6. On the 31st March 1952 the Defendants published in the Ceylon Daily News a report headed ; 'Child slavery says Magistrate' : 'Shameful behaviour of Muhandiram deplored'. They further reported under the said heading as follows :

It is disgraceful and shameful behaviour on the part of one who considers himself a social worker and it amounts to nothing less than child slavery to adopt such an attitude to a girl who had served him for seven years' said the Kandy Magistrate Mr. T. Quentin Fernando to Muhandiram A. W. Dawith Appuhamy at an inquiry into a Habeas Corpus application.

A copy of the said 'Ceylon Daily News' dated 31st March 1952 is annexed hereto marked 'A' and pleaded as part and parcel of this plaint.

7. The Plaintiff states that the said report which refers to the Plaintiff is false and malicious and defamatory of the Plaintiff and that the statements alleged to have been made by the Magistrate of Kandy as set out in paragraph 6 above were at no time made by the said Magistrate. The said report has caused serious damage to the Plaintiff's reputation which the Plaintiff assesses at Rs. 100,000 but the Plaintiff restricts his claim in this action to Rs. 50,000 ".

The respondents admitted the averments in paragraph 6 of the plaint and denied those contained in paragraph 7. They also pleaded that the publication was made without *animus injuriandi* and was a fair and accurate report of the remarks made by the magistrate, and that it was privileged.

Ram Menika was about 24 years of age at the time of the inquiry before the magistrate. The evidence that has been accepted by the district judge proves that she was at that time a domestic servant in the employ of the appellant's mother-in-law, Mrs. Charles Appuhamy, that from the age of seven she had been with that lady, and that she had at no time been in the appellant's custody or in his employ. The appellant, who was named as the 1st respondent in Heen Banda's petition, and Ram Menika, who was named as the 2nd respondent, appeared before the magistrate on the 3rd December 1951 in obedience to notices requiring their attendance at an inquiry into the petition ; but the petitioner himself had not been served with a notice and was absent, and the magistrate directed re-issue of a notice on the petitioner and also directed that the appellant should appear on the date of inquiry. Eventually all three parties appeared before the magistrate on the 18th February 1952. The magistrate's record of that day's proceedings shows that Ram Menika said that she was staying with Mrs. Charles Appuhamy, that she did not know the petitioner to be her brother, as she had left home when she was about 7 years old and she was now 24, and that she was not willing to go with him but was willing to go with

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her maternal uncle if he wished to take her. The magistrate directed that the case should be called on the 10th March 1952. On the 10th March he made this order :

" 1st respondent will appear on 24–3–52. 2nd respondent is willing to go with her uncle Pinhamy and both will appear in court on 24–3–52. Mrs. Charles Appuhamy will also appear on 24–3–52 ".

The record of the proceedings on the 24th March reads as follows :

" 24–3–52

Petitioner. W. Heen Banda

Respondents. 1. Muhandiram A. W. Dawith Appuhamy

2. U. Ram Menike

1st respondent denies that he had the custody of the child.

Sgd. .....
Mag.

Report

The 2nd respondent left with her uncle Pinhamy on 10–3–52. I asked the parties to appear in Court on 24–3–52 with a view of getting the 1st respondent or his mother-in-law Mrs. Charles Appuhamy to deposit some money in the girl's name or to transfer a property in consideration of the services rendered by the girl for a period of 7 years she had served under them. They were not prepared to do that.

Forward record S. C.

(Signed) .....
Magistrate "

It is in an account of the proceedings held before the magistrate on the 24th March that the words quoted in the plaint appear.

The main question of fact that arose for the district judge's decision was whether the magistrate, Mr. Fernando, did utter these words. Mr. Fernando himself, who was called as a witness for the defendants, said that he did, and his evidence was accepted by the learned judge. It was contended for the appellant that this evidence should not have been accepted.

One of the grounds upon which this contention was based was that the learned judge had found that there were other matters in regard to which he could not rely upon Mr. Fernando's recollection. But it is clear from the judgment that this was a circumstance that the learned judge had considered before he accepted Mr. Fernando's evidence on this point. He states in his judgment :

" Mr. Quentin Fernando himself says that he did make the remarks. I would have hesitated to act upon that statement if the only occasion

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thereafter on which he had any reason to recall to mind the remarks he made was the day on which he gave evidence in the witness box. He, however, says that he had good reason to remember his remarks because he read the newspaper report which appeared on the 31st March 1952 in the Daily News on that day itself. Any judge who did not make remarks of this nature is not likely to forget the fact that a newspaper report attributed to him words he never uttered ".

It appears that Mr. Fernando's attention was again drawn to this newspaper report within a couple of months, when he was interviewed by a representative of the paper to ascertain from him if the report was accurate. In a letter of demand written to the respondents on the 19th May the appellant's proctor had said :

" The statements attributed to the Magistrate in the said report are false and incorrect and I am instructed that such statements are at no time made by the Magistrate. The report in question has caused serious damage to my client's reputation ".

A representative of the Daily News interviewed Mr. Fernando on the 24th May 1952 and told him of this allegation and showed him a cutting of the newspaper report, and Mr. Fernando told him that the report was substantially correct and that he was prepared to give evidence to that effect. Referring to the evidence about this interview the learned district judge says :

" Apart, therefore, from the fact that the learned Magistrate was able to recall what he said when he read the Press report on the 31st March 1952, he was further able to fix his mind upon that question by reason of the fact that the representatives of the Daily News in May 1952 saw him again with the same report and informed him that there was a possibility of action being filed. The learned magistrate had then, waiving such privileges as he had, said he was prepared to give evidence. Though, therefore, there is no minute of what the learned magistrate actually said in the record of the Court proceedings, the fact that his mind and his attention were drawn to the matter so soon thereafter would, without doubt, have enabled him to remember the actual words he used ".

The learned counsel for the appellant also urged that Mr. Fernando could not have made the remarks in question because there was no evidence before him that Ram Menika had ever been employed by the appellant. It appears, however, from Mr. Fernando's record of the proceedings held before him on the 24th March 1952 that he had, however erroneously, come to the conclusion that Ram Menika had been in the service of both the appellant and Mrs. Charles Appuhamy and that he thought that one of them should remunerate her for her services.

Another circumstance that was relied upon in support of the argument that Mr. Fernando's evidence should not have been accepted was that the reporter who is said to have taken down his remarks was not called as a witness though he had been summoned and was present at the trial.

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Although the reporter may have been able to confirm or contradict Mr. Fernando's account of what he said on the occasion in question I do not agree that the fact that he was not called to give evidence is a sufficient ground for holding that the district judge should not have believed the magistrate's evidence.

The learned district judge has accepted Mr. Fernando's evidence on the question of the accuracy of the newspaper report after a very careful consideration of all the evidence in the case and there appears to be no sufficient ground for disturbing this finding of fact.

There is also no ground for disturbing the district judge's finding that the newspaper report was a fair and accurate report of the remarks made by the magistrate. They were remarks made in a judicial proceeding, for they were made in the course of the inquiry that was being held by the magistrate into Heen Banda's petition, the proceeding was one held in open court, and the report was one published shortly afterwards. These circumstances must be taken to negative *animus injuriandi ;* for reports of proceedings of courts of law " stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings "[1]. Nathan observes that (in authoritative works on Roman-Dutch Law) " the principle appears to have been approved of that a certain measure of protection should be accorded to fair reports of proceedings in the Courts of Justice, on the ground that as such proceedings, by the authority of the State, are open to the public at large, it is desirable that they should receive as much publicity as possible, in order that the citizens should have the opportunity of forming an opinion for themselves regarding what takes place in the Courts, and should become accustomed to the manner in which justice is administered ".[2] There is no evidence of malice in the publication and the plea of " privilege " has been established.

For these reasons the appeal was dismissed with costs.

BASNAYAKE, C.J.—

I agree with the Judgment of my brother Gunasekara.

I wish to add that the learned trial Judge has made a careful examination of the evidence and I am in entire agreement with his finding of fact that the publication is a fair and substantially accurate report of the proceedings before the Magistrate.

The only question for decision is whether the report is privileged. It is well established that newspapers and newspaper reporters enjoy a qualified privilege in respect of fair reports of proceedings of Courts of Justice. By " proceedings " is meant such of the judicial business as is conducted in open Court. The privilege does not attach to reports of anything that has not transpired in open Court.

[1] *Perera v. Peiris (1948) 50 N. L. R. 145 at 159.*
[2] *The Law of Defamation (1933) pp. 241-242.*

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The principle governing the privilege is thus stated by Barry J.P. in *Webb v. Sheffield* [1] :—

> " Though the publication of injurious words was taken to be evidence of an intention to injure, inferred from publication, even though such intention was really absent, still it was of public importance that cases heard in Court should be reported by newspapers, and the publishers held blameless for any injurious statements made, if reported with fairness and substantially accurate, because the necessity for publicity of legal proceedings took precedence over private interests. "

In the same case Shippard J. stated :—

> " There is no proposition of law more firmly established than this, that a fair report of a trial in a Court of law is privileged, nor can we allow it to be questioned. In order to be privileged, the report must be substantially correct and impartial ".

Learned counsel for the appellant challenged the accuracy and fairness of the report. He stated that the speeches and addresses of the pleaders who took part in the case and the other matters that were stated by the Magistrate should have been reproduced in the newspaper.

There is no obligation on a newspaper to publish the entire proceedings of a case in order to come within the ambit of the privilege, nor need the report be verbatim so long as it fairly reflects the proceedings and is substantially correct. The report should be a fair account of what happened and should not be coloured by the personal views of the reporter or by his partiality or hostility to any of the parties. A report may be condensed if the above requirements are observed.

Appeal dismissed.

1956 *Present :* **Sinnetamby, J., and L. W. de Silva, A.J.**

K. E. SEYED MOHAMED *et al.*, Appellants, *and*
M. C. PERERA *et al.*, Respondents

S. C. 313—D. C. Kandy, 2841/L

Evidence—Actio rei vindicatio—*Boundaries of land in dispute—Deeds tendered in evidence without objection by opposing party—Evidentiary value of statements therein—Civil Procedure Code, s. 154—Evidence Ordinance, ss. 32, 91, 92.*

To identify the premises in dispute in an action for declaration of title to immovable property, the Court may take into consideration statements of boundaries in title deeds of adjoining lands belonging to persons who are strangers to the action and who have not been called to give evidence. The evidence of such title deeds may become inadmissible only if objection to their production is taken in the court of first instance ; they cannot be objected to for the first time in appeal.

Peeris v. Savunhamy (1951) 54 N. L. R. 207 and *Solomon v. William Singho* (1952) 54 N. L. R. 512, not followed.

[1] *(1883-84) 3 E. D. C. 254 at 256.*

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APPEAL from a judgment of the District Court, Kandy.

C. Thiagalingam, Q.C., with *E. G. Wikramanayake, Q.C.*, *T. A. Dunuwila*, and *V. Arulambalam*, for the plaintiffs-appellants.

H. W. Jayewardene, Q.C., with *L. G. Weeramantry* and *P. Ranasinghe*, for the defendants-respondents.

Cur. adv. vult.

October 10 , 1956. SINNETAMBY, J.—

The plaintiffs sued the defendants for declaration of title to premises bearing Assessment Nos. 60, 62 and 64, Kandy Road, Gampola, for an order of ejectment against the defendants and for damages. At the hearing learned Counsel for the plaintiffs-appellants stated that he did not ask for damages as no income could have been derived from the property in view of a closing order that had been issued by the Gampola Magistrate at the instance of the Urban Council. The property in dispute is depicted in plan " X " and D1 made by a Commissioner appointed by the Court at the instance of plaintiffs and defendants respectively.

Defendants also claimed the same land on different deeds. The learned District Judge held that plaintiffs' title deeds refer to another land and dismissed the action with costs. The appeal is against this finding.

Plaintiffs based their title on two deeds bearing Nos. 3916 (P1) dated 15/7/80 and 578 (P2) dated 7/11/79. The transferee on those deeds is Cader Ibrahim Rawther a predecessor in title of the plaintiffs. Document P1 establishes the manner in which title devolved on the plaintiffs. It is not disputed that whatever Cader Ibrahim got on these deeds devolved on the plaintiffs. Defendants have produced deeds which trace the title of plaintiffs title still further back. One Meedin Kandu and U. M. Sulaiman Lebbe were the original owners of the land described in P1 and P2. On a Fiscal's Conveyance D2 of 1868 the land was sold and purchased by two persons, viz., Seyadu Assen Lebbe and A. M. or H. M. Sulaiman Lebbe. The Fiscal's Conveyance refers to a plan which has not been produced. These two gentlemen by deed No. 571 of 24/8/68 D11 transferred to Omar Lebbe Sinna Lebbe one of the two houses towards the south conveyed to them by D2, presumably the one belonging to Sulaiman Lebbe as the northern boundary is described in the deed as " the house of Seyadu Assen Lebbe. " This deed does not refer to a plan but plaintiffs had produced plans P3 and P4 which they say were with their title deeds. P3 bears an endorsement by a notary certifying that a house and land belonging to Sulaiman Lebbe has been transferred by Deed No. 571. This plan on the face of it does not show that it has been made by a surveyor. By deed D10 Sinna Lebbe transferred to Simeon Meedin on 27/4/75. This deed expressly refers to Plan P4. Simeon Meedin by deed P1 transferred to 1st and 3rd plaintiffs' grandfather Cader Ibrahim Rawther. The other share conveyed by Fiscal's

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Conveyance D2, which was the northern portion, was by deed P2 conveyed to the same Cader Ibrahim Rawther. These deeds show that whatever was conveyed on D2 eventually devolved on the plaintiffs. It is to be noted that all these deeds refer to T. S. Pieris' land as being one boundary: P1, P2 and D11 give it as the southern boundary, D10 as the western boundary. This mistake in D10 is presumably due to the fact that in plan P4 the Kandy Road has been shown as the northern boundary and not the eastern. T. S. Pieris is the predecessor in title of the defendants.

The defendants also relied on title deeds in support of their claim. According to them the original owners of this land were T. Simon Peiris and his wife Simona Mendis. By deed No. 382 of 1/11/64, D3, husband and wife divided the property described in that deed consisting of 11 houses into 11 parts each containing a house and numbered them 1 to 11 from north to south, No. 1 being at the extreme north. The property was then partitioned as follows :—

Nos. 1, 4 and 5 were given to Francisco Pieris.

Nos. 2 and 3 to Davith the grandfather of 2nd defendant.

Nos. 6, 7 and 8 to Bastiana's husband.

No. 11 to Bastiana.

The boundaries given show that on the north and east is Sulaiman Thamby's land. Plaintiffs contend that this Sulaiman Thamby is the same as their predecessor in title H. M. Sulaiman Lebbe in respect of whose land Fiscal's Conveyance D2 issued in 1868. After the execution of this deed D3 there has been no transfer of their interests till 1948, i.e., for 80 years, when 1st defendant transferred to 2nd defendant on deeds No. 806 of 26/7/48 and 2211 of 29/11/48. D7 and D8 purport to transfer the property bearing Assessment Nos. 60, 62 and 64.

According to the plaintiffs the defendants claimed title to the premises and disputed plaintiffs' claim in about August, 1949, and they were compelled to file this action.

At the argument both counsel agreed that the judgment of the learned District Judge was far from helpful. He has misdirected himself on many matters and has reached conclusions without considering evidence on important and relevant matters. Learned Counsel for the respondents found himself unable to support many observations and statements made in the course of his judgment by the trial judge and we were obliged to consider the case independently of the trial judge's findings: indeed learned Counsel for the respondents asked that the case be sent back for a re-trial. Having considered the matter very carefully although at a certain stage we felt inclined to favour this suggestion, we have come to the conclusion that justice demands a final adjudication in regard to all matters except on the question of compensation.

As stated earlier the only question that arises is whether the land claimed by the plaintiffs on D2, P1 and P2 is the land in dispute. The defendants say it is further to the north and have produced a series of deeds to show that the land called Gallewatte, which is the name given in plaintiffs' title deeds, is elsewhere.

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What then is the material on which plaintiffs rely to establish the identity of the lands referred to in their title deeds ? The main grounds on which they base their claims may be summarised as follows :—

1. They rely on the fact that the southern boundary given in their deeds is T. S. Pieris' land. The land to the north is the mosque at the present moment. Defendants' contention is that Isabella's share eventually went to the mosque. According to the deed of division D3 Isabella got house Nos. 6, 7 and 8 while Davith's share which devolved on plaintiffs comprised of house Nos. 2 and 3 which are to the north of Isabella's lots. This is inconsistent with the location in situ of the two lands for according to the above their land would be to the north of the mosque property and their contention is that Isabella's lots now form the mosque property.

2. They rely on plans P3 and P4. P4 in particular is a survey plan attached to their title deed, D11, and referred to therein. The configuration of the land depicted in P4 strongly resembles the shape of the land they now claim, which is surrounded on all sides by a wall and is depicted in plan X and as lot 2 in plan D1. The orientation is, however, different in P4 though it is correct in P3. The extent shown in X and D1 is 19·5 perches while the extent given in P4 is twenty perches and 8 sq. yards which for all practical purposes may be considered the same. The defendants' original deed of division D3 gives the northern boundary as Sulaiman Thamby's land which may well be a reference to Sulaiman Lebbe, plaintiffs' predecessor in title.

3. Plaintiffs also rely on the assessment sheet P18 issued by the Urban Council of Gampola. According to this in 1917, 1919 and 1920 Abrahim Saibo the plaintiffs' father is given as the owner of premises Nos. 174, 175 and 176. In 1922 Ibrahim Saibo is given as owner of 176, 177 and 178. Plaintiffs contend that about this time the numbers were changed. Although the assessment register itself does not on the face of it show the change, to establish it the plaintiffs rely on a deed of lease P32 executed in 1924 by Abrahim Saibo which describes the leased land as " premises bearing Assessment Nos. 174, 175 and 176 presently 176 to 178 ". This document certainly supports their contention. The numbers continued to be the same till a change was effected in 1941. The Assessment Register itself gives both the new and the old numbers. No. 178 was changed to 60,177 to 62 and 176 to 64. Ibrahim Saibo continued to be given as owner. It is certainly unfortunate that no officer from the Urban Council has been called to speak to these facts, but extracts of the Assessment Register were produced without objection for the purpose of proving ownership.

4. Plaintiffs then rely on a closing order issued in 1939 and served on Ibrahim Saibo. A note appears in the Assessment Register in regard to this. The plaint P19 and the closing order itself P20 were produced. They are in respect of premises Nos. 176, 177 and 178 which were the numbers of the disputed premises at that time. Ibrahim Saibo

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retained a proctor to appear for him, a course which one would not expect a man who was not the owner of the premises to take : 1st defendant admits that no closing order was served on him.

5. Notices of assessment P21 and P23 were served on Ibrahim Saibo. They were for the year 1940 in respect of premises Nos. 176 to 178.

6. A man by the name of Ghani claimed this property and plaintiffs filed a case against him in 1948 and obtained a decree. P24 is plaint, P25 is answer and P26 is decree. Second plaintiff stated that at that time no one was in occupation—the closing order had been served. The schedule to the plaint gives the assessment numbers of the premises as 176 to 178 though by this time the numbers had been changed to 64, 62 and 60.

7. Second plaintiff's account book P28 shows at page 36 (P29) that the collected rents from September 1936 to January 1937 from Abdul Gani & Co., for the premises Nos. 176, 177 and 178.

8. Lease Bond No. 18257 of 1942 (P32) shows that the premises Nos. 176 to 178 was leased by plaintiffs' father Ibrahim Saibo.

Apart from dealing very briefly with the assessment register the learned District Judge has not considered any of the other matters referred to above when he was considering the question of identity. Much of the above evidence is of a documentary nature relating to deeds, leases, assessment registers, etc., and are of a kind that cannot be fabricated for the purposes of a case. They certainly constitute compelling evidence requiring careful consideration. In the absence of any reference to many of them it must be inferred that the learned trial judge did not appreciate their significance and importance. In these circumstances we are unable to accept his finding that the plaintiffs' land is to the north of the land in dispute : indeed we have come to just the opposite conclusion. The learned trial judge relied on certain deeds and documents produced by the defendants which I shall now consider.

Dealing with D14 the learned judge says that the lots allotted to one of T. S. Pieris' heirs went to some Muslims. He draws attention to the fact that some of these properties have gone to Muslims and that the register shows that the premises No. 173 in respect of which certain deeds were registered gives the northern and southern boundaries as No. 172 and No. 174 respectively. If anything this would only show that 173 is to the north of 174 and at the time of the first registration, i.e., in 1918. The disputed lands, however, bore numbers 174, 175 and 176 according to Assessment Register P18 taken in conjunction with the recital in lease P32. In fact the evidence shows that D14 and D13 were only produced to show that a land called Madegederawatte which defendants claim is their land and a land called Galewatte which is the name given in deed D2 to plaintiffs' land existed in Gampola as two separate lands registered in two separate folios—vide evidence of 1st defendant. D20 and D21 were also produced for the same purpose. These documents may, however, well refer to other lands with similar names or other portions

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of the same land. The learned Judge then refers to D4 of 1919 and D5 of 1906 which deal with premises No. 174 and 175 and concludes that these are the numbers of the mosque property but in 1917 the premises in question bore numbers 174, 175 and 176 and it was only in 1922 that they were changed to 176, 177 and 178. Actually D5 is a gift by Isabella's husband to Joslin de Silva *nee* de Mel executed in 1906 and referred to premises Nos. 174 and 175. There is a plan referred to in this deed which was not produced. The next deed is D6 of 1917 which is a sale by the donee on D5 to Uduma Lebbe. In this deed the same numbers are repeated and also refers to the same plan. D4 is a mortgage bond executed by Uduma Lebbe in 1919. This property is obviously the property which Isabella got under the deed of division D3. D4 also refers to Nos. 174 and 175. It is quite possible that in giving the numbers 174 and 175 in D4 and D6 the notary followed the description in the earlier deed D5 : what the assessment numbers were in 1906 is not known and is not shown in P18. Uduma Lebbe's mortgage bond was put in suit and Fiscal's Conveyance D15 and D16 executed in favour of the purchasers. It is significant that neither of these deeds has any assessment numbers given in the description of the property but both refer to plans which defendants listed but did not produce. D15 is a transfer to Adam Lebbe and D16 to Uduma Lebbe. D15 and D16 it was contended show that Nos. 174 and 175 would in the opinion of the Fiscal not correctly describe the property sold. The learned judge relying on these deeds came to the conclusion that Abrahim Saibo did not have possession of Nos. 174 and 175. Such an inference it will be seen is completely erroneous.

It is interesting to note that D13 which is the encumbrance sheet of the mosque property gives as the southern boundary the property of Cader Ibrahim Rawther, the 1st and 3rd plaintiffs ' grandfather who probably was alive at the date of the first registration. Deed No. 13175 which is a deed of transfer to the trustees of the mosque is the last registration appearing at folio 35 of this document and in the remarks column the assessment number of the property transferred is given as 175 and the southern and south-western boundaries as the property of Ibrahim Saibo, plaintiffs ' predecessor in title. This deed No. 13175 was executed in 1922 when the assessment numbers of the disputed property had been changed according to P13 to 176, 177 and 178. This document was produced by the defendants.

Defendants ' main contention was that the land in dispute was called Madegederawatte while plaintiffs' earliest deed D2 refers to a land called Galewatte. Some of plaintiffs' deeds—vide P1, D10 and D11—refer to it as land in Mollegodapitiya (misspelt as Mannegodapitiya in D11). While it is relevant to take into consideration the names given in deeds to lands dealt with what is more important is the boundaries. Galewatte may well be the name for a larger area of which Maddegederawatte forms a part. Defendants for instance claim that Isabella's share of Maddegederawatte eventually went to the mosque but D13 shows the registration of a deed dealing with mosque property bearing assessment No. 175 registered under " Galewatte " in 1922. This would immediately adjoin the disputed property.

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The evidence reveals that plaintiffs and their predecessors in title never possessed any land other than the land in question in Kandy Street but 1st defendant owns other lands as well. The Gani whom the defendant charged with criminal trespass is one N. Gani and the plaint and proceedings in that case (P23) do not show what land was trepassed upon. The Gani whom the plaintiffs sued for declaration of title in respect of premises Nos. 176 to 178 in 1948 is one Abdul Gani. They may be the same person or different persons but P23 does not show it is in respect of the same property.

As regards prescriptive possession the learned trial judge summarily rejects the plaintiffs' evidence. He does not consider the effect of the several documents produced by plaintiffs such as the assessment notices, the lease P32, the action against Gani and 2nd plaintiff's evidence. He does consider but rejects the evidence of the closing order and the account book P28, but with his conclusions we cannot agree. In view of the closing order no one was in actual possession of the property since 1939 and this perhaps accounts for the paucity of evidence relating to possession in recent times. The Assessment Register P18, the closing order and the account books P28 while by themselves may not *per se* be evidence of actual possession they certainly corroborate the evidence of the 1st and 2nd plaintiffs.

For the reasons we have given we are of the opinion that plaintiffs have established satisfactorily the identity of the premises in dispute as the premises referred to in his title deeds. We are also satisfied that he has established his claim to prescriptive possession. The learned judge has held that the 2nd plaintiff is a bona fide possessor having purchased the premises from the 1st plaintiff. We do not propose to interfere with that finding. Learned Counsel did not seem to contest it and we were not addressed on it, but the evidence relating to compensation is very meagre and most unsatisfactory. The 2nd defendant says she spent about " Rs. 4,000 or something ". The 1st defendant says that 2nd defendant spent Rs. 5,000 and the judge awards Rs. 6,000, a sum which neither defendant claimed. No evidence of any kind apart from these mere statements was led. While we hold that compensation is payable we think that the case should go back for proper adjudication of the amount.

In the course of the argument learned Counsel for the appellants cited the case of *Solomon v. William Singho* [1] and contended that we should not take into consideration boundaries described in title deeds of adjoining lands belonging to " strangers to the action " who have not been called to give evidence in the lower Court. The defendants particularly relied on many such deeds including encumbrance sheets where the name of the land and the description of the boundaries are taken from the first deed registered in that folio. Plaintiffs-appellants also made use of entries in the encumbrance sheets produced by the defendants in support of their case. Learned Counsel for the defendants-respondents likewise objected to these descriptions of boundaries being considered on the same ground. Both Counsel relied in the case already referred to and on the

[1] *(1952) 54 N. L. R. 512.*

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earlier case of *Peeris v. Savunhamy* [1] in which the same question was considered. As this matter involved an important question of practice we heard as full an argument as was possible in the circumstances particularly as we were not disposed to agree with the decisions cited. It was contended by learned Counsel that the learned judges who decided these cases held that the principles therein enunciated were of general application irrespective of whether objection to the production was or was not taken in the court of first instance. Learned Counsel for respondents, who also appeared in the Appeal Court at the hearing of both these cases, assured us that no objection had been taken at the hearing of the cases in the original courts. I have since verified and found this statement correct by reference to the original record in the case of *Solomon v. William Singho*. In *Peeris v. Savunhamy* Dias, J. who delivered the judgment of the Court referred to the judgment of *Soney Lall v. Darbdeo* [2] where the Full Bench expressed its view on certain questions of law referred to for its opinion and held that statements of boundaries in title deeds between third parties are not admissible under section 32 of the Evidence Ordinance. Dias, J. did not, however, expressly follow it. Instead he said, " the value of the deed as evidence even if admissible is almost nil ", and proceeded to give his opinion on that basis. In the case of *Solomon v. William Singho*, Gratiaen, J. who was one of the two judges who constituted the Bench in *Peeris v. Savunhamy* held that such recitals in deeds between third parties are " hearsay evidence on the issues under consideration and are inadmissible ". The recitals in question were used for the purpose of establishing the identity of lands alleged to be lying on one of its boundaries. The opinion of so eminent a judge of this Court is entitled to the greatest weight and we have accordingly given it very careful consideration. Documents are constantly put in evidence in the course of a trial, sometimes without objection and sometimes by express consent. To rule every such document out on the ground of hearsay would necessitate parties calling into the witness box persons whose testimony in regard to the authenticity of the document neither side disputes though the contents may be disputed. To accept such a proposition as a legally sound and valid basis on which trials in the original courts should be conducted would add in no small measure both to the cost of litigation and to the law's delays, which we constantly hear so much about. We have therefore investigated this matter as fully as we can with such assistance as learned Counsel were able to give us and we have come to the conclusion that evidence of documents of title of persons who are strangers to the action and have not been called may become inadmissible only if objection to their production is taken in the original Court and that they cannot be objected to for the first time in appeal. We are fortified in our view by certain decisions of our own Courts and the express provisions of section 154 of our Code of Civil Procedure, which incidentally finds no counterpart in the Indian Code—learned Counsel who assisted in investigating this matter for us were unable to point to any corresponding provision.

[1] *(1951) 54 N. L. R. 207.* [2] *(1935) A. I. R. Patna 167.*

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The recital of the facts in the Patna case which was referred to in *Peeris v. Savunhamy* does not disclose whether objection was taken in the original Court to the documents which formed the subject matter of the reference. It is difficult to assume, however, that in the original Court no objection was taken in view of the numerous decisions of the Indian Courts under Order 13 rule 6 of the Code to the effect that " when evidence has been led without objection it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence had been recorded in direct contradiction of an imperative provision of the law the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legal enactment, does not apply. " (*Sahob Chandra v. Gour Chandra* [1].)

This statement of the law in the Calcutta case is however embodied as a positive enactment in our Code of Civil Procedure in the explanation to section 154, which finds no counterpart in the Indian Code. This provision has been construed and acted upon in our Courts over a long period of time, vide *Silva v. Kindersley* [2], and the cases referred to therein and *Siyadoris v. Danoris* [3]. The explanation in question is as follows :

> " If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the Court should admit it. "

What is meant by the expression " forbidden by law " was considered in the case of *Siyadoris v. Danoris* [3] and construed to mean absolute prohibition and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled—an instance of absolute prohibition which immediately comes to mind is income tax returns made by a person to the Income Tax Department.

The *18 N. L. R.* case was decided by de Sampayo, J. and Walter Pereira, J., two very distinguished and experienced judges of this Court, and this case was not considered in the two cases which we have been invited to follow, nor were the express provisions of section 154 taken into account.

The judgment in *Solomon v. William Singho* does not indicate what the arguments of Counsel were in regard to this matter but there is no reference in it either to the earlier decisions we have referred to or to section 154 : instead the decision in the Patna case was presumably adopted. As we have pointed out the facts do not clearly indicate whether in the Patna case objection was taken at the trial to the production of the deeds in question or not.

We accordingly in reaching our decision have taken into account description of boundaries in deeds between strangers to the action and in doing so have followed several earlier decisions which approved of that

[1] (*1922*) *A. I. R. Calcutta 160.* [2] (*1914*) *18 N. L. R. 85.*
[3] (*1941*) *42 N. L. R. 311.*

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practice as being in conformity with the law of the land and which unfortunately were not considered by the learned Appeal judges who decided *Peeris v. Savunhamy* and *Solomon v. William Singho.*

We would accordingly set aside the judgment appealed from and enter judgment for plaintiffs-appellants as prayed for subject to the following modifications :

> Plaintiffs are not awarded any damages, but plaintiffs will pay 2nd defendant compensation for improvements which will have to be assessed on proper evidence led before the District Judge. The case will go back for that limited purpose. Plaintiffs will be entitled to costs of appeal and costs of trial so far had in the Court below. The costs of the further hearing in regard to compensation will be in the discretion of the District Judge.

L. W. DE SILVA, A.J.—

I have nothing to add to the judgment of my brother except in regard to the reception and value of documentary evidence bearing on the identity of the property in suit. At the hearing of this appeal, learned Counsel for the appellants objected to the admissibility of certain documents which are either deeds of title relating to contiguous lands or encumbrance sheets descriptive of them. They were produced at the trial for the purpose of enabling the Court to identify the land in issue by reference to boundaries. No objection was taken to these documents at the time they were tendered in evidence at the trial. At the end of it, however, the plaintiff's counsel in the course of his argument did no more than cite to the District Judge the case of *Peeris v. Savunhamy* [1].

This method of trying to whittle away evidence already received is not known to our law. It has been held in the case cited that for the purpose of identifying property in dispute, statements of boundaries in title deeds between third parties are not admissible under Section 32 of the Evidence Ordinance. Some of the documents were held by Dias S. P. J. to be inadmissible in evidence while the evidentiary value of another document, even if it was admissible, was considered to be almost nil. This decision, with which Gratiaen J. concurred, followed a ruling by a Full Bench of Patna in *Soney Lall v. Darbedo* [2]. In the course of the argument before us, the appellants ' counsel also brought to our notice the case of *Solomon v. Don William Singho* [3] where too the view was taken by Gratiaen J., with whom Gunasekara J. agreed, that the recitals of boundaries in the deeds of third parties were at best hearsay evidence and were inadmissible. No other decisions were cited to us. In neither of these reported cases had the parties to the documents or their successors given evidence at the trial. Learned Counsel for the respondents also supported these judgments. Both decisions have assumed that a Court of Appeal has an unqualified right to rule on the admissibility of documents received without objection in the court of trial.

[1] *(1951) 54 N. L. R. 207.* [2] *(1935) A. I. R. Patna 167.*
[3] *(1952) 54 N. L. R. 512.*

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I do not think that the matter could be disposed of in that way, and regret I am unable to agree with the view taken in the two cases reported in *54 N. L. R.* In *Siyadoris v. Danoris* [1], the point was specifically decided that objection to a deed admitted in evidence without objection at the trial cannot be entertained in appeal on the ground that the document had not been duly proved. The same principle was followed in *Opalgalla Tea and Rubber Esates Ltd. v Hussain* [2], where no objection was taken to certain letters admitted in evidence without legal proof in the District Court.

In neither case reported in *54 N. L. R.* is there any reference to Section 154 of the Civil Procedure Code, the Explanation to which is as follows :—

> If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the Court should admit it.

In *Shahzadi Begam v. Secretary of State for India* [3], the Privy Council held that it was too late on the appeal to object to the admissibility in evidence of a document which had been admitted without objection in the first court.

The appellants' Counsel, however, argued that the law of evidence should receive primary consideration and cannot be made subordinate to a rule of procedure. There is no substance in this contention since it is in direct opposition to the Explanation to Section 154 of the Civil Procedure Code. A similar argument was rejected by Hutchinson C.J. in *Sangarapillai v. Arumugam* [4], where it was held that if evidence, which is repugnant to Sections 91 and 92 of the Evidence Ordinance is let in by consent, it is too late for either party to object to it in appeal since the requirements of Section 154 of the Civil Procedure Code were not observed. The question raised as to admissibility cannot therefore now be entertained.

The only other matter for consideration is the evidentiary value of the documents. This is covered by the decision in *Silva v. Kindersley* [5] which I brought to the notice of Counsel at the hearing of this appeal. Pereira J., with whom de Sampayo A.J. agreed, pointed out that a document not objected to by the opposing party in a civil suit is to be deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. The contention that the testimony of a Superintendent of Surveys was of no value, because the plans and surveys he relied on depended largely for their correctness on a third party's field books, was rejected because those field books had been admitted in evidence in the Court below without objection.

The Patna case on which the decision of *Peeris v. Savunhamy* [1] rests is neither sufficient nor persuasive authority for at least two reasons. Firstly, the Patna Court was called upon to deal with a general problem.

[1] *(1941) 42 N. L. R. 311.*
[2] *(1944) 45 N. L. R. 254.*
[3] *(1907) 34 Cal. 1059.*
[4] *(1909) 2 Leader 161.*
[5] *(1914) 18 N. L. R. 85.*

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Two questions of law formed part of the reference put before the Patna Bench : (i) whether statements of boundaries in documents of title between third parties are admissible in evidence under Section 32 (3), Evidence Act. Are they admissible under any other provision of the Act if the third parties are dead, or outside the jurisdiction of the Court ? and (ii) was the case of *1916 Pat. 416* correctly decided ? Secondly, the Patna Bench did not take into account provisions of law similar to those contained in Section 154 of the Civil Procedure Code. This Section is one of several provisions regulating the orderly manner in which trials are to be conducted in courts of first instance. To permit objections to be taken for the first time in appeal regarding the admissibility of documentary evidence not forbidden by law is to divert the orderly conduct of trials into an undesirable course not sanctioned by our law.

I concur in the order made by my brother and agree that the appellants have proved their title to the property in suit and are entitled to succeed.

Appeal allowed.

1956 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

J. B. L. KARUNARATNE (Chairman, Town Council, Kochchikade), Appellant, *and* W. W. FERNANDO *et al.*, Respondents

S. C. 54 (Inty.)—D. C. Negombo, T. C. 1

Housing and Town Improvement Ordinance (Cap. 199)—Refusal by Chairman to approve building plans—Scope of right of appeal—By-laws—Sections 5, 7, 16, 86.

By-laws 3 and 4 enacted under the enabling powers conferred by section 28 of the Housing and Town Improvement Ordinance provide :—

"3. . . . . no person shall within a residential area, ... except with the written permission of the Chairman erect a building for the purpose of being used as . . . . a shop . . . .

4. Permission to erect a new building for any purpose set out in by-law 3 shall be refused by the Chairman unless the following conditons are fulfilled :— . . . . "

Held : (i) There is no right of appeal to the Tribunal of Appeal against the refusal of the Chairman to grant written permission under by-law 3.

(ii) Where application is made for the approval of plans for the erection in a residential area of any building referred to in by-law 3, the Chairman is bound

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under section 7 of the Housing and Town Improvement Ordinance to refuse approval of the plans, unless written permission for the erection of that building has already been or is simultaneously granted in terms of the by-laws.

(iii) Every refusal to approve plans is appealable to the Tribunal of Appeal; but where the proposed building is one for the erection of which written permission under the by-laws is required, the appeal must necessarily fail if such permission has not in fact been granted.

APPEAL from an order of the District Court, Negombo.

S. Nadesan, Q.C., with *K. Shinya* and *T. G. Gunasekera*, for the petitioner.

D. S. Jayawickreme, Q.C., with *Stanley Perera*, for the 2nd respondent.

Cur. adv. vult.

March 27, 1956. H. N. G. FERNANDO, J.—

The 2nd respondent to this appeal (whom I will call the " applicant ") applied to the Chairman of the Town Council of Kochchikade for the approval of plans, drawings and specifications for the erection of a building within the administrative area of the town. His application was in the Form ordinarily used for the purposes of section 5 of the Housing and Town Improvement Ordinance (Cap. 199), which provides that " no person shall erect any building within the limits administered by a local authority except in accordance with plans, drawings and specifications approved in writing by the Chairman ". The building proposed to be erected was described in the application as a " Mobiloil Service Station ". The Chairman in reply informed the applicant that the erection of a service station " cannot be approved as the site is in a residential area ".

There are in force for the town of Kochchikade " zoning " by-laws enacted under enabling powers conferred by section 28 of the same Ordinance, and it is conceded that the site on which the applicant desired to erect the service station is in a residential area and that a petrol service station is a " shop " within the meaning of the relevant by-laws :—

3. . . . . no person shall within a residential area, ... except with the written permission of the Chairman erect a building for the purpose of being used as . . . . a shop . . . . :
. . . .

4. Permission to erect a new building for any purpose set out in by-law 3 shall be refused by the Chairman unless the following conditions are fulfilled :—

(Conditions, four in number, are not here reproduced).

The applicant appealed against the decision of the Chairman to the District Judge who is by section 86 of the Ordinance the Tribunal of Appeal for the area, a right of appeal being conferred by section 16

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upon any person " aggrieved by the refusal of the Chairman to approve any plan, drawing or specification, or by any requirement or order of the Chairman ".

It was argued on behalf of the Chairman before the Tribunal that the Chairman's letter constituted, not a refusal to approve building plans (against which there would be a right of appeal), but rather a refusal of the written permission referred to in the zoning by-laws, against which refusal an appeal to the Tribunal does not lie. This preliminary objection to the hearing of the appeal was over-ruled by the District Judge on the ground that the right of appeal conferred by section 16 was not only from a refusal to approve plans, but also " from any order of the Chairman in regard to an application for a building under the by-laws made under the Ordinance ".

In my opinion the preliminary objection was rightly rejected, but not upon the ground specified by the District Judge. Section 16 occurs in a Chapter, the principal section of which is section 5 to which I have already referred. There follow provisions which enable the Chairman to require applicants to submit plans and drawings in a prescribed form or to amend plans and drawings or to submit further information or to attend for purposes of explanation. There are also provisions which empower the Chairman, in a case of unauthorised building operations, to require the person undertaking them to show cause why the building should not be removed, altered or pulled down, as well as thereafter to order any building to be removed or pulled down. There is then conferred in the penultimate section (section 16) of the Chapter, the right of appeal in the terms set out above.

In a subsequent Chapter dealing with streets, the Chairman is empowered to make certain orders against which a right of appeal to the Tribunal is conferred by a section in that Chapter. Similarly in another Chapter which empowers the Chairman to order the demolition of obstructive buildings, a right of appeal against any such order is given by provision in that Chapter. In a Chapter headed " Miscellaneous Provisions " further supervisory powers are conferred on the Tribunal of Appeal.

In this context, it seems clear that the Tribunal of Appeal only has jurisdiction in respect of matters expressly committed to it by various provisions of the Ordinance and that any action of the Chairman whether it be an order or notice or a refusal to grant any species of application will not be appealable unless the right of appeal is expressly conferred. In the case of each of the Chapters to which I have referred such an express right is conferred, but in each case only in relation to the powers and duties of the Chairman under the particular Chapter. In so far as the zoning by-laws are concerned, however, there is no right of appeal expressly conferred either in the by-laws themselves or in the Chapter which empowers them to be made. If therefore the Chairman's reply to the respondent's application can be properly construed to be a refusal to grant written permission in terms of the by-laws, there would be no right of appeal to the Tribunal from that refusal.

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But the application made to the Chairman in this case was not in my opinion an application for written permission under the by-laws. It was rather an application for the approval of plans submitted for approval in terms of section 5 ; and whatever be the ground on which the Chairman decided to refuse approval of the plans, his refusal was properly the subject for an appeal under section 16, and it was then for the Tribunal to determine the validity of the grounds of refusal.

Having entertained the appeal, the District Judge proceeded to hold an inquiry at which evidence was recorded, and he ultimately made order directing the Chairman to approve the plans and to sanction the construction of the petrol service station. The real question for determination in this case is whether that order of the District Judge can be supported.

Section 7 of the Ordinance directs that the Chairman "shall not approve any plan or specification of any building . . . . which shall conflict with the provisions of this or any other Ordinance". Having regard to the power conferred by section 28 to make by-laws reserving any area for buildings of a specified nature and to the fact that such by-laws have to be laid before Parliament, I think that the prohibition against approval in section 7 is intended to apply (*inter alia*) in relation to buildings the erection of which would be in conflict with the provisions of the zoning by-laws. The Chairman is therefore bound to refuse approval of plans for a shop proposed to be erected in a residential area, unless the erection of the shop will by reason of permission granted under by-law 3 not be in conflict with that by-law. So far as the present application was concerned, there was no request in terms of the by-laws for the written permission of the Chairman and it is conceded that no such permission had in fact been granted.

Mr. Jayawickreme has argued that since the Chairman is the authority for both purposes, namely for approving plans as well as for granting permission under the by-laws, the application in this case was an application, both for the written permission as well as for the approval of the plans, and that accordingly the right of appeal conferred by section 16 rendered justiciable by the Tribunal both the refusal to approve plans as well as the refusal of permission to erect a shop. As I have already pointed out, there is no express provision in the Ordinance or in the by-laws which confers a right of appeal to the Tribunal against the refusal to grant permission under the by-laws; but if Mr. Jayawickreme's argument is correct, then an applicant can by incorporating his application for permission in an application for the approval of plans, secure a right of appeal which he would not have had if he had made in the first instance an application only for permission under the by-laws. I do not agree that such a situation was contemplated by the Legislature. While it may be correct that the Chairman might choose to treat an application for the approval of plans as being inclusive of an application for permission and may therefore properly grant his written permission at the same time as he approves the plans, the order which he makes in such a case would nevertheless be divisible into two parts and be referable not only to section 5 but also to the zoning by-laws. The terms of by-law 4

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are unusual : the Chairman is not empowered to grant permission where certain conditions are satisfied, *but is rather enjoined to refuse permission unless the specified conditions are satisfied :* so that it would appear that even where all the specified conditions are satisfied there is yet a residuum of discretion to refuse permission. I think therefore that save in the exceptional case where the Chairman *ex mero motu* investigates the suitability of the case for the grant of written permission under by-law 4, it would be for an applicant to satisfy the Chairman affirmatively of the existence of circumstances justifying the grant of such permission ; and if no effort is made by an applicant to discharge the burden of proving those circumstances, the Chairman would be fully entitled to refuse permission on the ground that the applicant has not made out a case for permission. In the present case the applicant merely asked for approval of his plans without even a reference to the grant of permission under the by-laws, and the Chairman therefore had the right, if he did not also have the duty, to refuse the approval of the plans on the ground that the erection of the proposed building would conflict with the zoning by-laws.

Although therefore there was a right of appeal to the Tribunal against the order of the Chairman, that order had necessarily to be upheld by the Tribunal as being an order authorised or even required by section 7. For these reasons I would allow the present appeal with costs fixed at Rs. 525 payable by the applicant, and reverse the order of 2nd April, 1954, made by the Tribunal of Appeal.

In lieu of answering the questions as formulated in the case which has been stated for the opinion of this Court, I think it would be more helpful to set out our opinion as follows :—

(1) There is no right of appeal to the Tribunal of Appeal against the refusal of the Chairman to grant written permission under by-law 3 of the " zoning " by-laws.

(2) Where application is made for the approval of plans for the erection in a residential area of any building referred to in by-law 3 of the zoning by-laws, the Chairman is bound under section 7 of the Ordinance to refuse approval of the plans, unless written permission for the erection of that building has already been or is simultaneously granted in terms of the by-laws.

(3) Every refusal to approve plans is appealable to the Tribunal of Appeal ; but where the proposed building is one for the erection of which written permission under the by-laws is required, the appeal must necessarily fail if such permission has not in fact been granted.

WEERASOORIYA, J.—I agree.

Appeal allowed.

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1956 *Present* : **H. N. G. Fernando, J.**

PADMA FERNANDO, Appellant, *and* T. S. FERNANDO, Respondent

In the Matter of an Application for a Writ of Habeas Corpus

Petition No. 2,239 of 1955

Habeas corpus—*Custody of child—Contest between father and mother—Scope of fundamental right of father.*

Where a wife sought to obtain from her husband the custody of a child who was a girl of the age of four and a half years—

Held, that a father's fundamental right to the custody of his child during the subsistence of his marriage may be overridden on the ground that if the child is permitted to continue in the custody of the father there would be detriment to the life, health or morals of the child. It would be detrimental to the life and health and even of the morals of a young child if that child is forcefully separated at a very tender age from her mother and compelled to live, not even in the father's custody, but under the care of an elderly relative to whom the child is not bound by any natural ties. So long as the mother is shown to be fit to care for the child, it is a natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously.

APPLICATION for a writ of *habeas corpus*.

S. Nadesan, Q.C., with *J. A. P. Cherubim* and *M. Siriwardene*, for the petitioner.

G. E. Chitty, Q.C., with *A. M. Coomaraswamy*, for the respondent.

Cur. adv. vult.

October 24, 1956. H. N. G. Fernando, J.—

This is an application by way of Habeas Corpus in which a wife seeks to obtain from her husband the custody of a child who is a girl presently of the age of four and a half years. There had been an earlier application by this petitioner for the custody of the same child and in June 1954 an agreement was reached by which the husband undertook to procure a suitable house on or before 1st August 1954, and that if he failed so to do he would deliver the custody of the child to the petitioner until such time as a suitable house was found. The husband failed to procure a suitable house within the specified period and a further settlement was reached in September 1954 by which he undertook to make habitable certain premises in Moratuwa and agreed that the petitioner could have custody of the child until those premises became available.

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In pursuance of this settlement which was approved by this Court, the petitioner had the custody of the child for some months, but in November 1955 the husband forcibly regained custody of the child against the wishes of the petitioner.

The case for the petitioner, which was put forward both at the earlier inquiry and at the present one and also at the other proceedings in which the petitioner sought maintenance from her husband, has been that the husband and wife lived, not in a house of their own, but at the house of the husband's sister, herself a married woman with no children. The allegation of fact made by the petitioner is that ever since the child was weaned the petitioner has not been permitted to look after the child or even have the child in her room, but that, instead, the child has been " handed over to the husband's married sister to be brought up as her child ". The petitioner has also alleged other conduct on the part of her husband amounting to cruelty and claims that the husband has brought about a situation in which it would be quite intolerable for the petitioner to live with him in the sister's house. It is in view of these allegations that the earlier settlements both provided that the husband would secure a house for the wife and child separate from the house of the married sister.

At the stage when the present inquiry was held by the Magistrate, the proceedings in the maintenance application were pending and have now been determined on appeal. By his judgment in S. C. No. 1373/55—M. C. Addnl. 37198, delivered on 6th August 1956, my brother Fernando has set aside the order made by the Magistrate in the maintenance proceedings and has made order directing the husband to pay maintenance to the petitioner. That judgment upheld the position taken by the petitioner that the husband did in fact take the child away from the petitioner and hand the child to his sister. There is therefore a decision of this Court which entirely accepts the position that the cause of the differences between husband and wife is that the husband wishes to deprive his wife of her natural right to care for and nurture the child of her marriage and to deprive the child at a very tender age of the inestimable benefit of being so cared for and nurtured. The husband's desire is to entrust the child instead to the care of a sister over fifty years of age to compensate her, apparently, for her own childlessness. On these facts the finding of which is for the present purpose incontrovertible, I have to apply the test which I adopted recently in *Ivaldy v. Ivaldy et al.*[1] and to ask myself whether a father's fundamental right to the custody of his children during the subsistence of the marriage is to be overridden on the ground that if the child is permitted to continue in the custody of her father there would be detriment to the life, health or morals of the child. In my opinion the answer is obvious. No reason whatever has been made out to show that the mother is in any way unfit to carry out the ordinary duties of a mother. On the contrary the evidence which has been accepted proves that the husband has done all he can to prevent his wife from carrying out those duties. I need hardly state any reasons for forming the opinion that it would be detrimental to

[1] *(1956) 57 N. L. R. 568.*

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the life and health and even of the morals of such a young child if that child is forcefully separated from her mother and compelled to live, not even in her father's custody, but under the care of an elderly relative to whom she is not bound by any natural ties. So long as the mother is shown to be fit to care for the child, it is a natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously. Moreover the very fact of the forced separation and the knowledge that the mother with whom the child had lived for a fairly long period can have no part to play in the child's future is at least likely to affect the mental health of the child. For these reasons I have no hesitation in accepting the recommendation of the Magistrate who conducted the inquiry and in making order directing the respondent to deliver the custody of the child to the Petitioner.

October 29, 1956.—

My attention has been drawn to the omission to provide in the above order that the respondent may have access to the child. I direct that the respondent should have the right to visit the child once each week either at the petitioner's residence, or if the parties are not agreeable to that, at a place determined by the Magistrate after hearing the parties. The Magistrate will also fix the hour and duration of the visits.

Application allowed.

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1956 *Present :* **Weerasooriya, J., and T. S. Feranando, J.**

E. F. W. FERNANDO, Appellant, *and* THE UNIVERSITY OF CEYLON, Respondent

S. C. 559—D. C. Colombo, 28,909

University of Ceylon—Right of student to sit for examinations—Misconduct of student—Scope of the powers of the Vice-Chancellor and Board of Discipline to investigate and punish— Remedy when the Vice-Chancellor and Board act in excess of jurisdiction—"Judicial act"—Natural justice—Scope of certiorari *proceedings— Jurisdiction of District Court—Ceylon University Ordinance, No. 20 of 1942, ss. 6 (b), 32—General Act No. 1, Chapter 8, Part I, ss. 8, 14, 17.*

When a purely administrative decision is taken against a party on the basis of an invalid report made by a person who has legal authority to determine judicially or quasi-judicially a question affecting a legal right of that party, the party affected by the administrative decision is entitled to claim relief by way of regular action, notwithstanding the absence of a right of appeal.

The plaintiff, who was a candidate at the final examination in science held by the University of Ceylon, instituted this action against the University claiming that the finding of the Vice-Chancellor (assisted by a committee of inquiry) that the plaintiff had acquired knowledge of the nature or substance of one of the Question Papers before the date of the examination, and the decision of the Board of Residence and Discipline suspending the plaintiff indefinitely from all examinations of the University, be declared null and void. The Vice-Chancellor and the Board of Residence and Discipline had purported to act under sections 8 and 14 respectively of Part I of Chapter 8 of the General Act No. 1 passed under the Ceylon University Ordinance, No. 20 of 1942. Section 8 provides that where the Vice-Chancellor is satisfied that any candidate for an examination has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination he may suspend the candidate from the examination or remove his name from the pass list, and shall report the matter to the Board of Residence and Discipline for such further action as the Board may decide to take. Section 14 deals with the powers of the Board on such a report being received. One of them is to suspend the candidate indefinitely from any University examination.

The aforementioned committee of inquiry had been appointed by the Vice-Chancellor in order to assist him in his investigation, and consisted of the Vice-Chancellor himself and two other members. At the chief sitting of the committee, the plaintiff was afforded no opportunity at any stage of cross-examining the witnesses who had testified against him, nor was even the gist of their evidence communicated to him. The plaintiff was the last person to be questioned at that sitting. No record of the proceedings was kept by the committee. The plaintiff had not been furnished sufficient particulars of the case he had to meet, nor was he at any time afforded an opportunity of explaining the allegedly suspicious features of a document which was produced at the inquiry.

Held, (i) that the action of the Vice-Chancellor in appointing a committee of inquiry (of which he himself was a member) to assist him in his investigation was not an improper delegation of his functions in contravention of sections 8 and 17 of Part I of Chapter 8 of the General Act No. 1.

(ii) that, subject to the powers conferred on the Vice-Chancellor and the Board of Residence and Discipline under sections 8 and 14 of Part I of Chapter 8 of the General Act No. 1, a student of the University of Ceylon has a legal right

2——J. N. B 64135—1,593 (2/57)

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to sit for any examination held by the University provided he satisfies the qualifying conditions prescribed by the Statutes, Acts and Regulations passed under the Ceylon University Ordinance.

(iii) that, inasmuch as the legal rights of the plaintiff were involved and no question of policy or expediency arose, the Vice-Chancellor was under a duty to act judicially when he investigated the allegation against the plaintiff and reported on it to the Board of Residence and Discipline. The words " where the Vice-Chancellor is satisfied . . . " in section 8 of Part I of Chapter 8 of the General Act No. 1 did not detract from the duty of the Vice-Chancellor to act judicially or quasi-judicially when proceeding under that section.

In the absence of specific provision in that behalf, the procedure to be followed by bodies which are not strictly judicial bodies vary with the kind of case which they are called upon to investigate. Where the matter to be investigated is an allegation of a grave nature which, if made out, would have serious consequences affecting the legal rights of the person whose conduct is called into question, a more strict procedure than otherwise is to be insisted on. In the present case, having regard to all the circumstances, the question of the truth or falsity of the allegation against the plaintiff could not fairly be determined except by the application of the judicial process or a form of procedure closely analogous to it.

(iv) that the investigation of the Vice-Chancellor was not made in accordance with the principles of natural justice and was not, therefore, valid for the purposes of any action which the Vice-Chancellor could have taken under section 8 of Part I of Chapter 8 of the General Act No. 1.

(v) that the decision which the Board of Residence and Discipline purported to take under section 14 of Part I of Chapter 8 of the General Act No. 1 did not have any legal effect inasmuch as the report made by the Vice-Chancellor without due inquiry (having regard to the duty imposed on him to act judicially) could not be regarded as a valid report for the purpose of enabling the Board of Residence and Discipline to take action.

(vi) that the proper remedy of the plaintiff against the decision of the Board of Residence and Discipline was not by way of *certiorari* proceedings but by way of an action for a declaration that the decision of the Board was null and void.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q. C., with *Walter Jayawardene* and *Barnes Ratwatte* for the plaintiff-appellant.

N. K. Choksy, Q. C., with *S. J. Kadirgamar*, *J. de Saram* and *Miss M. Seneviratne*, for the defendant-respondent.

Cur. adv. vult.

November 28, 1956. WEERASOORIYA, J.—

This is an appeal by the plaintiff from the judgment and decree of the District Court of Colombo dismissing the action instituted by him against the University of Ceylon, as the defendant. The substantial relief claimed in the action is a declaration that the finding of a committee of inquiry that the plaintiff acquired knowledge of the nature or substance of a passage in German in Zoology Paper V before the date and time of the examination, and the decision of the Board of Residence and Discipline of the University of Ceylon suspending him indefinitely from all examinations of the University be declared null and void.

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The judgment of the learned District Judge sets out the relevant facts of the case, but it would be necessary to refer to some of them again in this judgment. The final examination for the degree of Bachelor of Science of the University of Ceylon at which the plaintiff was a candidate took place in the months of March and April, 1952. The plaintiff offered himself for examination in Zoology as his special subject and Botany as a subsidiary subject in accordance with the provisions of the General Act No. 1 made under the Ceylon University Ordinance, No. 20 of 1942. The examination in Zoology consisted of five papers in theory and three in practical work. There was also one paper in Botany. The examination in the last theory paper in Zoology (Paper V) was held on the 4th April, 1952. P3 is a copy of this paper. It is in two parts, the first consisting of an essay and the second of a passage in French or German one of which had to be translated into English and commented on. The maximum marks for the essay was 90 and for the translation and comments 10, and this allocation was known to the candidates prior to the examination. There is no evidence that out of the 10 marks assigned for the translation and comments a candidate was required to obtain any specified minimum in order to secure a pass, or become eligible for a first or second class (denoted by the letters A and B respectively) in Paper V. The plaintiff actually obtained an A in that paper, having scored a total of 90 marks which included 8 out of the maximum of 10 marks for his translation of, and comments on, the German passage (which was the passage selected by him). On his marks in this and the other papers the plaintiff came an easy first in order of merit among the candidates offering the same subjects at the examination, and in the normal course he would have been entitled to the degree of Bachelor of Science with First Class Honours. Of the witnesses called at the trial Dr. Hilary Crusz, a lecturer in Zoology at the University, who appears to have had opportunities of forming an estimate of the plaintiff's ability, described him as a brilliant student.

One of the candidates at the examination who offered the same subjects as the plaintiff was a Miss Balasingham who is the sister-in-law of Mr. Sivaprakasapillai, a lecturer in the Engineering Faculty of the University. Shortly after the examination in the paper P3 Miss Balasingham appears to have conveyed certain information to Mr. Sivaprakasapillai which he considered it his duty to communicate (though he did not do so immediately) to the Vice-Chancellor of the University, Sir Ivor Jennings. The information related to the possibility of the plaintiff having had prior knowledge of the German passage set for translation and comments in P3. But before that information reached Sir Ivor Jennings he had already received similar information from Mr. Kirthisinghe, the senior lecturer in Zoology, and also the examiner who had marked that part of the answer script submitted by the plaintiff on the German passage in P3.

Under the Ceylon University Ordinance, No. 20 of 1942, the Vice-Chancellor is the principal executive officer of the University and it is his duty to see that the provisions of the Ordinance and of the Statutes, Acts and Regulations made thereunder are duly observed, and he is given such power as he may deem necessary to exercise for that purpose. Section 8 of Part I of Chapter VIII of the General Act No. 1 provides that where the Vice-Chancellor is satisfied that any candidate for an examination

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has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination he may suspend the candidate from the examination or remove his name from the pass list, and shall report the matter to the Board of Residence and Discipline for such further action as the Board may decide to take. Section 14 deals with the powers of the Board on such a report being received. One of them is to suspend the candidate indefinitely from any University examination. It will be noted that the Board is empowered to act on the basis of the report, without making any further inquiry. The Vice-Chancellor is an *ex officio* member of the Board.

The Vice-Chancellor, having considered the information which he received, decided to investigate the matter further and for that purpose he appointed a committee of inquiry consisting of himself, Mr. A. E. Keuneman who is a member of the University Council and Professor Mailvaganam, Dean of the Faculty of Science. Besides other claims that the Vice-Chancellor Sir Ivor Jennings has to eminence it may be stated that he is a Queen's Counsel of the English Bar. Mr. Keuneman is a Queen's Counsel of the Ceylon Bar and a retired Judge of this Court. There can be no doubt that all the gentlemen who comprised the committee were exceptionally suited, by reason of their qualifications and experience, to conduct an inquiry of this nature. That Professor Mailvaganam was a member of the committee was criticised by learned counsel who appeared for the plaintiff at the hearing of the appeal on the ground of his somewhat distant relationship to Miss Balasingham and Mr. Sivaprakasapillai and also that he was a member of the Board of Examiners, as well as of the Scrutinising Committee the functions of which were to modify the questions set for the examinations and if necessary refer them back to the examiners for re-consideration. I am unable to say that there is any substance whatever in this criticism.

On the 16th May, 1952, that is to say, several weeks after the examination in paper P3 had been held (being the last of the papers which the plaintiff was called upon to answer) the Vice-Chancellor wrote to him the letter P4 informing him of an allegation against him that he had acquired prior knowledge of the content of one or more of the papers set for the examination at which the plaintiff had presented himself as a candidate and requesting him to attend at a specified time and place before the committee of inquiry on the 21st May, 1952. The plaintiff has stated in evidence at the trial that when he received this letter he had no idea at all as to the nature of the allegation against him except for what was in the letter, namely, that he had acquired prior knowledge of the content of *one or more* of the examination papers. According to the Vice-Chancellor the letter was so worded because the information coming to him from Miss Balasingham (who, apparently, had been questioned at that stage) suggested the possibility of the plaintiff having acquired prior knowledge of the content of some of the papers in practical work too in addition to knowledge of the German passage in P3. It would seem, however, that between the date of the despatch of the letter and the 21st May the committee of inquiry had decided that the evidence which Miss Balasingham was in a position to adduce was quite insufficient to justify an investigation into that part of her allegation which related to

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the plaintiff having acquired prior knowledge of the content of any paper in practical work. It may be assumed that the members of the committee did not consider that this decision reflected in any appreciable degree on the credibility of Miss Balasingham in regard to the evidence that she would give on the question whether the plaintiff had acquired prior knowledge of the German passage in P3. It does not appear, however, that the plaintiff was at any stage informed that the matter to be investigated by the committee was restricted to that allegation alone, and it is highly probable that throughout he was under the impression that the scope of the inquiry was as stated in P4, particularly as he was questioned by the committee about his practical examination as well.

On the 21st May, 1952, as notified in P4, the committee of inquiry held its first sitting. Miss Balasingham appears to have been questioned as the first witness. The next to be questioned were Mr. Kirthisinghe and Professor W. Fernando, in that order. Professor Fernando is the head of the Department of Zoology in the University and the maternal uncle of the plaintiff. He came into the inquiry as the German passage in P3 was selected by him as examiner, with the approval of Mr. Kirthisinghe the other examiner, from a book belonging to him which was kept under lock and key in his office. Sir Ivor Jennings stated in evidence at the trial that he was satisfied from his inquiries that the drawer of the table in Professor Fernando's office in which the book was kept had been locked, presumably at all material times. If there was originally any suspicion that Professor Fernando had dishonestly apprised the plaintiff, his nephew, of the German passage that would be set for the examination, all I need say is that there is no evidence pointing in that direction. Sir Ivor Jennings also stated in evidence that there were several possible sources of leakage of the content of an examination paper and that although he and the other members of the committee of inquiry ultimately were satisfied that the nature or substance of the German passage in P3 had become known to the plaintiff prior to the examination, none of them could reach a definite conclusion as to the point at which the leakage occurred.

To resume the narrative as to what took place at the sitting of the committee of inquiry on the 21st May, 1952, the plaintiff was the last person to be questioned at that sitting. In his evidence at the trial he said that his questioning by the committee on that occasion did not last more than half an hour but he admitted that at an early stage he was shown an exercise book, said to belong to Miss Balasingham and containing eight or nine German words, and he was asked whether he had those words in any book of his prior to the examination, which he denied. He also said that from the questions put to him he gathered that Miss Balasingham had alleged that prior to the examination she had copied those words into her book from a book belonging to him. The plaintiff was next given the queston paper P3 with those same eight or nine words (which also occur in the German passage in that paper) underlined and he was asked to translate the passage into English which, he says, he did without difficulty but he was stopped before he had completed the translation. He was next put further questions with regard to his knowledge of German and he replied that he studied German for three years

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at the University for the purpose of his course in Zoology. While this three-year study of German turned out to be nothing more than a weekly lecture of an hour's duration at which German passages on different topics in Zoology were given to the students for translation, it may be assumed that the instruction given in this particular branch was considered by the University authorities to be sufficient for the purpose for which it was intended. In the absence of any contra-indication there seems to be no reason, therefore, to think that in this branch of his studies too the plaintiff had not attained a proficiency comparable to that attained by him in the other branches as shown by the marks which he scored in the rest of the examination.

The report of the committee of inquiry, which is the document P11, sets out in an amplified form the allegation made by Miss Balasingham as to how she came to copy the eight or nine German words into her exercise book. According to that report the incident took place some weeks prior to the examination. Miss Balasingham said she suspected from the plaintiff's behaviour that there was something in one of his notebooks which he did not wish the other students to see. On one occasion (apparently in a moment of absent-mindedness quite in contrast to his previous vigilance) he had left the book on a bench in the Zoology research laboratory and had gone out when she seized the opportunity to glance through the book and saw a list of about thirty German words, in some cases with the English equivalents, of which words she copied nine into the exercise book produced by her. Of the other words she later remembered that one was *zitronensaft*. The words which she copied appear in the German passage in P3 in the same order in which she had copied them into her book except for the eighth and ninth words. The report P11 purports to reproduce the whole passage with the ten words underlined. Actually only nine words have been underlined including the word *zitronensaft* which occurs at the end of the passage. The plaintiff stated in evidence that on being questioned by one of the members of the committee as to the meaning of the word *zitronensaft* he gave it as citronella juice whereas the correct rendering appears to be lemon juice. The observation may be permitted that if the object of the plaintiff in having the German words written in his exercise book, as alleged by Miss Balasingham, was to acquaint himself with their English equivalents, it was hardly likely that he would not have been able to give the correct rendering of the word *zitronensaft* when questioned by the committee unless, of course, he tried to make it appear that he was unfamiliar with that word, but in that case it would have been a simple matter to ascertain how he had translated it in the answer script submitted by him at the examination.

Why the plaintiff should have written these German words in an exercise book which he habitually took with him to the Zoology laboratory, or why Miss Balasingham should, several weeks prior to the examination, have copied them into her book, are questions the answers to which do not appear in evidence in the case.

The full particulars of the allegation made by Miss Balasingham, as set out in the report P11, do not seem to have been made known to the plaintiff either at the inquiry on the 21st May or on the only other

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occasion when he was questioned, namely, the 3rd June, 1952. The plaintiff was afforded no opportunity at any stage of cross-examining Miss Balasingham, nor was even the gist of her evidence communicated to him. No record of the proceedings was kept by the committee, nor does it appear that any member of it made notes of the evidence adduced. According to Miss Balasingham, another student (Miss de Silva) was sitting next to her when she copied the words from the plaintiff's book. Miss de Silva denies that she saw the copying but admitted that Miss Balasingham had subsequently, but before the examination was held, told her about the list. Miss Balasingham also stated to the committee that immediately after the examination she told some of the other students about the words which she had copied from the plaintiff's book and which she found in the German passage in P3, but only one of those students when questioned by the committee appears to have corroborated her on the point. The substance of the evidence given by those other witnesses who were questioned (which evidence was partly in favour of the plaintiff and partly against him) was not communicated to him. Even with regard to the only specific allegation of Miss Balasingham with which the plaintiff was confronted on the dates on which he was questioned by the committee, namely, that she had copied eight or nine German words from a book in the plaintiff's possession which words occurred in the German passage in P3, no particulars appear to have been furnished to the plaintiff as regards the date, time or place of the incident. To put it shortly, the plaintiff was, several weeks after the examination, questioned about something which is alleged to have taken place several weeks before the examination and all the information given him was that these eight or nine German words from a list which appeared in a book belonging to him had been copied by Miss Balasingham into her book and that those identical words as underlined in the passage shown to him at the inquiry before the committee were to be found in the German passage set for the examination.

It is clear from the report P11 that the finding of the committee of inquiry that the plaintiff had acquired prior knowledge of the nature or substance of the German passage in P3 proceeded almost entirely from an acceptance of Miss Balasingham's evidence. There can be no doubt that on an acceptance of that evidence the Vice-Chancellor would have had ample ground to be satisfied that the plaintiff had improperly acquired that knowledge and to have reported the matter to the Board of Residence and Discipline for further action. It is also clear that the Board of Residence and Discipline in deciding to suspend the plaintiff indefinitely from all examinations of the University acted (as the Board was entitled to do) on the basis of the report of the committee without holding any independent inquiry. In the normal course the matter would have been finally concluded on the Board of Residence and Discipline giving their decision as there is no provison for an appeal from that decision either to any other authority of the University or a Court of law. The case for the plaintiff, however, is that in holding the inquiry the committee collectively or the Vice-Chancellor alone (if he is to be regarded as the person who held the inquiry) was performing a quasi-judicial function and under a duty to conduct it in accordance with the principles

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of natural justice and that as these principles were disregarded the plaintiff is entitled to a declaration in these proceedings that the finding of the committee of inquiry or of the Vice-Chancellor, as the case may be, and the decision of the Board of Residence and Discipline are null and void and of no legal effect.

One of the reasons stated in the report P11 for accepting the evidence of Miss Balasingham is that she was able to describe the incident alleged by her " with a wealth of circumstantial detail, of no direct relevance to the story as such, which carried conviction ". Although " the wealth of circumstantial detail " given by Miss Balasingham was not directly relevant to her story the committee of inquiry did consider it relevant for the purpose of testing Miss Balasingham's credibility, but nowhere in the report is it stated what this circumstantial detail consisted of nor was it communicated to the plaintiff.

It appears that some time after the first sitting of the committee of inquiry (on the 21st May, 1952) Miss Balasingham was further questioned regarding the exercise book said to belong to the plaintiff and from which she alleged she had copied the German words. She then described that book as one with a blueish cover and of the same size as a University exercise book. The plaintiff was thereupon requested by the Vice-Chancellor, by his letter P5 dated the 28th May, 1952, to appear before the committee again on the 3rd June, 1952, and to bring with him all the exercise books which he had used during his course. The plaintiff duly appeared before the committee on the 3rd June, 1952, and produced only one exercise book. This was a University exercise book which the plaintiff had obtained prior to 1950. Twenty eight of the front pages in the book contained notes on Botany for the first examination in Science while the other back page contained a few more notes on Botany and three impressions of the rubber stamp of the Zoology Department, signed by the plaintiff and one of them bearing the date 7.12.48. Apparently this rubber stamp was available at all times to the students. In the middle of the book were five sheets on the right hand page of each of which was a drawing of the circulatory system of the rat. One of these drawings appeared to have been corrected by Dr. Crusz. The five pages referred to were of the same type of paper as the rest of the book, which also contained the correct number of sheets for a University exercise book. The cover and the pages of the book were in good condition but the binding thread appeared to have torn the cover. The book itself is not an exhibit in this case, and these observations as regards its condition and contents are taken over from the report P11 in which the committee's findings were communicated to the Board of Residence and Discipline. It appears from the same report that at the meeting of the committee at which the plaintiff produced the exercise book, but before he had done so, Miss Balasingham had been questioned whether she could remember anything specific about the book other than the German words and she stated that she thought that it contained a drawing of the arterial system of the rat because she had previously copied that drawing into the same exercise book into which she subsequently had copied the German words. There were in fact in Miss Balasingham's book copies of two of the drawings appearing in the plaintiff's book.

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After the plaintiff had produced his book it was shown to Miss Balasingham who was, however, not prepared to assert positively that it was not the book from which she had copied the German words although she had no recollection that it contained any notes in Botany. Dr. Crusz was also questioned as regards the particular drawing in that book which he had corrected and which bore, in what appeared to be in his own handwriting, a remark he had made on the progress shown by the plaintiff as indicated by that drawing. Dr. Crusz stated in evidence at the trial that when he was questioned about that drawing by the Vice-Chancellor he identified it as undoubtedly one corrected by him, not only because it bore his own handwriting but also because he had an independent recollection of the matter. He also stated that the Vice-Chancellor seemed to be taken aback by this reply and that as the latter was sceptical of his assertion he suggested to the Vice-Chancellor that the opinion of a handwriting expert be obtained. No expert opinion was, however, obtained.

The exercise book produced by the plaintiff contained no German words at all, nor (presumably) did it bear any signs of erasures on any of its pages. The real evidence afforded by the book, the evidence of Dr. Crusz, identifying the particular drawing in it which he claimed to have corrected and the reluctance of Miss Balasingham to assert positively that it was not the book from which she copied the German words, were all in favour of the plaintiff. But the members of the committee of inquiry appear to have taken the view that there were circumstances justifying the suspicion that five sheets had been extracted from the middle of the book and five other sheets containing the drawings referred to had been removed from a similar book and interpolated so as to make it appear that this was the only book in plaintiff's possession from which it would have been possible for Miss Balasingham to have copied anything into her book. The main circumstances which influenced the Committee in entertaining this suspicion are (1) that the binding thread appeared to have torn the cover, possibly indicating that the thread had been removed and replaced by means of a stout needle ; (2) that the book opened readily at the centre page and there was a crease in a drawing on one page, suggesting that the book had been placed in a press ; (3) that that there was no explanation as to why the plaintiff should have stamped one of his Botany notebooks with the stamp of the Zoology Department and have signed and dated one of the impressions ; (4) that it was remarkable that although, as stated on an earlier occasion by the plaintiff, he made notes of his lectures in Zoology in files and drawing books, he should have at the end of his course entered in an old Botany exercise book his drawing of the circulatory system of the rat ; and (5) that the particular drawing which had been corrected by Dr. Crusz and bore his handwriting may have been " copied " and was not the original. The committee accordingly concluded that no inference, either favourable or unfavourable to the plaintiff, should be drawn from this book and decided to consider the allegation against the plaintiff only on such other evidence as was available. In my opinion, and with all respect to the members of the committee, most of the matters which raised this cloud of suspicion regarding the book were either too trivial or too speculative to have merited serious consideration.

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It was, nevertheless, entirely within the competence of the committee to have entertained the suspicion that the exercise book produced by the plaintiff was a fabrication provided it was arrived at fairly and in good faith. Regarding the good faith of the members of the committee there can be no question. But it seems to me that what is disquieting about this part of the committee's investigation is that the plaintiff was at no time afforded an opportunity of explaining the allegedly suspicious features about this book. His explanation of these features, given after the report P11 and the final decision of the Board of Residence and Discipline had been communicated to him, is contained in paragraphs (*f*) to (*n*) of his letter P14 to the Vice-Chancellor. That on the ground of these suspicious features the committee should have decided to ignore the evidence relating to this book could not have been otherwise than detrimental to the plaintiff since if that evidence had been taken into consideration in the light of the plaintiff's explanation (had he been given an opportunity of tendering it in the course of the committee's inquiry) it may well have turned the scales in his favour.

Having considered the various matters to which I have drawn attention in this somewhat detailed summary of the proceedings before the committee of inquiry I have little hesitation in forming the opinion that, irrespective of the question whether the committee of inquiry or the Vice-Chancellor were performing a quasi-judicial or purely administrative function in holding the inquiry, the procedure adopted was unfair to the plaintiff in that it deprived him of a reasonable opportunity of testing the truth of the case against him or of presenting his defence and explaining various matters in regard to which adverse inferences were drawn against him. In my view it is no answer in justification of that procedure to say that the plaintiff at no time asked for an opportunity of cross-examining Miss Balasingham or to be given fuller particulars of the case he had to meet. It must be remembered that the plaintiff appeared before the committee of inquiry in the position of an accused without being represented by counsel or a friend, and it is hardly to be expected that in the circumstances he would have made these requests which, reasonable as they would have been, may have induced in him the apprehension that they could be misconstrued by the committee and have prejudiced his case.

Mr. Choksy on behalf of the defendant submitted that it would not be safe to assume that the extent and sufficiency of the proceedings before the committee of inquiry are fully reflected in the evidence adduced in this case, and that if this Court, acting on such an assumption, were to arrive at an adverse finding against the defendant in respect of those proceedings, it would virtually be condemning the defendant without having given the defendant an opportunity of placing the full facts before the court. There is, however, nothing in the cross-examination of the plaintiff or the evidence of Sir Ivor Jennings to suggest that all the material facts connected with the proceedings of the committee of inquiry had not been elicited at the trial. It is also to be noted that a substantial part of the plaintiff's case was that the findings of the committee of inquiry were null and void on the ground, *inter alia*, that they were contrary to the principles of natural justice. A specific issue incorporating

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that ground was raised at the trial, and the cross-examination of the plaintiff and the evidence of Sir Ivor Jennings were, no doubt, mainly directed towards rebutting this part of the plaintiff's case. If there was other evidence material to the case which was available to the defendant, such evidence should, in my opinion, have been adduced at the trial and in the circumstances it cannot fairly be urged that the defendant had no opportunity of placing all the facts before the Court.

Two submissions made by learned counsel for the plaintiff at the hearing before us may be dealt with at this stage. The first of these was that the action of the Vice-Chancellor in appointing a committee of inquiry to investigate the allegation against the plaintiff amounted to an improper delegation of his functions and was illegal since under Section 8 in Part I of Chapter VIII of the General Act No. 1 the person to be satisfied is the Vice-Chancellor himself and no other, and he could not have delegated his functions under that section except in accordance with the specific provision which has been made in that behalf. Section 17 of the same Part and Chapter in which section 8 occurs provides that the Vice-Chancellor may delegate his functions under section 8 to the Dean of a Faculty. It was open, therefore, for the Vice-Chancellor to have delegated to Professor Mailvaganam, but not to Mr. Keuneman, the function of inquiring into the allegation against the plaintiff. The evidence given by Sir Ivor Jennings at the trial makes it clear, however, that he did not intend the appointment of the committee of inquiry to be a delegation of his functions, and that his object was only to have the assistance of the other two gentlemen in the elucidation of what he considered to be a serious allegation reflecting on the reputation of the University itself. This evidence has been accepted by the trial Judge. The very fact that Sir Ivor Jennings himself was a member of the committee of inquiry is inconsistent with a delegation. There is no procedure laid down in section 8 as to how the Vice-Chancellor should act in satisfying himself in regard to any of the matters dealt with therein. The submission that there was an improper delegation of the Vice-Chancellor's functions cannot, therefore, be accepted. The other submission was that the findings of the committee of inquiry, as set out in the concluding part of P11, represented the findings of the collective body and cannot be regarded as findings arrived at by the Vice-Chancellor. But the evidence of Sir Ivor Jennings is that as a result of the proceedings before the committee he was personally satisfied that the nature or substance of the German passage in P3 had become known to the plaintiff prior to the examination and that he drafted a report expressing his views and sent it to the other two members of the committee and they agreed with him. This evidence, too, has been accepted by the trial Judge. While it is possible that before the draft report was sent to the other two members Sir Ivor Jennings had discussed the matter with them and ascertained their tentative views and was to some extent influenced by those views in arriving at the findings against the plaintiff, I do not think that it alters the position that each member of the committee, including the Vice-Chancellor, was individually satisfied that the plaintiff had obtained prior knowledge of the nature or substance of the German passage in P3. This submission too must, therefore, be rejected.

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I now come to the principal point on which this appeal was pressed, namely, that in the circumstances of this case the Vice-Chancellor, in holding an inquiry into the allegation against the plaintiff the truth of which allegation had necessarily to be decided on the evidence of witnesses (though not evidence in the strictly legal sense), was performing a quasi-judicial function and that such inquiry had to be conducted in accordance with the principles of natural justice. In the determination of this point much assistance is derived from some of the judgments in English and local cases in which the powers of the Courts have been invoked to quash by writ of *certiorari* the decisions of various administrative bodies. It was stated by the Privy Concil in the case of *Nakkuda Ali v. Jayaratne*[1] that in the exercise of the powers granted under section 42 of the Courts Ordinance in regard to the issue of prerogative writs the Supreme Court should be guided by the relevant rules of English common law. The circumstances as to when the English Courts would issue these writs have been laid down in the oft-quoted passage from the judgment of Lord Atkin in the well-known case of *Rex v Electricity Commissioners. Ex Parte London Electricity Joint Committee*[2] which reads as follows: "whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".

In the present case it is not disputed that in inquiring into the allegation against the plaintiff the Vice-Chancellor purported to do so on the basis that he was clothed with legal authority in that behalf (as indeed he was). But Mr. Choksy strenuously contended that in regard to the action taken by the Vice-Chancellor and the Board of Residence and Discipline no legal rights were involved, either of the plaintiff or any other person. His position was that no student of the University could claim a legal right to be allowed to sit for any University examination and that, on the contrary, the matter was entirely within the discretion of the appropriate authorities of the University.

Section 6 (*b*) of the Ceylon University Ordinance, No. 20 of 1942, empowers the University to hold examinations for the purpose of ascertaining the persons who have acquired proficiency in different branches of study, and section 32 provides that the conduct of such examinations shall be prescribed by Statutes, Acts and Regulations made under the Ordinance. Chapter V of the General Act No. 1 deals with the conditions under which a student becomes eligible to sit for examinations for first degrees, while Chapter VIII of the same Act deals with examinations procedure. Under section 10 in Part II of Chapter V a candidate for the final examination in science is required to have passed or been exempted from the first examination and to have followed to the satisfaction of the Vice-Chancellor for at least two years the courses prescribed by regulations made by the Senate in the subjects in which the candidate presents himself for examination. Presumably, when the plaintiff presented himself for the examination to which this case relates he had fulfilled the

[1] *(1950) 51 N. L. R. 457.* [2] *(1924) 1 K. B. 171 at 205.*

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conditions imposed under section 10. But even where those conditions had been fulfilled by a candidate, section 8 of Part I of Chapter VIII empowers the Vice-Chancellor to suspend him from the examination, while under section 14 of the same part the Board of Residence and Discipline may suspend him indefinitely from any University examination. It seems to me, therefore, that even though a right to sit for a particular examination is not conferred in specific terms on a student of the University, it is implicit in the provisions to which I have referred that such a right exists subject, however, to the powers conferred on the Vice-Chancellor and the Board of Residence and Discipline under sections 8 and 14 respectively of Part I of Chapter VIII of the General Act No. 1. It would follow, then, that if, as may be presumed, the plaintiff had fulfilled the conditions imposed under section 10 of Part II of Chapter V of the General Act No. 1, he acquired a right to sit not only for the examination held in March and April, 1952, in the subjects which he offered but also any future final examination in science in the same subjects which may be held by the University authorities, and such a right could only be taken away by appropriate action under the provisions of the above-mentioned sections 8 and 14.

In my opinion, therefore, the present case would fall within the ambit of the observations of Lord Atkin which I have already quoted, provided, of course, there was imposed on the Vice-Chancellor, or on the Board of Residence and Discipline, in respect of the action taken against the plaintiff, a duty to act judicially, and the question whether there was such a duty I shall now proceed to consider.

On this question the argument in appeal followed the usual pattern in such cases, and numerous decisions of the English and Ceylon Courts were cited to us. Having regard, however, to the importance to either side of the issues involved, no criticism can be made of learned counsel for having taken up several days of hearing in a detailed scrutiny of these decisions, but as stated by Lord Radcliffe in delivering the judgment of the Privy Council in *Nakkuda Ali v. Jayaratne* (*supra*), " the basis of the jurisdiction of the Courts by way of *certiorari* has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute, " and he added that the general principle is most precisely stated in the passage quoted earlier by me from the judgment of Lord Atkin in *Rex v. Electricity Commissioners* (*supra*).

Mr. Choksy laid great stress on the words " where the Vice-Chancellor is satisfied . . . . " in section 8 of Part I of Chapter VIII of the General Act No. 1 as indicating that, inasmuch as the Vice-Chancellor is the person to be satisfied, no duty to act judicially is imposed, and he submitted that this view is confirmed by the absence of provision requiring an inquiry of any kind to be held by the Vice-Chancellor, or giving a right of appeal to the candidate adversely affected from any order made by the Vice-Chancellor under this section. He also pointed out that such order cannot be set aside even by the Board of Residence and Discipline,

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empowered though the Board be to deal further with the matter in the manner specified in section 14 on receiving the Vice-Chancellor's report in terms of section 8.

The effect of language similar to that occurring in section 8 was considered in *Weeraratne v. Poulier* [1] by Dias, J., who came to the conclusion that no duty to act judicially was imposed. That case, however, dealt with the revocation of an authority granted to a dealer in certain controlled commodities under the Food Control (Special Provisions) Regulations, 1943. The regulations do not appear to have conferred a right in any dealer either to obtain the authority which had been revoked or to continue to enjoy the status of an authorised dealer once that authority had been granted. In *Dankoluwa Estates Co., Ltd. v. The Tea Controller* [2] the question whether words of a similar nature implied a duty to act judicially was also answered by Soertsz, J., in the negative. But the decision did not turn on the wording alone but on other considerations as well. In *Point of Ayr Collieries Ltd. v. Lloyd-George* [3] and *Robinson and Others v. The Minister of Town and Country Planning* [4] the effect of equivalent phraseology was considered and the Court held that there was no duty imposed to act judicially. In both these cases the making of the orders which were the subject matter of the proceedings had been entrusted by the legislature to a Minister of State who in arriving at his decision was, it would seem, entitled to take into account questions of policy and expediency and they are, therefore, to be distinguished from the present case. It is also to be observed that in *Nakkuda Ali v. Jayaratne* (*supra*) the judgment emphasised that there is no general principle that phraseology such as under consideration excluded an objective test and their Lordships took the view that the words "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer", in the particular regulation the interpretation of which arose in that case, imposed a condition that there must in fact have existed such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation of a licence issued to the dealer. Notwithstanding this interpretation, Mr. Choksy relied on the ultimate finding in that case, that the Controller was under no duty to act judicially or quasi-judicially when applying the regulation, as supporting his submission that the Vice-Chancellor too is not required to act in a similar way when proceeding under section 8. But, as I understand the grounds for that finding, they were that when the Controller revoked a licence granted to a dealer he was only taking executive action to withdraw a privilege and not determining any question involving the legal rights of the dealer; and that there was nothing in the bare words of the regulation itself from which a duty to act judicially could be inferred. I have already stated why in the present case I consider that legal rights of the plaintiff were involved in the action taken by the Vice-Chancellor as well as the Board of Residence and Discipline. Moreover, when one looks at the reasons as set out in the letter P4 and in the evidence of the Vice-Chancellor for appointing a committee of inquiry it is apparent that the matter was not one which could have been disposed

[1] (*1947*) *48 N. L. R. 441.*
[2] (*1941*) *42 N. L. R. 197.*
[3] (*1943*) *2 A. E. R. 546.*
[4] (*1947*) *1 A. E. R. 851.*

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of by executive action alone. The allegation, he said, was an extremely serious one which affected not only the plaintiff but also the reputation of the University and " a formal inquiry " was necessary so that the public may be satisfied and because if there had been a leakage from the University it was his duty to report it to the University Council for disciplinary action. Mr. Weerasooria who appeared for the plaintiff stated from the Bar, and it was not contradicted by learned counsel for the defendant, that as long as the order of suspension against the plaintiff stood he would be precluded from continuing his academic career not only at the University of Ceylon but also at any other university.

As observed by Lord Atkin in *General Medical Council v. Spackman*,[1] in the absence of specific provision in that behalf, the procedure to be followed by bodies which are not strictly judicial bodies would necessarily vary with the kind of case which they are called upon to investigate. His observations imply that where the matter to be investigated is an allegation of a grave nature which, if made out, would have serious consequences affecting the legal rights of the person whose conduct is called into question, a more strict procedure than otherwise is to be insisted on. In the present case, having regard to all the circumstances, it seems to me that the question of the truth or falsity of the allegation against the plaintiff could not fairly be determined except by the application of the judicial process or a form of procedure closely analogous to it. To adopt the dictum of Parker, J., in *Rex v. Manchester Legal Aid Committee. Ex Parte Brand and Co., Ltd.*,[2] the Vice-Chancellor or the committee of inquiry had to decide the matter " solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words, they must act judicially . . . . " Parker, J., also pointed out in that case that " the duty to act judicially may arise in widely different circumstances which it would be impossible, and indeed, inadvisable, to attempt to define exhaustively ".

Mr. Weerasooria drew our attention to two decisions of long standing authority where it has been held that even purely domestic tribunals such as committees of clubs, which under the rules have the power to expel a member on the ground of misconduct, are under a duty to act judicially in the exercise of such power. In *Fisher v. Keane*[3], although the decision proceeded on the failure of the committee of a club to follow the rules governing the expulsion of a member, Jessel M. R. observed that a committee functioning on such an occasion must act according to the ordinary principles of justice and should not convict a man of a grave offence which shall warrant his expulsion from the club without fair, adequate and sufficient notice and an opportunity of meeting the accusations brought against him. In the leading case of *Labouchere v. The Earl of Wharncliffe*[4] power was given under the rules to the committee of a club to take certain action towards the expulsion of a member if " in the opinion of the committee " such action was called for. It was clearly stated by the Court that although it had nothing to do with the

[1] *(1943) A. C. 627 at 638.*
[2] *(1952) 1 A. E. R. 480 at 490.*
[3] *(1879) 11 Ch. D. 353.*
[4] *(1879) 13 Ch. D. 346.*

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question whether the judgment of the committee, having the facts fully before them, might be right or wrong, it was, nevertheless, concerned whether the accused had been given fair notice and due inquiry had been made. No authority was cited to us where the correctness of these decisions was questioned. It seems to me that these decisions do indicate that the committee of a club function as a quasi-judicial tribunal when proceeding under the rules against a member of the club for alleged misconduct.

Two other cases cited by Mr. Weerasooria show to what extent the Courts in England have gone in holding that decisions of purely administrative bodies come within the range of the jurisdiction of the Court in *certiorari*. These are *Rex v. Boycott and others. Ex parte Keasley* [1], and *The King v. Postmaster-General. Ex parte Carmichael* [2]. In the latter case Lord Hewart C.J. expressed the opinion that the certificate of a medical officer, issued under certain statutory provisions and relating to the question whether the person to whom the certificate referred was suffering from a particular disability or not, was of the nature of a judicial act and a fit subject for *certiorari*. But it is not necessary, I think, that for the purpose of the present case I need to rely on these cases.

While neither the Vice-Chancellor nor the Board of Residence and Discipline can be regarded as purely domestic tribunals they would, nevertheless, be statutory bodies inasmuch as they are constituted under the provisions of the Ceylon University Ordinance, No. 20 of 1942. But I do not see any reason why the same considerations should not be applicable to statutory bodies as well when functioning in similar circumstances as domestic tribunals.

In the present case an inquiry was necessary in order to decide on the truth of the allegation against the plaintiff. The legal rights of the plaintiff were involved. No question of policy or expediency arose. I would hold, therefore, that the Vice-Chancellor was under a duty to act judicially when he investigated the allegation and reported on it to the Board of Residence and Discipline. In my opinion the learned trial Judge came to a wrong conclusion on this question. I also hold, for the reasons already stated by me, that the investigation of the Vice-Chancellor was not made in accordance with the principles of natural justice and is not, therefore, valid for the purposes of any action which the Vice-Chancellor could have taken under section 8 of Part I of Chapter VIII of the General Act No. 1.

With regard to the Board of Residence and Discipline, the position would appear, however, to be different. Even in the circumstances of this case no inquiry into the allegation against the plaintiff need have been made by the Board in taking action under section 14 of Part I of Chapter VIII of the General Act No. 1, as all that the section requires is that there should be before the Board a report (in this instance from the Vice-Chancellor). The Board was under no duty even to inquire on

[1] *(1939) 2 K. B. D. 651.*

[2] *(1928) 1 K. B. D. 291.*

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what material the Vice-Chancellor arrived at any finding contained in the report. In any event, they were entitled to assume that the report had been made after due inquiry. The decision taken by the Board under section 14 in this particular case cannot be regarded as anything more than a purely administrative or executive one. In arriving at that decision there was no duty imposed on the Board, therefore, to act judicially, although different considerations might have arisen had the Board too decided to hold an independent inquiry into the allegation against the plaintiff. This view does not, however, conclude the matter.

Mr. Choksy conceded that even though the acts of the Board of Residence and Discipline under section 14 be of a purely administrative or executive nature, they could, nevertheless, be set aside by the Courts in appropriate proceedings where they are shown to have been performed without jurisdiction or in excess of jurisdiction as, for example, where the conditions prescribed for the performance of the acts had not been satisfied. The principle on which the Courts will intervene in a purely administrative decision has been explained in *Lee v. The Showmen's Guild of Great Britain* [1]. See also, *In re Bracegirdle.* [2] When one looks at section 14, it is clear that the only condition precedent for the Board taking any action under it is that there should be a valid report before the Board. If in the present case the Board acted without any report at all, or on a report purporting to be by the Vice-Chancellor but which subsequently turned out not to have been made by him, the decision of the Board, however *bona fide* arrived at, cannot be supported as having any legal effect. So also a report made by the Vice-Chancellor but without due inquiry (having regard to the duty imposed on him to act judicially) cannot be regarded as a valid report for the purpose of enabling the Board to take action under section 14.

Had the present proceedings been by way of *certiorari* the plaintiff would undoubtedly have been entitled (assuming that the conclusions reached by me are sound) to an order quashing the report of the Vice-Chancellor. But Mr. Choksy contended that this action was wholly misconceived and that it is not open to the District Court, nor equally to this Court sitting in appeal, to grant the relief asked for in the prayer in the plaint. His argument on the point was twofold : firstly, that such relief as the plaintiff claims can be obtained only on an application in the first instance to this Court by way of *certiorari* and, secondly, that as no right of appeal has been granted from the finding of the Vice-Chancellor or the decision of the Board of Residence and Discipline under sections 8 and 14 respectively of Part I of Chapter VIII of the General Act No. 1, the District Court has no jurisdiction, in any event, to entertain such an action as this.

In England the jurisdiction to issue writs of *certiorari* is exclusively in the Queen's Bench Division. But there are numerous instances where the validity of orders, for the quashing of which a writ of *certiorari* would

[1] *(1952) 2 Q. B. D. 329.* [2] *(1937) 39 N. L. R. 193.*

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have issued, has been successfully challenged by proceedings for a declaration and injunction instituted in the Queen's Bench Division or the Chancery Division. Two such instances are *Fisher v. Keane* (*supra*) and *Labouchere v. The Earl of Wharncliffe* (*supra*), both being cases where an injunction was applied for in the Chancery Division to restrain the committees of certain clubs, which had made orders of expulsion of the plaintiffs from the clubs on the ground of misconduct, from interfering with the plaintiffs' enjoyment of the use and benefit of the clubs. Both actions were brought on the basis that the orders of expulsion were null and void, and the injunctions applied for were granted. If I am right in the view expressed earlier by me as to the effect of the decisions in those cases, the orders which were impugned could have been quashed by writ of *certiorari*, but it does not seem to have been even argued that the alternative remedy of an injunction was not available to the plaintiffs. In *Barnard and Others v. National Dock Labour Board and Others* [1], which was an action filed in the Queen's Bench Division for a declaration that an order of suspension made by a statutory board was unlawful, the point was specifically taken that the only way in which the decisions of the board could be questioned was by writ of *certiorari*. The Court of Appeal rejected this contention and granted the declaration. It should be stated, however, that in that case the Court took the view that proceedings by way of *certiorari* would not have been open to the plaintiffs as the illegality which vitiated the decision of the Board came to light long after the time for the writ had run.

In the present case, too, it would seem that against the purely administrative or executive decision (as held by me) of the Board of Residence and Discipline suspending the plaintiff indefinitely from all University examinations, the remedy of *certiorari* is not available to him. If, therefore, any legal remedy be open to him at all it would be by way of an action for a declaration that the decision of the Board is null and void. Plaintiff's substantial grievance arises out of this decision. With regard to Mr. Choksy's submission that even this remedy is not available to the plaintiff inasmuch as no appeal from the decision of the Board lies, the point was considered in *Barnard and Others v. National Dock Labour Board and Others* (*supra*), the decision in which is against Mr. Choksy. The judgment of Lord Justice Denning in that case as well as the authorities cited by him clearly show that, particularly where the remedy by *certiorari* may not be available, the Courts will intervene by declaration and injunction notwithstanding the absence of a right of appeal. Moreover, if, for the reasons stated by me, the report P11 is not a valid report, the decision of the Board in acting on it would be in excess of the jurisdiction conferred on the Board under section 14; and it is well settled law that a non-appealable order made without, or in excess of, jurisdiction has not the conclusive effect which the legislature may have intended when it withheld the right of appeal.

On the basis that the decision of the Board is invalid, a cause of action as defined in secton 5 of the Civil Procedure Code would clearly have

[1] *(1953) 2 Q. B. D. 18.*

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accrued to the plaintiff to obtain the declaration claimed in these proceedings and in my opinion the learned trial Judge was wrong when he held that the District Court had no jurisdiction to entertain this action.

The judgment and decree appealed from are set aside and decree will be entered declaring that—

(i) the finding of the committee of inquiry contained in the report P11

and (ii) the decision of the Board of Residence and Discipline suspending the plaintiff indefinitely from all University examinations

are null and void and of no legal effect. The plaintiff will be entitled to his costs both here and in the Court below.

T. S. Fernando, J.—I agree.

Appeal allowed.

1957 *Present :* **Gunasekara, J., and T. S. Fernando, J.**

S. SOCKALINGAM CHETTIAR, Appellant, *and* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 107—Application D 1586

In the matter of an Appeal under Section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration as citizen—Prima facie case not established—Failure to show cause—Refusal of application—Right of appeal—Service of notice to applicant—Proof—Sections 9 (2), 15, 20.

(i) Appeal lies against an order made under Section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act.

Sivan Pillai v. Commissioner for Registration of Indian and Pakistani Residents (1953) 54 N. L. R. 310, not followed.

(ii) It is provided by Section 20 of the Indian and Pakistani Residents (Citizenship) Act that a notice which is required to be served on an applicant " shall, where it is not served personally on him, be deemed to have been duly served if it has been sent to him by post in a registered letter addressed to his last known place of residence or of business ".

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Held, that there should be clear and unambiguous evidence to prove the facts necessary to raise the presumption of law for which provision is made by the Section. Evidence furnished by the presence of two documents in the Commissioner's file, namely, the notice itself and an envelope addressed to the applicant, which bears certain post marks and endorsements, is not sufficient to prove that the notice was sent to the applicant by post in a registered letter, which was eventually returned undelivered.

APPEAL from an order made under Section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act.

S. Thangarajah, for the applicant-appellant.

J. W. Subasinghe, Crown Counsel, for the respondent.

Cur. adv. vult.

January 21, 1957. GUNASEKARA, J.—

This is an appeal from an order made under section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, refusing an application made by the appellant for the registration of his wife and himself as citizens of Ceylon.

It was contended by the learned crown counsel, on the authority of the decision of Swan J. in *Sivan Pillai v. Commissioner for Registration of Indian and Pakistani Residents*,[1] that an order made under section 9 (2) is an administrative act and is therefore not appealable. With all respect to the learned judge, it seems to me that this view is in conflict with the express terms of section 15 of the Act, which provides that " an appeal against an order refusing . . . . . an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant ". An order made under section 9 (2) is such an order, and therefore, according to the plain meaning of the language of section 15, is an order against which an appeal may be preferred. There appears to be no ground for reading into section 15 a provision excluding from its operation orders made under section 9 (2). I therefore hold that the order in question is an appealable order.

The application was made on the 3rd August 1951. A deputy commissioner who considered the application was of opinion that a *prima facie* case had not been established, and it therefore became necessary for him, in terms of section 9 (1), to cause to be served on the appellant a notice setting out the grounds on which the application would be refused and giving the appellant an opportunity to show cause to the contrary within a period of three months from the date of the notice.

[1] *(1953) 54 N. L. R. 310.*

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The necessary notice was signed by the deputy commissioner on the 7th September 1955. On the 14th December 1955 be made the order that is the subject of this appeal, holding, among other things, that the notice had been duly served on the appellant.

The order does not state upon what material this finding is based. The learned crown counsel has submitted to us that it is based on the evidence furnished by the presence of two documents in the Commissioner's file, namely, the notice itself and an envelope addressed to the appellant, which bears certain post marks and endorsements. It is contended for the respondent that the right conclusion to be drawn from this evidence is that the notice was sent to the appellant by post in a registered letter, which was eventually returned undelivered. If that is the right conclusion the fact that the letter was returned undelivered proves of course that actually the notice was not served on the appellant. But the learned crown counsel seeks to rely on the provision in section 20 of the Act that a notice which is required to be served on an applicant " shall, where it is not served personally on him, be deemed to have been duly served if it has been sent to him by post in a registered letter addressed to his last known place of residence or of business ".

The presumption of law for which provision is made by this section is one that the applicant is not permitted to rebut (*Marimuttu v. Commissioner for Registration of Indian and Pakistani Residents*[1]). Moreover the evidence relied on for proof of the facts necessary to raise the presumption would ordinarily be evidence that the applicant has had no opportunity of challenging or contradicting. For both reasons the evidence must be conclusive before these facts can be held to be proved.

If the notice that had been served on the appellant had been " sent to him by post in a registered letter addressed to his last known place of residence or of business ", clear and unambiguous evidence furnishing conclusive proof of those facts should have been readily available in the files and registers kept in the Commissioner's office. The learned crown counsel has not been able to point even to an office minute, or other entry in any official record or register, stating that the notice was so sent to the appellant or sent to him at all. I agree with a contention that was advanced by Mr. Thangarajah that the fact that the notice and the envelope are in the file is insufficient by itself to prove conclusively that what the envelope contained when it was posted was the notice.

[1] (*1956*) *57 N. L. R. 307.*

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The deputy commissioner himself has not held that the notice has been sent to the appellant in a registered letter addressed to his last known place of residence or of business and that it must therefore be deemed to have been duly served on him. The effect of his finding is that it was in fact served. The presence of the document in the file, however, proves the contrary, and there is no sufficient evidence of the facts that must be proved before it can be deemed to have been served.

The order appealed from must be set aside and the respondent must be directed to cause to be served on the appellant a fresh notice in terms of section 9 (1) of the Act and to proceed thereafter in due course of law. The appellant must have his costs of appeal, which I would fix at Rs. 105.

Postscript

Since the above judgment was written my brother has drawn my attention to the case of *K. Easiah v. Commissioner for Registration of Indian and Pakistani Residents*,[1] where Gratiaen J. has expressed agreement with Swan J.'s conclusion in *Sivan Pillai's case*.[2] Gratiaen J. points out that both are cases in which the appellant failed to avail himself of the opportunity given to him by a notice in terms of section 9 (1) of the Act to show cause why his application should not be refused, and says that Swan J. has held " that in such circumstances the remedy by way of appeal to this Court was not available ", and that he himself agrees with this conclusion but " would prefer not to attempt to solve the difficult question whether the order under appeal is of a judicial, a quasi-judicial or a purely administrative character ". He goes on to consider the appeal on its merits and dismisses it on the ground that there is no error made by the tribunal of first instance to which the appellant can point. The appeal was dismissed, as in the later case of *Marimuttu*[3] (where Gratiaen J. delivered the judgment of the court), and was not rejected as in *Sivan Pillai's case*.

As I read the judgment in *Easiah's case*, what was decided was not that the applicant had no right of appeal and therefore the appeal could not be entertained, but that in the circumstances of that case the appeal could not succeed.

T. S. FERNANDO, J.—I agree.

Order set aside.

[1] (*1953*) *58 N. L. R. 37.*

[2] (*1953*) *54 N. L. R. 310.*

[3] (*1956*) *57 N. L. R. 307.*

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1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

W. G. D. KIRIGERIS APPUHAMY, Appellant, *and*
M. H. M. NAZIR, Respondent

S. C. 143—D. C. Tangalle, 6,325

Vendor and purchaser—Actio venditi—*Issue of non-delivery.*

When immovable property is sold, the *actio venditi* for the purchase price would be available to the vendor only when delivery of the property has been made to the purchaser. The purchaser may, therefore, raise the issue of non-delivery even if it was not pleaded in the answer.

APPEAL from a judgment of the District Court, Tangalle.

D. R. P. Goonetilleke, with *A. K. Premadasa*, for the defendant-appellant.

E. A. G. de Silva, for the plaintiff-respondent.

Cur. adv. vult.

June 25, 1956. H. N. G. FERNANDO, J.—

This was an action for the recovery of a sum of Rs. 1,000, being the balance amount of the purchase price of a land sold to the defendant by the plaintiff. The failure to pay the balance was admitted, but the defendant alleged in his answer that his rights to the property sold had been disputed in another action filed against him in the same Court, and pleaded that the money was being retained pending the determination of that action. The evidence adduced at the trial indicated however that the defendant was also relying upon a somewhat different ground, namely that the plaintiff had not placed him in possession of a boutique on the land.

This question of non-delivery was raised in an issue suggested by the defence, but the issue was withdrawn upon objection, presumably taken on the ground that it was not pleaded in the answer. I do not think that such a plea was necessary. The plaint averred that the defendant had *purchased* the land but did not allege that he had obtained delivery of the property sold. But the *actio venditi* for the purchase price lies *when delivery has been made to the purchaser* and he fails to make payment. (*Wille : Principles of South African Law, 2nd Edn. p. 364.*) "If he (the purchaser) has not paid the price and his title is threatened, he is entitled to refuse payment until the vendor gives security against eviction". (*Norman on Purchase and Sale in South Africa, 2nd Edn. p. 305.*) To succeed in the present action the plaintiff should have proved due

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delivery, and the question of delivery was therefore rightly raised for determination. The objection to that issue and its subsequent withdrawal had the result that there was no adjudication upon a relevant question.

I would therefore set aside the decree under appeal, and remit the case to the District Court for a trial *de novo*, with a direction that an issue as to delivery be admitted, together with any other relevant issue. In the circumstances, I think each party should bear his own costs of the first trial and of this appeal.

T. S. FERNANDO, J.—I agree.

Decree set aside.

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1956 *Present :* **Basnayake, C.J., and Gunasekara, J.**

COMMISSIONER OF INCOME TAX, Appellant, *and* THE GLASGOW ESTATE CO., LTD., Respondent

S. C. 5—Income Tax Case stated BRA/PT 4

Income tax—Profits Tax Act, No. 5 of 1948—Section 9—" Capital employed in the business ".

Where a limited company engaged in producing tea retained in the form of cash the equivalent of the amounts that were likely to be needed for the payment of (*a*) the income tax that would shortly fall due and (*b*) dividends that would shortly be declared—

Held, that the sum of money so retained was " capital employed in the business " within the meaning of section 9 of the Profits Tax Act, No. 5 of 1948.

CASE stated under section 74 of the Income Tax Ordinance (Cap. 188) read with section 14 of the Profits Tax Act, No. 5 of 1948.

M. Tiruchelvam, Deputy Solicitor-General, with *A. Mahendrarajah*, Crown Counsel, and *I. F. B. Wickremanayake*, Crown Counsel, for the appellant.

H. V. Perera, Q.C., with *S. Ambalavanar*, for the respondent.

Cur. adv. vult.

October 26, 1956. GUNASEKARA, J.—

This is an appeal by the Commissioner of Income Tax by way of a Case Stated under section 74 of the Income Tax Ordinance (Cap. 188) read with section 14 of the Profits Tax Act, No. 5 of 1948. Section 9 of the latter enactment provides that the chargeable surplus of profits or income of any person for each profits tax year shall be ascertained by deducting from the taxable profits or income of that person for that year an allowance equal to the larger of the two following amounts :—

(*a*) an amount equal to six per centum of the capital employed in the business of that person at the commencement of the accounting period of which the profits are assessed to tax in that year, or

(*b*) an amount of fifty thousand rupees.

The main question that arises upon the appeal is the meaning of the expression " capital employed in the business " that is used in this section.

The respondent is a limited company engaged in producing tea. In an appeal to the Commissioner of Income Tax against an assessment to profits tax for the year 1951 it claimed that an item of cash amounting

2——J. N. B 64243—1,593 (3/57)

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to Rs. 475,162 should have been included in the computation of the capital employed in its business at the commencement of that year. This item, according to the company's balance sheet for 1950, was made up as follows :—

	Rs. c.
National Bank of India, Ltd.—	
Current Account	468,258 55
Dividend Account ..	5,137 35
Estate Current Account ..	1,624 62
Cash on Estate	141 30
	475,161 82

The assessor had reduced the amount to Rs. 375,162, on the ground that that was " a reasonable estimate of the amount of cash used by the company for the purpose of the business ". Upon a reference back to the assessor the question was discussed between an assistant commissioner and the company, and the former offered to fix the amount at Rs. 320,000. At the hearing of the appeal before the commissioner the assessor contended that the amount must be further reduced by a sum of Rs. 140,632, made up as follows :—

	Rs.
Net dividend paid in respect of 1950 ..	73,125
Income tax for 1951–1952	67,507
	140,632

The commissioner agreed with this contention and fixed the amount of the cash to be included in the computation of the capital employed in the business at Rs. 180,000. Upon an appeal by the company the Board of Review increased the amount by Rs. 190,000. The commissioner had included in the sum fixed by him a sum of Rs. 120,000 as the equivalent of 2 months' estate expenditure, which he held would be sufficient for the current requirements of the business. The Board increased this sum by Rs. 50,000, on the ground that " a prudent Tea Estate Co. would keep more than 2 months' costs of upkeep in ready cash, because unforeseeable contingencies like a slump, strike accompanied by violence or an unusual pestilence, may suddenly demand abnormal expenditure ". They held that they should allow under this head the equivalent of the " costs of upkeep " for 3 months, which they estimated at Rs. 170,000. They also held that " it was plainly necessary for the appellant company to have in deposit on 1.1.1951 the cash required (1) to pay the income tax which would shortly fall due, i.e. 67,507, (2) the dividend of 73,125 ", and that the commissioner " was wrong in reducing the capital employed by the amount of those two items ".

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The questions of law that are said to arise for decision upon this appeal are formulated in the stated case as follows :—

" (1) Can the monies held in deposit (*a*) for the payment of Income Tax which will fall due and (*b*) for the payment of dividends, amount in law to capital employed in the business of the Glasgow Estates Co., Ltd., for the accounting period in question ?

(2) Were the Board of Review justified in holding, in the absence of evidence, that three months cost of upkeep be held as working expenses in place of the two months cost fixed by the Commissioner ? "

At the commencement of the chargeable accounting period, that is to say on the 1st January, 1951, the income tax for 1951–1952 had not been assessed and the dividend in question had not been declared. The Board took the view that " the company was well advised to have cash in hand to meet those claims " and that therefore the cash that was necessary for the purpose must be taken to have been capital employed in the business. It is contended for the Crown that tax and dividends must be paid out of profits and that therefore the sum of Rs. 140,000 cannot be treated as capital. It is also contended that in any event cash that was reserved for these payments was money that was to be paid out and not money that was to be employed in the business.

On the question of the meaning of " capital employed in the business " the learned Deputy Solicitor-General cited, among other cases, those of *Liberty & Co., Ltd. v. The Commissioners of Inland Revenue*[1] and *James Waldie & Sons, Ltd. v. The Commissioners of Inland Revenue*[2]. The question that was considered in each of these cases was whether certain sums forming part of the capital employed in a business were also investments and should therefore be excluded in the computation of the amount of the capital employed in the business for the purposes of Excess Profits Duty under certain provisions of the Finance (No. 2) Act, 1915. The sums in question in the former case were held to be investments and in the latter not. The question whether they were investments arose, however, only upon the assumption that they formed part of the " capital employed in the business ". These cases, therefore, throw no light on the question whether this expression means anything more than the " capital of the business ". The same comment may be made on the case of *Inland Revenue Commissioners v. Laurence Philipps & Co. (Insurance), Ltd.*[3], which too is relied on by the learned Deputy Solicitor-General. The question there was whether certain loans were investments and should therefore be left out of account, as provided in Schedule VII to the Finance (No. 2) Act, 1939, in the computation of the capital employed in a business in the relevant period.

It is contended for the Crown that the expression means capital that " is actually earning profits " and does not include capital in the form of cash lying idle in the bank. The learned Deputy Solicitor-General

[1] *(1924) 12 T. C. 630.* [2] *(1919) 12 T. C. 113.*
[3] *[1947] 2 All E. R. 141.*

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cited in support of this contention an observation made by Lord Greene M. R., in *Northern Aluminium Co., Ltd. v. Inland Revenue Commissioners*[1], as to the meaning of " capital employed in the trade or business in any chargeable accounting period " in the proviso to section 13 (3) of the Finance (No. 2) Act, 1939. But the distinction drawn there is not between capital actually earning profits and capital lying idle, but between capital actually earning profits in the relevant period and " notional and artificial capital which had no real existence " during that period. What Lord Greene said was :

> " That (i.e. ' capital employed ') seems to me quite clearly to refer to capital actually employed, not to some item which is artificially going to be written back into the capital in some future year, but capital which is in fact being employed for the purpose of earning profits. You earn profits with real capital, not with something which, on a subsequent re-opening of the account, is going artificially to be attributed to a particular period. "

The question whether there is any distinction that can be drawn between one part of the capital of a business as being employed in the business and another as not being so employed did not arise for consideration. The learned judge was only concerned to point out that the capital provisions of the Act " are dealing with realities, things which are really assets and really liabilities, and not with something which is for profit purposes (which is quite a different conception) to be artificially regarded as a liability to be written back into the accounting period ".

It was pointed out in the case of *Laurence Philipps & Co. (Insurance), Ltd.*[2] that " there is never any difficulty about regarding money lying idle in the bank as money employed in the business providing there is a reasonable probability of it being wanted in the accounting year or in a short space of time thereafter ". The qualification that there must be such a reasonable probability was necessary in view of a provision in the Finance (No. 2) Act, 1939, Schedule VII, Part II, para. 3 that " any moneys not required for the purposes of the trade or business " shall be left out of account in the computation of the capital employed in the trade or business in any chargeable accounting period. Our Profits Tax Act, No. 5 of 1948, contains no such provision, although there was a similar provision in section 10 (5) of the Excess Profits Duty Ordinance, No. 38 of 1941, as amended by Ordinance No. 6 of 1942. Under our law, therefore, there is no ground for limiting to an amount that will probably be " wanted in the accounting year or in a short space of time thereafter " the amount of any cash in the bank that can be regarded as employed in the business, but the entirety of such an asset must be regarded as being so employed inasmuch as it is available for any purpose of the business.

The case of *Birmingham Small Arms Co., Ltd. v. Inland Revenue Commissioners*[3] was cited by the learned counsel for the Crown. The question that arose for decision there was whether a right of claim to compensation for war damage, under the War Damage Act, 1941, was

[1] [*1946*] *1 All E. R. 546 at 550, 552.* [2] [*1947*] *2 All E. R. 144.*
[3] [*1951*] *2 All E. R. 296.*

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an asset the value of which, during a chargeable accounting period, formed part of the capital employed in the trade or business of the appellant company, within the meaning of the Finance (No. 2) Act, 1939, Schedule VII, Part II, paragraph 1 (1); which provides for the valuation of various kinds of assets in the computation of "the amount of the capital employed in a trade or business (so far as it does not consist of money)". When the company was assessed to excess profits tax for the period 1st August 1940 to 31st July 1941 no account was taken of this claim in the computation of the amount of the capital employed in their trade or business. The company appealed against the assessment, contending that the right of claim, which was in respect of damage caused before the 31st May 1941, became an asset of the trade or business on that day upon the coming into force of Regulations under the War Damage Act. The appeal was dismissed by the Commissioners for the Special Purposes of the Income Tax Acts, who held that the claim, regarded as an asset, did not appear to them to be employed in the trade. An appeal from their determination to the King's Bench Division was dismissed, and further appeals taken successively to the Court of Appeal and the House of Lords were also dismissed. The appeal to the House of Lords was heard by Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Lord Tucker. The ground upon which Lord Simonds based his conclusion was that a right which is assumed to be an asset belonging to a limited company "cannot be capital employed in its trade unless it is an asset so employed", and that he saw no reason for disturbing the finding of the commissioners who had determined as a fact that the right in question had not been so employed; Lord Normand, Lord Radcliffe and Lord Tucker were of the view that the dismissal of the appeal should be based on a different ground, that the right was not an asset of the kind contemplated by the relevant provision of the Finance (No. 2) Act, 1939; and Lord Oaksey said that he was not prepared to dissent from the conclusions at which the rest of their Lordships had arrived.

The opinion of Lord Simonds is relied upon by the learned Deputy Solicitor-General as supporting a view that an asset can form part of the capital employed in a trade or business only if it "is actually earning profits" or is "actively" employed in the trade or business. I am unable to agree that support for this view can be found in that opinion. Having pointed out that the right in question "consisted of a right, subject to proof which might be difficult, to an indeterminate sum payable at a future and uncertain date", and that that was the position during the two months of the relevant accounting period with which alone the appeal was concerned, Lord Simonds formulated as follows the question that arose:

> "The question, then, is what was the average amount of capital employed by the trade or business of the appellants during the accounting period, or, more precisely, was it right, in order to bring up that average, to include at any, and what, figure the value of the right to which I have referred for the last two months of the period?"

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Discussing the answer to this question, he rejected a contention that " every asset of a trade or business is part of the capital employed in the trade or business unless expressly excepted by statute ", and that therefore the commissioners must be held to have misinterpreted the word " employed " ; but he did not hold that an asset is not " employed in a trade or business " unless it was " actually earning profits " or was " actively employed ". On the other hand, the opinions of Lord Normand, Lord Radcliffe and Lord Tucker definitely negative such a view. Lord Normand held that " para. 1 (1) of Part II of sched. VII to the Finance (No. 2) Act, 1939, does not call for an inquiry whether an asset (within the meaning of the paragraph) was ' actively ' employed in the company's trade or business in the relevant year " ; Lord Radcliffe that he did not think that the words " capital employed in a trade or business " bore any significant difference of meaning from the words " capital of a trade or business " ; and Lord Tucker that " the words ' capital employed ' . . . . do not refer to the actual use made of a particular asset in the relevant accounting period once it is shown to have been a form of capital put into the business and still there ".

I do not think there can be any question that the Board of Review were right in regarding the item of cash with which the present case is concerned as being " a form of capital put into the business and still there ". A decision by the company to retain in the form of cash the equivalent of the amounts that were likely to be needed for the payment of the income tax that would shortly fall due and dividends that would shortly be declared would not be a withdrawal of that amount of cash from the capital or even an earmarking of any money for these purposes ; for the sum so retained in the form of cash would continue to be available for any purpose of the business. I am therefore unable to accept the contention that the sum of Rs. 140,000, which the commissioner regarded as representing the amount needed for the payment of the income tax for 1951–1952 and the dividend declared in 1951, cannot be treated as capital.

In my opinion there is no ground for limiting to what is required for the purposes of a trade or business the amount of cash that can be regarded as capital employed in it. But assuming that it was necessary in this case to determine what sum the appellant company needed to have available in cash for working expenses, I am unable to agree that the Board determined this question without evidence when it held that a reasonable sum would be the equivalent of the cost of upkeep for 3 months rather than 2 months. The Board had before it sufficient material in the form of evidence as to the nature and extent of the business done by the company.

The appeal must be dismissed with costs.

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BASNAYAKE, C.J.—

I have had the advantage of reading the Judgment prepared by my brother Gunasekara with which I agree.

The Board of Review has held as a question of fact that there was a reasonable probability of a sum of Rs. 370,000 out of the money in the cash account of the Company being required by the assessee for his business. That is a finding of fact which falls within the province of the Board and is final under our Income Tax Ordinance.

The statement of Atkinson J. in the *Acme Flooring Co.* case [1] in regard to the manner in which this question of the capital employed in a business should be approached appeals to me and I quote his words :—

> " A man could not be allowed to retain very, very large sums of money where the possibilities of their being required were so unlikely or so remote that no reasonable man would retain the money lying idle in order to meet such vague possibilities. I imagine (the Special Commissioners) have to ask themselves this question : ' What would a reasonable business man regard as sufficient money to retain lying idle to meet his future commitments—certainly the commitments in the near future ? ' The Commissioners say : ' We accept that. ' I think they have said : ' We go beyond that ' but we do not think that he ought to be allowed to look too far ahead. ' To my mind, where the line is to be drawn is obviously a question of fact. I cannot interfere merely because I think I would have drawn the line somewhere more favourable to the trader. It is for the Commissioners to say. "

In the later case of *Inland Revenue Commissioners v. Laurence Philipps & Co.* [2] the same Judge said :

> " There is never any difficulty about regarding money lying idle in the bank as money employed in the business providing there is a reasonable probability of it being wanted in the accounting year or in a short space of time thereafter. "

The view that it is the function of the Special Commissioners to determine as a fact whether an asset belonging to a Company is an asset employed in its trade has never been doubted. It was re-asserted in the *Birmingham Small Arms* case [3]. Though the questions stated by the Board for the opinion of this Court have been answered they are strictly not questions of law which arise on the stated case.

Appeal dismissed

[1] *1948 (1) All E. R. 546.* [2] *1947 (2) All E. R. 144.*
[3] *1951 (2) All E. R. 256.*

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1956 *Present:* **H. N. G. Fernando, J., and Sinnetamby, J.**

B. J. F. MENDIS, Petitioner, *and* B. J. M. C. FERNANDO *et al.*, Respondents

S. C. Application 433

S. C. 181—D. C. Panadura, 1,834

IN THE MATTER OF AN APPLICATION IN TERMS OF RULE 25 OF THE SCHEDULE TO THE APPEALS (PRIVY COUNCIL) ORDINANCE (CAP. 85)

Privy Council—Grant of final leave to appeal—Delay of appellant thereafter to take necessary steps—Dismissal of appeal for non-prosecution—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 25—Appellate Procedure (Privy Council) Order, 1921, paragraphs 11 and 18.

A party seeking to appeal to the Privy Council from a judgment of the Supreme Court was granted on November 11, 1955, final leave to appeal. He elected to print the record in Ceylon. On May 4, 1956, he was informed by the Registrar of the Supreme Court that the record was ready for printing, and he was requested to nominate a printer to whom the record was to be entrusted for printing. He failed to respond to this request until August 20, 1956, and the work of printing was not commenced by the printers until about November 1, 1956.

The appellant established no good cause either for his failure to nominate a printer within a reasonable time after he was called on to do so by the Registrar or for his delay in having the work of printing taken in hand. It was only after his delay was brought to his notice by the present application made on October 24, 1956, under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance that he applied for relief and extension of time under paragraph 18 of the Appellate Procedure (Privy Council) Order, 1921.

Held, that the appellant clearly failed to show due diligence for the purpose of procuring the despatch of the record to England and that his appeal should, under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance, be dismissed for non-prosecution.

APPLICATION in terms of Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance.

E. G. Wikramanayake, Q.C., with *T. B. Dissanayake*, for the plaintiff-petitioner.

Walter Jayawardene, with *Neville Wijeratne*, for the defendants-respondent.

Cur. adv. vult.

November 23, 1956. H. N. G. FERNANDO, J.—

This is an application under Rule 25 of the Privy Council Appeals Ordinance Ch : 85 N. L. E. to declare that the respondent's appeal to the Privy Council in S. C. 181/L-53, D. C. Panadura 1834, stands dismissed for non-prosecution. The ground upon which this Court may

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make such a declaration is that the appellant in the appeal had failed " to show due diligence in taking all necessary steps for the purpose of securing despatch of the record to England ".

Final leave to appeal was given by this Court on11th November 1955 ; the appellant elected to print the record in Ceylon and accordingly under paragraph 11 of the Appellate Procedure (Privy Council) Order 1921 it was his duty to deliver the prints to the Registrar for examination and certification at the latest on or about 11th January 1956. It is unnecessary to consider whether the failure to comply with this obligation established a want of due diligence on the part of the appellant because his want of due diligence is conclusively established by other circumstances.

On the 4th of May 1956, the appellant was definitely informed by the Registrar of this Court that the record was ready for printing, and he was requested to nominate a printer to whom the record was to be entrusted for printing. Despite several letters inviting his attention he failed to respond to this request until 20th August 1956 and no explanation has been offered for this failure. In his letter of 20th May 1956 the appellant stated that " he had made arrangements with *Ceylon Daily News*, Lake House, Colombo, to print the record, and the Registrar forthwith transmitted the record to *Ceylon Daily News*. Correspondence between *Ceylon Daily News* and the Registrar shows that on 1st November 1956 the printers informed the Registrar that the work of printing " has now been taken in hand ". The most that is thus established in the appellant's favour is that the work of printing was commenced at or about 1st November, and there is no explanation to show why the work was not commenced earlier. Counsel for the appellant now submits that the appellant's statements in August 1956 that he had " made arrangements for printing " must be taken to mean that he had paid *Ceylon Daily News* the cost of printing and that therefore the reason for delay must be taken to be that the printers were unable to take the work in hand before November 1956. We do not agree with this submission. The expression " made arrangements " might equally well refer to a mere undertaking on the part of *Ceylon Daily News* to print the record and does not fairly constitute evidence that payment had been made in advance. Hence it is equally possible that the delay in commencing the work of printing was due to the fact that the printers waited until payment was actually made. In the absence therefore of positive evidence to show that the delay in the commencing of the printing was not due to the fault of the appellant, counsel's explanation for the delay is not an acceptable one. At the date of the present application to this Court, therefore, the position was that the printing had not been taken in hand and the appellant has not satisfied us that the delay was due to any cause beyond his control.

In the result the appellant has established no good cause either for his failure to nominate a printer within a reasonable time after he was called on to do so by the Registrar, nor has he established that by October 24th 1956, which was the date of the present application, he had taken the steps within his power to secure that the work of printing would be done expeditiously.

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Paragraph 18 of the Order enables this Court to extend the time allowed for doing any act, but the appellant did not think fit to seek any such relief and thus to make sure that the delay in printing the record would not prejudice his appeal. He only made the application for such relief *after* his delay had been brought to his notice by means of the present application.

We are of opinion that the appellant clearly failed to show due diligence for the purpose of procuring the despatch of the record and that the present application must therefore succeed. We would therefore grant the declaration prayed for in the petition and direct that the costs incurred by the petitioner in consequence of the appellant's filing an appeal to the Privy Council be taxed by the Registrar and be paid to the petitioner out of the sum Rs. 3,000 deposited as security for costs. We direct also that the appellant do pay to the petitioner the taxed costs of this application and that the decree of this court in appeal be transmitted to the District Court for execution.

SINNETAMBY, J.—I agree.

Application allowed.

1955 *Present :* **Swan, J., and K. D. de Silva, J.**

E. S. WIMALASEKERA, Appellant, *and* PARAKRAMA SAMUDRA CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD., Respondent

S. C. 77—D. C. Anuradhapura, 3,452

Execution—Writ issued without jurisdiction—Seizure of goods thereunder—Liability for damages—Proof of malice—Quantum of damages—Civil Procedure Code, s. 763.

A seizure of goods on a writ issued without jurisdiction renders the party, at whose instance the seizure was effected, liable in damages without proof of malice.

Under the provisions of section 763 of the Civil Procedure Code it is imperative that, in an application for execution of a decree which has been appealed against, the judgment-debtor should be made respondent. A writ which fails to comply with this requirement of section 763 falls into the category of a writ issued without jurisdiction.

It is the duty of a party who is entitled to claim damages to take all reasonable steps to minimise the damages.

APPEAL from a judgment of the District Court, Anuradhapura.

N. Kumarasingham, for the defendant appellant.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiff respondent.

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Cur. adv. vult.

September 14, 1955. K. D. DE SILVA, J.—

This is an appeal from a judgment of the District Judge, Anuradhapura, awarding the plaintiff a sum of Rs. 12,276 with legal interest thereon as damages for illegal seizure of the goods belonging to the plaintiff.

The plaintiff is a Co-operative Society duly registered under the provisions of the Co-operative Societies Ordinance (Cap. 107) which carries on the business, *inter alia*, of the purchase and sale of paddy. The defendant on 9th August, 1951, obtained judgment against the plaintiff in Case No. 3122 D. C. Anuradhapura in a sum of Rs. 41,892·50. On the same day that judgment was entered in that action the present plaintiff who was the defendant in that case filed a petition of appeal. The same day the Proctor for the plaintiff in that action filed an application for execution and obtained a writ for the recovery of the amount due on the decree. This writ was issued to the Fiscal returnable on 1.12.'51. On 15.8.'51 the Proctor for the defendant in that case filed a petition stating, *inter alia*, that the application for writ had been made after the appeal had been taken against the judgment but that the judgment-debtor had not been made a respondent to the writ application as required by Section 763 of the Civil Procedure Code. Therefore he moved that the application for execution be refused and the writ be recalled. On the previous day, that is to say on 14th August, the Fiscal had seized on this writ 3908 bushels of paddy and lorry bearing No. C. L. 5148 belonging to the judgment-debtor. These goods were pointed out to the Fiscal by the judgment-creditor for seizure. On 16.8.'51 the Counsel for the judgment-debtor supported the application for recall of writ and the learned District Judge made order recalling the writ and directed the judgment-debtor to pay the Fiscal's charges, if any. He further directed that notice of the application for recall of writ be issued on the judgment-creditor. On the same day the Fiscal on receipt of the order recalling the writ reported to Court that 3908 bushels of paddy and lorry No. C. L. 5148 had already been seized and asked for instructions as to what should be done regarding the seizure, and the learned District Judge on the same day made the following order :—

" The property seized to be released on giving security." No security however was tendered by the judgment-debtor and the property continued to remain under seizure.

The matter of the application for recall of writ came up for inquiry on 11.9.'51 and the learned District Judge made his order on 18.9.'51 that the order of 9.8.'51 to issue writ had been made *per incuriam* and directing the Fiscal to release the property from seizure on payment on the Fiscal's charges. The point which came up for consideration at that inquiry was, which was filed earlier, the petition of appeal or the application for writ. The case for the judgment-creditor was that when the application for writ was tendered to the Secretary of the Court no appeal had yet been filed and the Secretary supported the judgment creditor on this point. On the other hand, it was contended on behalf of the judgment-debtor, that the petition of appeal was tendered first

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and it was minuted in the journal earlier than the application for writ. The learned District Judge held that the journal entries represented the correct sequence of events and made order recalling the writ. There was no appeal from that order which is now binding on the parties.

In the present action the claim for damages was based on two grounds namely (1) that the seizure was illegal on the ground that the judgment-debtor was not made respondent to the writ application and (2) that the present defendant acted maliciously and unlawfully and without reasonable or probable cause in obtaining the seizure. The learned District Judge held that the plaintiff had failed to establish malice and that therefore damages could not be claimed on that ground. That finding is supported by the evidence and was not canvassed in appeal. The learned District Judge, however, held that the defendant in having got the property seized on a writ that was void *ab initio* was liable in damages without proof of any malice on his part. It is contended on behalf of the appellant that the learned District Judge erred on the law in holding that the defendant became liable in damages in the absence of proof of malice on his part. That in an application for execution for a decree which is appealed against it is imperative that the judgment-debtor should be made respondent is admitted. The provisions of Section 763 C. P. C. are clear on that point. In the earlier action when the application for execution was made on 9.8.51 the judgment-debtor was not made respondent to that application, although an appeal had already been taken by him against the judgment. The writ obtained on that application, it is contended on behalf of the plaintiff, was not merely irregularly issued but issued without jurisdiction. It is argued on behalf of the plaintiff that the judgment of the Privy Council in *Ramanathan Chetty v. Meera Sahibo Marikar* [1] is authority for the proposition that a seizure on a writ issued without jurisdiction renders the party, at whose instance this seizure is effected, liable in damages without proof of malice. In that case Their Lordships of the Privy Council stated,

> "A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice."

Mr. Kumarasingham who appeared for the defendant appellant contended that this judgment of the Privy Council supported him. According to him, the writ in question is not one issued without judicial sanction but a writ which was improperly obtained. Therefore he submitted that proof of malice was essential for the plaintiff to succeed. On this point the observations of Soertsz A.C.J. in *Edward v. de Silva* [2] are very

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[1] *(1930) 32 N. L. R. 193.* [2] *(1945) 46 N. L. R. 342.*

illuminating. In that case he was dealing with a writ similar to the one under review. Dealing with the rules of procedure relating to the issue of writs he said,

" Some of these rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve exercise of it in irregularity." He held that a writ which failed to comply with the requirements of section 763 fell into the category of a writ issued without jurisdiction. In coming to that view he relied on two Indian cases decided by the Privy Council—*Rajunath Das v. Sundra Das Khelvi* [1] and *Makar Jun v. Nahari* [2]. In *Rajunath Das v. Sundra Das* section 248 of the Indian Code of Civil Procedure came up for consideration. The provisions of that section required that a certain party should have been served with a notice calling upon him to show cause why the decree should not be executed against him, before obtaining execution against him. The judgment-debtor had failed to do this. Lord Parker in that case observed, " A notice under Section 248 is necessary in order that Court should obtain jurisdiction. " If I may say so, with respect, I agree with the view expressed by Soertsz A.C.J. in *Edward v. de Silva* [3]. The resulting position therefore is that the plaintiff's goods were seized on 14.8.'51 on a writ which the Court had no jurisdiction to issue. A writ issued without jurisdiction cannot be invested with judicial sanction. Seizure effected on that writ was illegal and the plaintiff is entitled to recover damages without proof of malice on the part of the defendant.

I would now proceed to consider the question of damages. The sum of Rs. 12,726 awarded as damages to the plaintiff was made up as follows :—

	Rs.
(1) Expenses incurred in getting the seizure released ..	300
(2) Shrinkage of paddy during 39 days at Rs. 25 per day ..	975
(3) Loss caused by non user of lorry for 39 days ..	1,251
(4) Loss of trade and prospective gain from 14.8.'51 to 21.9.'51 at Rs. 250 per day	9,750

The plaintiff gave evidence stating that he incurred the expenses and sustained the losses referred to above. No evidence was led on behalf of the defendant to contradict the testimony of the plaintiff on this point. The learned District Judge held that the damages claimed were not excessive and allowed the plaintiff's claim.

[1] *A. I. R. 1914 P. C. 129.* [2] *I. L. R. 25 Bombay 338.*
[3] *(1945) 46 N. L. R. 342.*

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The learned District Judge however overlooked the fact that on 16.8.'51 he had ordered the seizure to be released on the present plaintiff giving security. The security I take it would be the amount due under the decree namely Rs. 42,892·50 with legal interest thereon from 5.4.'50. Although this order was made, the present plaintiff failed to furnish the security and obtain the release of the property. The President of the plaintiff Society has stated that security was not given because the Society between 16.8.'51 and 21.9.'51 did not have the sum of Rs. 41,000 to be utilized as security. He however admitted that there was a sum of Rs. 15,000 on 16.8.'51 in the bank to the credit of the Society. This sum of Rs. 15,000 could not be drawn without a resolution of the Committee. In fact it would appear that security has to be sanctioned by the Committee and approved by the Registrar. There is no evidence whether or not a resolution was passed by the Committee authorizing the furnishing of security. The President has merely stated that the Registrar did not approve of giving security in Rs. 14,000. It is the duty of the plaintiff to take all reasonable steps to minimise the damages. In this case the plaintiff Society does not appear to have taken sufficient action to furnish the security. It is reasonable to hold that if adequate steps were taken to obtain the necessary money for the purpose of giving security the plaintiff could have got the property released within two weeks. The value of the paddy alone which was seized was over Rs. 30,000. To the credit of the Society there was a sum of Rs. 15,000 in the bank. Therefore if the Society so desired it would not have been impossible for it to have obtained the necessary money to give the security. Accordingly it would be fair in my view to restrict the damages claimed under items 2, 3 and 4 for a period of 14 days only. I would therefore fix the damages that the plaintiff is entitled to recover as follows :—

		Rs.
Item 1	.. ..	300
Item 2	.. ..	350
Item 3	.. ..	448
Item 4	.. ..	2,500
	Total ..	3,598

To this sum of Rs. 3,598 I would add a further amount of Rs. 402 on account of the expenses in raising the required security and perfecting the same. Let judgment be entered for the plaintiff in the sum of Rs. 5,000 with costs in that class. The plaintiff would pay half the costs of this appeal to the defendant appellant. Subject to this variation the appeal is dismissed.

SWAN, J.—I agree.

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Decree varied.

1956 *Present:* **Weerasooriya, J., and H. N. G. Fernando, J.**

R. G. DE SILVA, Appellant, *and* M. V. ZOYSA *et al.*, Respondents

S. C. 118—D. C. Balapitiya, 423

Sale of immovable property—Conveyance coupled with clause for reconveyance—Oral evidence of mortgage—Admissibility—Tender of money—Quantum of evidence.

In a transfer of immovable property, what purports to be a conveyance coupled with a clause for reconveyance on payment of a certain sum of money within a stipulated period cannot be proved by oral evidence to have been in reality a mortgage.

Quantum of evidence necessary to prove tender of money before the due date considered.

APPEAL from a judgment of the District Court, Balapitiya.

Sir Lalita Rajapakse, Q.C., with *Bertram J. de Zylva*, for the 2nd defendant-appellant.

S. C. E. Rodrigo, for the plaintiff-respondent.

Cur. adv. vult.

March 28, 1956. H. N. G. FERNANDO, J.—

The plaintiff in this action has been granted a decree declaring that two deeds executed by him are in the nature of mortgage bonds and that he is entitled to obtain a discharge of the bonds on payment of specified sums of money.

By a notarial document dated 11th October, 1949, described on its face as a Bill of Sale, the plaintiff sold and conveyed certain immovable property to the 1st defendant for a sum of Rs. 750, " reserving the right to have a reconveyance within two years on payment of the said principal and interest ". By a second notarial document of 1st July, 1950, described as a transfer, the plaintiff sold and conveyed to the 1st defendant for a sum of Rs. 470 " the right to re-purchase " the same property, which right had been reserved to the plaintiff by the earlier deed, while again reserving the right to re-purchase the right now sold on any date " within one year, three months and eleven days " of 1st July, 1950. It will be seen that, while the reservation in the first deed was a right to a reconveyance if a sum of Rs. 750 together with interest was paid before 11th October, 1951, the effect of the second deed was that the right to a reconveyance would be lost unless the plaintiff *in addition* re-paid within the same stipulated period a further sum of Rs. 470 with interest. In so far as the 1st defendant was concerned, the second payment which he made had the consequence of increasing the amount which the plaintiff would have had to pay for the reconveyance and thus of diminishing the chance of the exercise of the right to claim the reconveyance.

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It was admitted that the plaintiff was entitled to remain in possession of the land in terms of the first deed and did in fact continue in possession. It is also in evidence that the plaintiff borrowed two sums of Rs. 250 and Rs. 120 from the 1st defendant in December, 1949. These loans represent the amount of consideration for the second deed of July, 1950, and it may be assumed that the necessity for the second deed arose because the plaintiff was unable to repay those loans. These circumstances do indicate that the plaintiff in all probability regarded his transactions with the 1st defendant as being loans upon the security of land and hoped for an improvement of financial circumstances to release him from his liabilities. But the difficulty in which the plaintiff finds himself is that the legal form of the transactions was that of a sale coupled with a clause for a reconveyance and not that of a mortgage.

In view of the recent judgments of the Privy Council and of this Court, it is now too late to take up the position which the plaintiff has attempted to take in this case. Their Lordships of the Privy Council in *Saverimuttu v. Thengavelautham et al.* [1] approved the principle laid down in *Perera v. Fernando* [2] 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 ". If what purports to be a sale pure and simple cannot be proved by oral evidence to have been in reality a mortgage, neither can a conveyance coupled with a clause for reconveyance on fulfilment of a stipulated condition be shown to have been a mortgage. This latter proposition was clearly recognised by this Court in the recent case of *Setuwa v. Ukku* [3] after an examination of all the relevant authorities. The finding of the learned District Judge that the transactions which are the subject of this action constituted a mortgage cannot therefore be sustained.

Counsel for the appellant has argued that the deeds relied on by the plaintiff do not even establish a valid agreement to reconvey the property, for the reason that they are signed only by the transferor, and that there is no notarially attested writing binding the transferee to reconvey. It is not, however, necessary to decide whether this argument should succeed since the plaintiff's action must fail even upon the assumption that there was a valid agreement to reconvey.

The learned District Judge, having held on the law that the transaction between the plaintiff and the 1st defendant was in reality a mortgage, went on to find upon an issue of fact that the plaintiff did tender to the 1st defendant on or about 3rd August, 1951, the two amounts which he had to repay as a condition precedent to the reconveyance of the property. But this finding is quite unsupported by the evidence. The plaintiff stated in chief that he tendered the money to the 1st defendant at the latter's boutique at Ratmalana once on 3rd August, 1951, and again two days later ; on each occasion he was informed that the 1st defendant would come to the plaintiff's village (in the Southern Province) to receive the money ; but the 1st defendant failed to go to the

[1] *(1954) 55 N. L. R. 529.* [2] *(1914) 17 N. L. R. 486.*

[3] *(1955) 56 N. L. R. 337.*

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village as promised. The plaintiff also stated that he then informed the Debt Conciliation Board about the transaction. In cross-examination the time of the tender was changed to the first week in September, and there was the additional allegation that the Debt Conciliation Board asked the 1st defendant to accept the money. This last allegation would have been decisive if it was supported either by the evidence of an officer of the Board or even by the production of a copy of the plaintiff's application to the Board. But no such evidence was available at the trial. Having regard to the purposes for which the assistance of the Board is usually sought, the probabilities are all in favour of the 1st defendant's version that the plaintiff made his application to the Board only in an endeavour to secure an arrangement for payment by instalments and not in order to tender immediate payment.

As to the alleged tender at Ratmalana, there was not only the contradiction as to the date of the tender. The plaintiff apparently allowed the sands to run out without writing any letter to the 1st defendant on the subject of the repayment and without consulting his lawyers as to the action he should take in order to secure the reconveyance. Even when he came into Court, he did not, as is usual in such cases, bring in the moneys payable for the reconveyance. Moreover his cause of action was not upon the footing of a conditional transfer and a tender in fulfilment of the condition, which would have been the obvious course if there had in fact been a tender in due time. The allegation of tender was quite irrelevant to the plea that the transactions were in reality a mortgage. The choice of this plea is to my mind a strong indication that the plaintiff's advisers had themselves little confidence in his ability to prove the tender. The plaintiff has in my opinion failed to discharge the burden of proving the tender, and the relevant issue should have been answered in favour of the defendants.

For these reasons I would set aside the decree entered in favour of the plaintiff and dismiss his action with costs in both Courts.

WEERASOORIYA, J.—I agree.

Appeal allowed.

1956 *Present :* **T. S. Fernando, J.**

R. M. APPUHAMY, Appellant, *and* B. D. MENDIS, Respondent

S. C. 198—C. R. Badulla-Haldumulla, 3,230

Public Servants (Liabilities) Ordinance (Cap. 88)—Section 2 (1) (a)—Protection of Ordinance not available against actions based on unjustified enrichment or for recovery of money paid on a consideration which has failed.

By an informal writing the defendant, who was a public servant, had agreed to transfer certain immovable property to the plaintiff. The document contained an acknowledgment of the receipt of a sum of Rs. 250 " as advance this day on that account ". When the defendant subsequently failed to transfer the property as agreed upon, the plaintiff instituted the present action for the recovery of the sum of Rs. 250 paid in advance.

Held, that the action did not fall within the class of actions described in section 2 (1) (*a*) of the Public Servants (Liabilities) Ordinance.

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APPEAL from a judgment of the Court of Requests, Badulla-Haldumulla.

T. B. Dissanayake, for the execution-purchaser appellant.

G. P. J. Kurukulasuriya, with *E. L. P. Mendis*, for the defendant respondent.

Cur. adv. vult.

December 21, 1956. T. S. FERNANDO, J.—

In execution of a decree entered against the defendant-respondent ordering him to pay to the plaintiff a sum of Rs. 250 a land belonging to the defendant was seized and put up for sale by the Fiscal, and at the sale it was purchased by the present appellant. The defendant applied to court to set aside the sale on the ground (i) of certain irregularities alleged by him in the conduct of the sale and (ii) that he was a public servant entitled to plead in this case the protection of the Public Servants (Liabilities) Ordinance (Cap. 88). The issues in regard to the alleged irregularities have not been answered by the learned Commissioner of Requests as he treated another issue (issue 9) as to whether the cause of action upon which the defendant was sued was barred by the provisions of section 2 of the Public Servants (Liabilities) Ordinance as a preliminary issue an answer to which in favour of the defendant was conclusive in the case.

The Commissioner has found that (i) the defendant was a public servant who came within the class of public servants entitled to plead the Ordinance, and (ii) it is open to the defendant to plead the benefit of the Ordinance at the stage of execution notwithstanding that judgment has been entered against him, and learned counsel for the appellant does not canvass these findings. He has however strenuously contended that these findings are of no avail to the defendant in this case as the latter must show further that the action upon which he has been sued is an action of the kind described in section 2 (1) of the Ordinance. Both counsel before me were agreed that the action filed against the defendant does not come within the class of actions described in section 2 (1) (*b*) or 2 (1) (*c*). The present appeal therefore hinges upon the question whether it is an action *upon any promise, express or implied, to repay money paid or advanced to him* and thus falling within the class of actions described in section 2 (1) (*a*).

It is therefore necessary to consider the real nature of the action in which the defendant was sued by the plaintiff. By an informal writing P1 the defendant had agreed to transfer to the plaintiff certain premises situated at Bandarawela on the plaintiff paying to him a sum of Rs. 4,250 before a date specified in the writing. P1 further contained an acknowledgment of the receipt of a sum of Rs. 250 " as advance this day on that account ". The plaintiff alleged in his plaint that the defendant had failed to transfer the property as agreed upon and had failed and

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neglected to pay back the sum of Rs. 250 paid as advance. He therefore claimed that a cause of action had arisen to him to sue the defendant for the recovery of the said sum of Rs. 250. The writing P1 not being notarially attested could not have been sued upon in respect of the promise to transfer the immovable property, but was available as evidence of the receipt by the defendant of Rs. 250 which sum was no doubt paid by way of earnest money. Indeed, the receipt of this sum was admitted by the defendant in his answer. On the day fixed for trial judgment was entered against the defendant in terms of section 823 (2) of the Civil Procedure Code on default of his appearance, and I shall therefore proceed to consider the question now before me on the assumption that the assertion in the plaint that it was the defendant who failed to carry out the terms of the agreement embodied in P1 by transferring the property is established. As it was the defendant who failed to complete the transaction of the sale of the property, the plaintiff became entitled in law to a refund of the money advanced by him on the informal agreement. This was a case where the action for recovery of the money lay either on the basis of an unjustified enrichment of the defendant or on the principle that money paid on a consideration which has failed may be recovered as money had and received.

If the real nature of the action be as stated by me above, can it be said that it fell within the class of actions described in section 2 (1) (*a*) of the Ordinance ? Learned Counsel for the defendant conceded what is, no doubt, obvious that the action was not based upon any express promise, but he argued that there was an implied promise by the defendant to repay the sum of Rs. 250 paid to him by the plaintiff as an advance on the consideration which had been agreed upon at Rs. 4,250. I am of opinion that the actions described in section 2 (1) (*a*) are principally actions for the recovery of sums paid out as loans or on transactions in the nature of loans and that they do not in the context embrace actions based on the quasi-contractual obligations referred to by me in the paragraph above.

As Dalton J. said in *Samarasundera v. Perera* [1], " the limits within which public servants are protected are very carefully prescribed by the Ordinance ", and Courts should be watchful to grant the protection of the Ordinance only in respect of actions which fall strictly within the terms of section 2.

I am of opinion that the answer to issue 9 should have been that the cause of action sued upon in this case did not fall within the exempted classes specified in section 2 (1) (*a*) of the Ordinance. I would therefore set aside the order made by the learned Commissioner on 8th December 1955 and remit the case to the Court of Requests for the inquiry to be continued on the other issues that were framed. The appellant will be entitled to the costs of this appeal and of the proceedings so far held in the Court of Requests on the application to set aside the sale.

Appeal allowed.

[1] (1930) 31 N. L. R. at 295.

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1956 *Present :* **Sinnetamby, J.**

O. A. PEMADASA, Appellant, *and* L. DAVID (D. S. I.), Respondent

S. C. 383—M. C. Matara, 40,041

Conditional release of offenders—Recognizance—Proper Form—Criminal Procedure Code, ss. 80, 82, 325, 327 (4).

Before a court can proceed to act under section 327 (4) of the Criminal Procedure Code, the recognizance entered into must be in conformity with the provisions of section 325. The form of bond relating to conditional release of offenders under sections 325 and 326 is prescribed in Subsidiary Legislation of Ceylon, Volume I, Chapter 16, at page 113.

APPEAL from an order of the Magistrate's Court, Matara.

R. A. Kannangara, for the accused-appellant.

T. A. de S. Wijesundera, Crown Counsel, for the Attorney-General.

October 31, 1956. SINNETAMBY, J.—

The accused in this case was on his own plea convicted under section 326 of the Penal Code and ordered to enter into a bond of good behaviour for a period of two years. He was ordered to pay Rs. 25 as Crown costs ; presumably the Magistrate purported to act under section 325 of the Criminal Procedure Code, but he had proceeded to convict the accused which he should not have done if his intention was to proceed under section 325.

In compliance with the Magistrate's order, the accused signed a bond but the form of bond used is one intended for bonds entered into under section 82 of the Criminal Procedure Code. The accused bound himself by the terms of that bond to be of good behaviour for two years and in the case of making default to forfeit the sum of Rs. 100.

The accused was subsequently convicted for using obscene words under section 287 of the Penal Code. The police thereupon moved the Court to issue notice on the accused to show cause why the bond he had already entered into should not be cancelled. The accused appeared on notice and had no cause to show. The Magistrate then proceeded to vacate the bond which he had no authority to do. He should either have forfeited the bond or not done so. He also proceeded to sentence the accused to a term of six months' R. I. presumably purporting to act under the provision of section 327 (4). That particular sub-section

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provides that a Court before which a person is bound by his recognizance to appear for his conviction and sentence on being satisfied that he has failed to observe any conditions of his recognizance may forthwith sentence him for the original offence.

Before, therefore, the Court can proceed to act under section 327 (4), the recognizance entered into must be in conformity with the provision of section 325. The bond actually entered into in this case is not in conformity with those provisions. The form of bond to be entered into under sections 325 and 326 is prescribed in Subsidiary Legislation of Ceylon, Vol. I, Chapter 16 at page 113. The form of bond entered into by the accused cannot in any sense be said to comply even substantially with the form prescribed.

This question was considered by the Supreme Court in the case of *A. G. v. Dissanayake* [1] reported in 55 N. L. R. page 100. At page 104, the Acting Chief Justice makes the following observations, " But unfortunately due to carelessness there can be little doubt the bond that was taken by the learned Magistrate is one which comes more under section 82 rather than 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 conviction and sentence in this case ".

It seems to me, therefore, that the learned Magistrate had no jurisdiction to convict and sentence the accused for failure to observe the conditions of the bond that the accused actually entered into. It might incidentally be noted that the learned Magistrate did not make any inquiry or record any facts in regard to the antecedents or character of the person charged or to any extenuating circumstances under which the offence was committed. That seems to me to be a condition precedent to the imposing of an order under section 325. On the other hand, the Magistrate proceeded to convict the accused which is an act consistent only with the provisions of section 80 of the Criminal Procedure Code where the bond that should have been entered into is to keep the peace and the period for which that bond can be in force is a maximum of only 6 months. Carelessness on the part of the Magistrate has resulted in this inability to legally enforce the bond which he called upon the accused to enter into.

In view of the observations of the Acting Chief Justice in the *55 N. L. R.* case with which I agree, I set aside the order which the learned Magistrate has made on 20th February 1956.

Order set aside.

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[1] *(1953) 55 N. L. R. 100.*

1956 *Present :* **L. W. de Silva, A.J.**

E. DE LA HARPE *et al.*, Appellants, *and* G. WICKREMARATNE, Respondent

S. C. 189—C. R. Colombo, 50,953

Servitude—Private right of way—Reasonable user—Obstruction by gates—How far actionable.

An obstruction of a private right of way is not actionable unless it is substantial.

Plaintiff had a right of way from her residential property along lot C which was a portion and boundary of the defendants' residential property and leading to a public roadway. At the entrance to lot C from the roadway there were two gates which were maintained by the defendants and had been in existence even before the servitude had been acquired by the plaintiff.

Held, that the plaintiff was not entitled to have the gates removed. The defendants were, however, bound to keep the gates open at all times except at night-time when they might remain closed but never locked.

APPEAL from a judgment of the Court of Requests, Colombo.

H. V. Perera, Q.C., with *Ivor Misso* and *A. Nagendra*, for the defendants-appellants.

E. B. Wikramanayake, Q.C., with *T. P. P. Goonetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

December 11, 1956. L. W. DE SILVA, A.J.—

The dispute between the parties to this action, instituted in 1954, is concerned with a private right of way which is depicted as Lot C in D1, the plan No. 51 of 1941. The plaintiff-respondent as the owner of Lot A is entitled to a right of way over Lot C, leading to Lot A from the 43rd Lane which is now known as Vivekananda Road at Wellawatte. The defendants-appellants, who own Lot C subject to this right of way, also own Lot B which adjoins Lot A on the southern side. Lot C runs along the western boundary of Lot B and touches the southern boundary of Lot A. Lots A and B are respectively the residential properties of the respondent and the appellants.

It is common cause that the grant in favour of the respondent gave her and her agents a full and free right of way over Lot C at all times for the purpose of passing and repassing, with or without animals and vehicles, to Lot A. The respondent alleged in her plaint that the appellants had in 1946 erected a gate at the entrance to Lot C but did not make use of it so as to affect the roadway. Since July 1953, however, they had begun to keep the gate always closed, thereby obstructing the

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right of way and denying to the respondent the free use thereof. At the trial it was found that a gate had existed at the same spot from about 1929, and it had been replaced by another gate about the year 1946. The learned Commissioner of Requests found that there were in fact, at all material times, two gates at the entrance to Lot C from Vivekananda Road. What the appellants had done since 1946 was to close the gates and place a latch across the two projections on the gates. The appellants contended that, since the gates were not locked, freedom of passing along the roadway to and from the respondent's premises was not hindered. They took up the position that the servitude in issue had been acquired by the respondent subject to the existence of the gates.

There was no evidence at the trial whether the gates were kept closed at all times of the day and night before 1946. The learned Commissioner, after recounting the hardships caused to the respondent and her family by their having to alight from their car, raise the latch, open the gates, and again close them, came to the conclusion that, though these gates had existed since 1929, the right of way created in 1941 gave a free and full passage over Lot C at all times of the day and night to the occupants of Lot A, and the appellants themselves became the owners of Lot C in 1951 subject to the same right in the owners of Lot A. He accordingly entered a decree in favour of the respondent, declaring her entitled to the free and unobstructed use of the right of way over Lot C and also ordered the appellants to remove the gates at the entrance to Lot C as prayed for by the respondent.

Under the Roman-Dutch Law, an obstruction of a private right of way is not actionable unless it is substantial. There is no difference between the Roman-Dutch Law and the English Law on this question : vide *ex parte Letord : in re Marcus, N.O. & others* [1], which follows the ruling in *Pettey v. Parsons* [2] cited by learned counsel for the appellants. The following statement of the law in Halsbury's Laws of England (Hailsham's ed.) is quoted and followed in Letord's case [1] :

> " No action will lie unless there is a substantial interference with the easement granted . . . The question whether any particular interruption amounts to an unlawful interference depends upon the nature of the right of way and of the *locus in quo*, and upon the general circumstances of the case."

The fact cannot be overlooked that, in the case of a private right of way, the ownership of the way is in the owner of the soil, though such ownership does not entitle him to obstruct the way to any substantial degree. At the same time, the owner of the right is entitled only to reasonable user. The learned Commissioner has upheld the literal terms of the grant and has not considered this legal aspect of the matter. The order to remove the gates cannot be justified since they have been in existence even before the servitude. There is no doubt that the keeping of the gates closed, held together by a latch at all times of the day, is a substantial interference with the enjoyment of the respondent's

[1] (*1953*) *4 S. A. L. R. 339.* [2] (*1914*) *2 Ch. 653.*

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right. Two main questions arise in the case of an obstruction to a private right of way—firstly, whether the interference is substantial and not merely appreciable, and, secondly, reasonable user of the way by the owner of the right. There are in this case, established by evidence, circumstances which make it necessary to secure to the appellants some degree of privacy and protection which they need against trespassers on their residential property consistent with the legal right of the respondent to reasonable user. In *Pettey v. Parsons* [1], where the grant was in substantially the same terms, Pickford L.J. said : " The claim to erect and maintain a gate which is to be open during business hours is not in my opinion a derogation from the grant of the right of way." Taking all the facts and circumstances into account, I direct a variation of the decree that the gates at the entrance to Lot C be kept open at all times except at night-time between the hours of 9 p.m. and 6 a.m. when they may remain closed but never locked. The appellants must pay the respondent half the costs of this appeal.

Decree varied.

[1] *(1914) 2 Ch. 653.*

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[In the Privy Council]

1957 *Present :* **Earl Jowitt, Lord Oaksey, Lord Mac Dermott, Lord Cohen and Lord Keith of Avonholm**

L. P. ABEYAWARDENE, Appellant, *and* C. S. WEST, Respondent

Privy Council Appeal No. 37 of 1952

S. C. 572—D. C. Colombo, 2,680

Donation by parents to minor child—Acceptance—Fideicommissum in favour of family —May be "single" or "recurring (multiplex)"—Acceptance of such gifts—Revocability—Entail and Settlement Ordinance (Cap 54), ss. 4, 5, 7, 8—Exchange of fideicommissary property thereunder—Effect thereof on rights of fiduciaries and fideicommissaries—Bona fide purchaser from fiduciary—His position as against the fideicommissary—Partition of fideicommissary property by the fiduciaries—Binding effect on the fideicommissaries.

Where both parents of a minor child jointly gift immovable property to the latter, acceptance on behalf of the donee by his nearest male relatives, other than his father, would be sufficient acceptance of the gift. (In the present case acceptance was by the two brothers and brother-in-law of the donees.)

A deed of gift which creates a fideicommissum in favour of the children not yet born of the fiduciary donee is a fideicommissum in favour of a family. In such a case acceptance by the fiduciary is an acceptance for his children the fideicommissaries, and the gift to the fideicommissaries cannot be subsequently revoked by the donor, even with the consent of the fiduciary, without the consent of the fideicommissaries.

A fideicommissum in favour of a family need not necessarily be a fideicommissum which goes on from generation to generation. A fideicommissum which comes to an end with the first generation of fideicommissaries, i.e., with the fiduciary's children who are free to dispose of the property as they wish, is also a fideicommissum in favour of a family. The presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation. *Carolis v. Alwis* (1944) 45 N. L. R. 156, overruled.

Where the Court authorises an exchange of fideicommissary property on an application made under the provisions of the Entail and Settlement Ordinance, the property becomes free of the fideicommissum, but the terms of the original fideicommissum are preserved and are applicable to the land taken in exchange, even though no reference is expressly made in the Order of the Court that the land is to devolve on the fideicommissaries on the cessation of the fiduciaries' interests. The Court may, however, with the consent of the fiduciaries, modify the terms of the original gift in regard to the powers of the fiduciaries in respect of their own rights and interests in the land. But that cannot affect the rights of the fideicommissaries.

A fiduciary though vested in the dominium of the property gifted has that dominium only during his life and cannot convey more than he enjoyed. On

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2——J. N. B 64607-1,593 (3/57)

his death, or other event, the fideicommissary becomes the owner of the property with title which must prevail even against a bona fide purchaser from the fiduciary without any notice of a defect in his title.

Where the fiduciaries, or those to whom they transfer their intersts, make a partition agreement *inter se* in respect of the fideicommissary property, the partition will be good and binding on the respective fideicommissaries.

Siman and Maria, who were husband and wife, jointly gifted to their daughters Cecilia and Jane a parcel of land known as " The Priory ". The gift was subject to a life interst in the donors and also created a fideicommissum by which, after the death of the donees, the title in the premises was to devolve on the children of the donees. As the donees were minors, the gift was accepted on their behalf by their two brothers and their sister's husband. The fideicommissries had not yet been born at the date of the gift.

By application under the Entail and Settlement Ordinance made on 17th June 1896, in which Siman and Maria were petitioners and Cecilia and Jane were respondents, the petitioners asked the Court to authorise Cecilia and Jane to convey " The Priory " to Siman free from all restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called " Sirinivasa " subject to certain conditions imposed on Cecilia and Jane as against the petitioners. All parties consented to the application which was, accordingly, allowed by the Court. The Order of the Court, however, made on 18th June 1896, did not make any reference that " Sirinivasa " should devolve after the death of Cecilia and Jane on their respective issue.

Following on the Order of Court two conveyances in respect of " The Priory " and " Sirinivasa " were executed on 23rd June 1896. On the same day Cecilia conveyed to Siman her undivided moiety of " Sirinivasa ", which she had just received from her father, in consideration of the sum of Rs. 45,000. " Sirinivasa " was thus held by Siman and Jane in undivided moieties. On 30th June 1900 they agreed on a partition and Siman conveyed his undivided share in the eastern portion of " Sirinivasa " as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited. On 30th November 1905, Jane conveyed her divided share of " Sirinivasa " to Siman. Siman thereafter, in 1907, conveyed the whole of " Sirinivasa " to his son James. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The father of the person who is the defendant in the present action became purchaser of two of these lots. When he bought them he did not look further back in the chain of title than the Order of the Court made in 1896. He subsequently donated them to the defendant. The plaintiffs, who were the children of Jane, claimed title in the present action to these two lots as fideicommissaries under the deed of gift executed in 1883.

Held, (i) that, as regards the gift of 1883, the acceptance of it by the brothers and brother-in-law of the donees who were minors was a valid acceptance on behalf of the donees.

(ii) that the gift created a fideicommissum in favour of a family. Acceptance therefore, by the fiduciary donees was an acceptance for their children the fideicommissaries, and the gift to the fideicommissaries could not be revoked subsequently by the donors, even with the consent of the fiduciaries.

(iii) that the effect of the Order of Court of 18th June 1896 was that " Sirinivasa " when received in exchange for " The Priory " was bound by the terms of the original fideicommissum of 1883. Subject, therefore, to any limitations placed upon the rights of the fiduciaries with their consent the rights of the fideicommissaries in relation to " Sirinivasa " were not affected. The effect of the Entail and Settlement Ordinance was to write the terms of the original

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fideicommissum into the substituted gift and the consequences of what was done in 1883 must be considered at the date of the present action when the fideicommissaries made their claim and not in 1896 when there was none in existence.

(iv) that the fact that the defendant's father did not look further back in the chain of title than the Order of Court of 1896 and was, therefore, a bona fide purchaser without any notice of a defect in his title could not avail the defendant as against the fideicommissaries.

(v) that when the partition of " Sirinivasa " took place between Jane and her father Siman in 1900 the fideicommissum attached to each of the divided portions for the benefit of Jane's issue and Cecilia's issue respectively. Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane.

APPEAL from a judgment of the Supreme Court reported in *53 N. L. R 217.*

D. N. Pritt, Q.C., with *John Stephenson* and *L. Kadirgamar*, for the plaintiffs appellants.

Frank Gahan, Q.C., with *R. O. Wilberforce, Q.C.*, and *S. N. Bernstein*, for the defendant respondent.

Cur. adv. vult.

January 14, 1957. [*Delivered by* LORD KEITH OF AVONHOLM]—

The appellant is plaintiff for himself and as substituted for other two plaintiffs, his brothers, both now deceased, in an action brought in the District Court of Colombo for declarator that the original plaintiffs were entitled to a parcel of land in Colombo known as " Sirinivasa " and for other relief. The respondent is defendant in the action. She holds the land under gift from her father, who bought the land in dispute (on a title traceable back to the same source from which the appellant's claim is traced), and thereafter gifted it to the respondent subject to a fidei-commissum. The District Judge granted the declarator sought subject to certain conditions that it is not material here to notice. The respondent appealed to the Supreme Court which allowed the appeal with costs both there and below. From that judgment appeal has been taken, with leave of the Supreme Court, to their Lordships' Board.

The dispute turns upon the effect of a gift of land made in 1883 subject to a fidei-commissum and subsequent transactions. The material portions of the deed of gift, deed No. 2110, are in the following terms :—

" Know all men by these Presents that we, Mututantrige Siman Fernando and Colombapatabendige Maria Perera, husband and wife residing at Horetuduwa in Panadura being desirous of making some

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provision for our children and in consideration of the love and affection we bear to our daughters Mututantrige Cecilia Fernando and Mututantrige Jane Fernando and for divers other good causes and considerations us hereunto moving do hereby give grant, assign, set over and assure by way of gift subject to the conditions hereinafter stated, unto the said Mututantrige Cecilia Fernando and Mututrantirge Jane Fernando (hereinafter called the donees) the following property, to wit:

(description of property)

To have and to hold the said premises with the easements, rights and appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, their heirs, executors and administrators in equal undivided shares forever subject however to the conditions following that is to say that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and appropriate to his own use the issues, rents and profits of the said premises and that after his death and in the event of his wife Colomba Patabendige Maria Perera surviving him she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees to wit, the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando and subject also to the conditions that the said donee Mututantrige Cecilia Fernando and Mututantrige Jane Fernando shall not nor shall either of them be entitled to sell, mortgage, lease for a longer term than four years at a time or otherwise alienate or encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of anyone of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid.

And these presents further witness that Mututantrige John Jacob Cooray also of Horetuduwa aforesaid doth hereby on behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fenando, who are minors jointly with Mututantrige Alfred Thomas Fernando and Mututantrige James Fernando, brothers of the said minor donees accept the gift and grant of the said premises subject to the respective conditions aforesaid.

In witness whereof we the said Mututantrige Siman Fernando and Colomba Patabendige Maria Perera and we the said Mututantrige John Jacob Cooray, Mututantrige Alfred Thomas Fernando and Mututantrige James Fernando do set our respective hands to three

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of the same tenor as these presents at Horetuduwa aforesaid, this Fourth day of October, in the year One thousand eight hundred and eighty-three.

Signed, sealed and delivered in the presence of us :

Sgd. (Illegibly).
,, (In Sinhalese).
,, JOHN J. COORAY.
,, A. J. FERNANDO.
,, JAMES FERNANDO.
,, N. M. FERNANDO.
,, L. FERNANDO.

Sgd. C. DE A. GUNARATNE,
N. P."

There is appended to this deed the notary's docquet attesting that it had been read over and explained to the parties and that they and the subscribing witnesses were all known to him, the notary.

It is not disputed that this deed was effectual to constitute a valid fidei-commissum, subject to a question at issue between the parties as to its revocability. The plaintiff and his two brothers, now deceased, were the children of Jane and so indicated as fidei-commissarii under the deed, though not born at its date. The parcel of land thus gifted was known as " The Priory ".

By application under Ordinance No. 11 of 1876 in the District Court of Colombo, made on the 17th June 1896 in which Siman and Maria were petitioners and Cecilia and Jane and James Fernando were respondents, the petitioners asked the Court to appoint James as guardian *ad litem* of Jane, who was then 19½ years of age, to authorise Cecilia and James as such guardian to convey " The Priory " to Siman free from all conditions and restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called " Sirinivasa " subject to certain conditions which need not be here set out as they are incorporated in the order of the Court next to be noticed. All parties consented to the application. The professed reason for the exchange was that it was not desirable or beneficial for Cecilia and Jane to hold in common " The Priory " and that Siman was anxious to make better provision for these two daughters. " The Priory " was valued at Rs. 45,000 and " Sirinivasa " at Rs. 90,000.

On the following day, the 18th June, the District Judge pronounced the following order :—

" It is hereby adjudged and ordered that James Fernando of Horetuduwa be and he is hereby appointed guardian of Jane Fernando (the second respondent) in this matter to represent her in these proceedings.

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It is further ordered and decreed that upon the petitioners transferring and assigning unto the first and second respondents Cecilia Fernando and Jane Fernando the allotments of land (fully described in Schedule B to the said petition of the petitioner) situated at Edinburgh Crescent, Flower Road and Green Path, Colombo, and the buildings thereon called and known as "Sirinivasa" bearing assessment No. 8 subject to the conditions following, that is to say, viz., that they the 1st and 2nd respondents shall not sell, mortgage or otherwise alienate the said premises except with the consent of the petitioners or the survivor of them and that the first petitioner shall during his life time be entitled to make, use, enjoy and appropriate to his own use the rents, issues and profits of the said premises and that after his death and in the event of the second petitioner surviving him she shall during her life time be entitled to take use, enjoy and appropriate to her own use one just half of the said rents, issues and profits the other half thereof being taken, used, enjoyed and appropriated by the 1st and 2nd respondents that the said Cecilia Fernando and James Fernando as guardian of the said Jane Fernando, do and they are hereby authorised and empowered to convey and assign unto the said Mututantrige Siman Fernando, the 1st petitioner, the aforesaid lands and premises called and known as "The Priory" (fully described in Schedule A in the said petition) absolutely and free from all conditions and restrictions contained in Deed No. 2,110 dated the 4th day of October, 1883, and that the said Cecilia Fernando and James Fernando as guardian as aforesaid do and they are hereby empowered and authorised to execute and deliver the necessary Deed of Conveyance of the said premises in favour of the said Mututantrige Siman Fernando absolutely and free and clear of all conditions and restrictions."

Following on this Order an exchange of lands was made by a conveyance by Cecilia and James, as guardian of Jane, of "The Priory" to Siman "freed and clear from all and every restrictions and conditions" in the Deed of Gift of 1883 and a conveyance by Siman and Maria "by way of gift" to Cecilia and Jane of "Sirinivasa" subject to the conditions, set out verbatim, contained in the said Order of Court. The respective conveyances are each dated 23rd June, 1896. On the same date by another conveyance Cecilia conveyed to Siman her one undivided moiety of "Sirinivasa", which she had just received from her father, in consideration of the sum of Rs. 45,000. By a fourth conveyance of the same date Siman conveyed to Cecilia "as a gift absolute and irrevocable" "The Priory" which had just been conveyed to him by Cecilia and Jane.

So far as "Sirinivasa" was concerned Siman and Jane held this now in undivided moieties. On 30th June, 1900, they having agreed on a partition, Siman by Deed of Indenture conveyed his undivided share in the eastern portion of "Sirinivasa" as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited.

On 30th November, 1905, by Deed of Indenture, Jane, who was now married, with consent of her husband and of her mother, Maria, conveyed

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her divided share of " Sirinivasa " to Siman in consideration of the sum of Rs. 75,000. Siman thereafter by Indenture dated 6th December, 1907, conveyed the whole of " Sirinivasa " to his son James Fernando, in consideration of the sum of Rs. 175,000. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The respondent's father became purchaser, *inter alia*, of two of these lots. These are the subject matter of this action and as already indicated, were gifted to the respondent by her father subject to a fidei-commissum in favour of her issue, failing whom, her brother and his issue.

On these facts a number of difficult and important questions have been argued before the Board. No question of registration arises in the case. The appellant's case is based on the acceptance by Jane, his mother, of the gift of 1883, which acceptance he says enured to the benefit of himself and his deceased brothers as fidei-commissaries under the deed of gift. Both Jane and Cecilia were minors in 1883 and acceptance was made on their behalf by Cooray and their brothers Alfred and James. Cooray, as appears from the evidence in the case, was Jane's brother in law, married to her sister Isabella. The deed was executed before a notary who attested that he knew all the parties. Their Lordships see no reason to think that this was not a valid acceptance on behalf of Cecilia and Jane. Their natural guardians, their father and their mother, could not accept for them, because they were the donors. In similar circumstances acceptance on behalf of a minor donee by his grandmother (who was the other donee) was held good in *Francisco v. Costa and Others* [1], as was also acceptance by a brother on behalf of his minor brother in *Lewishamy v. De Silva* [2]. One of the grounds of judgment in these cases was that the donors had allowed such acceptances to be made on behalf of their minor children. Forms to be found in the Appendix to Raj Chandra's book on Fidei-Commissa disclose similar acceptances. The Supreme Court and the District Judge held that, in any event, the daughters had ratified the acceptance on their behalf by their subsequent conduct. Their Lordships do not feel called on to consider this point. In the circumstances of this case they consider that acceptance on their behalf by three of their nearest male relatives, other than their father, was sufficient acceptance of the gift to them.

There remains, however, the question whether the acceptance by Jane and Cecilia (the fiduciaries), was an acceptance for their children the fidei-commissaries. This is one of the major issues between the parties. If there was no acceptance for the fidei-commissaries the gift to them was revocable in the lifetime of the donors at any time before their acceptance and there is no doubt that the conduct of the donors and the fiduciaries in the various transactions already mentioned would amount to such revocation. The District Judge held on earlier authority in Ceylon that acceptance by Jane was acceptance for her issue. The Supreme Court on a review largely of passages from commentators on Roman-Dutch law held that there was no acceptance for the fidei-commissaries.

[1] *(1889) 8 S. C. C. 189.* [2] *(1906) 3 Balasingham, 43.*

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Their Lordships would observe that the learned jurists of the 16th and 17th centuries were far from united in their opinions on various points arising with reference to donation and fidei-commissa and this left much scope for the consolidation of debatable points by legal decision. Their Lordships also accept as a correct approach in considering the authority of the early Dutch jurists the following passage from Professor Lee's introduction to Roman-Dutch Law (4th Edn. p. 15) :

> " The works of the older writers, on the contrary, have a weight comparable to that of the decisions of the Courts, or of the limited number of ' books of authority ' in English law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course the opinions of these writers are often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is best supported by authority or most consonant with reason ; or will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life ; or, again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience. "

On the question of acceptance for or by a fidei-commissary reference was made in the Supreme Court and before their Lordships to Perezius's Praelectiones (1653) Bk. VIII Tit. LV §§7 to 12. This learned commentator opens paragraph 7 thus :—

> " The greater dispute is whether a donor who has gifted property to another with this pact and limitation that after a certain time he should restore it to some third person can in the meantime revoke this pact. " [1]

He proceeds to point out that there was a divergence of opinion on whether the third party needed to accept to prevent revocation by the donor, the majority view being that no acceptance was necessary. In subsequent paragraphs he considers special cases of events happening before the date of restoration, viz., acceptance by a notary for the third party, death of the donee, delivery by the donee of the subject of gift to the third party, death of the donor, confirmation of the gift by the donor's oath. He then comes to another case which he deals with in paragraph 12. The following is a translation of the relevant portion of this paragraph.

> " Lastly the former opinion [by which Perezius means the opinion of the majority stated in paragraph 7] would be the more correct if the gift made to one person is made in favour of a family in which the donor wishes the property gifted to remain ; for by no pact can it be revoked in respect of after-comers ; for it is sufficient in order that it may be considered a perpetual donation that the first donee has accepted it so that there is no need of a subsequent acceptance where the burden imposed on a first donee results in an action available to all as Molina says (de Hisp. primog. L. 4 c.2 n.75) because it would

[1] *Wikramanayake's translation, p. 26.*

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be absurd, in order to make a fideicommissum irrevocable, to require the acceptance of infants and persons not yet born; so that as the gift cannot be revoked in respect of these it follows that the same thing must be said with regard to those who precede them lest property left to the family should go to more remote relations to the exclusion of closer ones. See Anton Gomez in L. 40 Tauri n. 34; also Molina (d.loco) who say that it has thus been decided at the present day by the laws of the King of Spain, especially L. 44 Tauri where delivery alone made to the one first called to the succession of the Majorate has the effect of making the Majorate itself absolutely irrevocable both in respect of himself and also of after-comers."[1]

Of this passage their Lordships would observe that the writer speaks of a "perpetual donation" not of a perpetual fidei-commissum. "*Satis enim est ut censeatur donatio perpetua quod primus eam acceptaverit, ulteriore acceptatione opus non sit.*" In its context their Lordships think it clear that perpetual donation here means an irrevocable donation.

Their Lordships have not had their attention directed to any other commentary of the early writers which deals with this matter as fully as Perezius has done. Mr. Jutice Basnayake in the Supreme Court quotes certain passages from Van Leeuwen's Censura Forensis (1662) and Pothier's Law of Obligations (1761). Van Leeuwen does not appear, however, to be dealing with fidei-commissa, but with donations generally and indeed would seem to exclude fidei-commissa as appears from the following passage (iv.12.18): "But there is a doubt whether a gift can be conferred on anyone through an intermediate person, as it verges on a fidei-commissum, which cannot be created by gift or other disposition inter vivos, nor can it hold good". This view that a fidei-commissum cannot be created by gift *inter vivos*, if at one time doubtful, does not now prevail in Roman-Dutch law. But the passage would seem to exclude Van Leeuwen as an authority on the problem with which their Lordships are concerned. Pothier was not of course an authority on Roman-Dutch law. He did not accept the doctrine of *jus quaesitum tertio* but he did recognise gifts made *sub conditione* or *sub modo*. In this connection he poses the question (Law of Obligations, Evans translation, Vol. I, p. 39):

"Hence arises another question, whether after giving you anything with the charge of restoring it to a third person in a certain time, or of giving him some other thing, I can release you from the charge without the intervention of such person, who was no party to the act, and who has not accepted the liberality which I exercised in his favour."

Here again, as did Perezius, he sets out the two conflicting views of learned writers on this question without arriving at any conclusion. Their Lordships are then left in the position that, so far as has been shown, there is nothing in the older writers more definite than the passage quoted from Perezius.

[1] *Wikramanayake's translation, p. 30.*

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In connection with this passage from Perezius there was canvassed before this Board—a matter which entered into the ratio of the judgment of the Supreme Court—whether the gift in the present case is a gift made in favour of the family, "*si donatio concernat favorem familiae*". The view of the Supreme Court was that it was not a gift in favour of the family because it came to an end with the first generation of fidei commissaries, that is with Jane's children who were free to dispose of the property as they wished. What the Court required was a fidei-commissum enduring indefinitely from generation to generation, in other words a perpetual fidei-commissum. Reliance for this view was placed particularly on certain passages in Sande's Treatise on Restraints on Alienation (1633) (Webber's translation). Their Lordships are unable to draw the same conclusion from the passages in question when taken in their context with other passages. The material passages are to be found in Part III, Chapter V of the treatise and their Lordships will quote more fully from this chapter than was done in the Supreme Court. Chapter V is headed "What fidei-commissum is induced from this prohibition upon alienation". The writer first considers two types of fidei-commissum which he calls conditional and simple or absolute. Broadly the distinction is between a prohibition of alienation outside the family (conditional) and a direct bequest such as "I leave my landed property to the family" coupled with a prohibition against alienation (simple and absolute). It is to be observed that the writer is speaking of testamentary dispositions and not of gifts *inter vivos* but that would not appear to be material. The importance of the distinction was in the results that might follow and Sande discusses these very fully. Sande clearly favours restricting restraints on alienation as much as possible. In paragraph 10 he says:

> "And in case of doubt a testator should not be considered to burden his descendants with the perpetual and indefinite fideicommissum, by a prohibition restraining the heir from alienating. And a substitution made in favour of a family, of descendants, or of several persons under a collective name, takes place in the highest grade which survives at the time when the condition arises, and it is not extended to the lower grades unless the testator has expressly so willed."

He returns to this point in paragraph 11:

> "But the point we are discussing is not in what order succession to a fideicommissum to a family takes place, but whether a testator, by a simple prohibition against alienation outside the family, wishes to induce a perpetual fideicommissum among the members of the family, and to make this apply to many, so that one after another, and so on, as long as a single member of the family survives, is considered to be burdened by fideicommissary substitution. We say it is not so, because in cases of doubt a direct substitution rather than an oblique and fideicommissary one is presumed."

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Sande elaborates the matter further in paragraphs 13, 14 and 15 which, to preserve the context their Lordships quote in full :—

" 13. The argument which the supporters of the opposite view take up is very weak. They say, since persons of different grades are described under a collective term, and since they therefore cannot be admitted to the inheritance all at the same time, but must succeed in the order of succession, one after the other, that the term must have some extended meaning. This is quite true ; but the extension is one not of time, but of grades, so that many grades are called to the fideicommissum, which, however, rest only in the first grade of those who are admitted, and is not extended from that to lower grades ; and thus many grades may be called, but only one can be said to be admitted.

14. Since this is what takes place when a fideicommissum is expressly bequeathed to a family, it would much rather take place in a tacit fideicommissum, which is induced by interpretation from a prohibition against alienation outside the family. for otherwise a tacit fideicommissum would induce a greater multitude of fideicommissa than an express one. Therefore a fideicommissum which is implied from a prohibition upon alienation is binding only on one person (unicum), and therefore if he, who has succeeded by virtue of such tacit fideicommissum to the estate on account of alienation which has been made by another, afterwards alienates the same estate to a stranger he would do so with impunity.

15. This is so except where it can be gathered from the words of the Will itself that the intention of the testator was otherwise ; for example, if wishing to provide for the preservation of his family, he says, " I will, or I order, that the landed property be retained, remain and be left in the family, so that it may never go out of the family. " For from these words would be induced a real, multiplex and perpetual fideicommissum, which would last as long as any one of the family survived. And therefore, even although the landed property has once been left in the family, yet it would be against the will of the testator that it should at any time thereafter go out of the family. "

Sande concludes Chapter V with the passage : " The truer view is that when the testator wills that his goods remain in his family and his name *in perpetuo*, then the fideicommissum is never closed but is indefinitely extended. "

Consideration of the effect of prohibitions of alienation in favour of a family will be found in others of the early commentators. Their Lordships would quote only one passage from Voet's Commentaries on the Pandects (1698–1704) dealing with Fidei Commissa (Macgregor's translation) XXXVI. 1.28 :

" Where a fideicommissum is left to a family the nature and effect of such a bequest is not the same in every case. For the bequest may be of such a kind that the fideicommissum is a single one ; and,

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where it has operated once, or where there has been one restitution to the family, the fideicommissary obligation is determined; nor is the person who by virtue of such a restitution to the family has acquired the property or the inheritance obliged after his death to restore it to another member of the same family, but he is able to transfer it to a stranger by act *inter vivos* or by last Will. But on the other hand, it may be a recurring (multiplex) fideicommissum, circulating as it were throughout the family, with the result that the person to whom in the first instance restitution has been made as being one of the family is bound to restore the inheritance to another member of the family, and he again to a third member, and so on, so long as there are members of the same family surviving."

Their Lordships are unable to extract from these passages that a fidei commissum in favour of the family is confined to a fidei commissum which goes on from generation to generation. The writers seem to contemplate a fidei commissum which comes to an end with the first generation as being a fidei commissum in favour of the family. The question whether it is perpetual or not will depend on the language used by the testator, or donor. Nor can their Lordships see any reason why it should be so limited. When the gift in this case was made Jane was a child. It would be impossible for any issue of hers to accept for very many years. The reason given by Perezius that "it would be absurd, in order to make a fidei commissum irrevocable, to require the acceptance of infants and persons not yet born" is as valid in the case of her children as it would be in the case of children to come into existence in a perpetual fidei commissum. No doubt the same could be said of a fidei commissum to stranger beneficiaries yet unborn. But a donation in favour of the family is an exception and the presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation.

The great weight of authority derived from legal decision in Ceylon until the decision in the present case supports that view. In a matter in which so much was left open by the early commentators their Lordships attach great weight to a current of legal decision in a country in which fidei commissa are extensively resorted to by its inhabitants, are part of its law and become frequent subject of consideration by its Courts. The earliest authority to which their Lordships were referred is the case of *Perera v. Marikar*[1]. The facts and judgment are concisely set out in the head-note:

"A father conveyed certain houses by post-nuptial settlement to his married daughter, subject to the condition that she should enjoy the same for her life with restraint on anticipation or incumbrance, and that after her death they should be enjoyed by her heirs and descendants in perpetuity. The daughter accepted this gift. Afterwards, the daughter having as yet no issue, the father made a will by which he devised the same houses to the daughter absolutely, and died, and his

[1] (1884) 6 S. C. C. 138.

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executor executed a conveyance of the houses in favour of the daughter, her heirs, executors and her assigns for ever. After the father's death a son, the plaintiff, was born to the daughter.

Held, (*dissentiente* Burnside, C.J.), affirming the decision of the district court, that the plaintiff, when he came into esse had an interest in the houses, which could not be defeated by any act of the testator subsequent to the settlement, and consequently that plaintiff, on establishing that he was the son of the settlor's daughter, was entitled to recover the houses in ejectment from defendant, who claimed through a person to whom the daughter had conveyed the houses after the executor's conveyance to her."

The judgment of the majority of the Court (Clarence and Dias, JJ.), was delivered by Mr. Justice Clarence. He refers to Voet and Perezius and quotes from the passage in Perezius already quoted by their Lordships. He then proceeds :

"I find, therefore, the Roman-Dutch Jurists, so far as their hypothetical reasoning or imaginary cases go, favouring what seems to me the common sense view, that where a voluntary family settlement is made, by which somebody benefits immediately and other classes contingently on their being born and living to inherit the settlement, takes effect in favour of these future classes immediately on its taking effect, qua the immediate participator : and for these reasons I think that the decision of the learned district judge in upholding the plaintiff's demurrer must be affirmed."

It has been said in a later case (*Mudaliyar Wijetunga v. Duwalage Rossie et al.*)[1] that *Perera v. Marikar* was not a case of a perpetual fideicommissum but a fidei commissum unicum. But the point, in their Lordships' view is immaterial as the ratio of the judgment in the passage quoted from Clarence J. is not, in their Lordships' view, dependent on the character of the fidei commissum so long as it is in favour of a family. The decision was a decision of the full Court. It has been followed in a series of cases which their Lordships find it unnecessary to examine at length. None so far as their Lordships have noted was a case of a perpetual, or multiplex, fidei commissum. The cases constitute a very long train of authority.

In *Soysa v. Mohideen*[2] it was argued that the Perezius exception must be confined to the case of a *familia* which includes other people besides children and descendants. De Sampayo A.J. said of this argument, "But no such distinction is intended, and the reasoning applies even more strongly to a fidei commissum, in favour of a family in the narrower sense of a man's own children and descendants. Perezius means to lay down generally that acceptance by the immediate donee, who is the head of the family, is valid acceptance on behalf of all those who follow him, and that, then, the entire donation is considered *perpetua* or at once complete in respect of all the succeeding beneficiaries." In referring here to

[1] (*1946*) *47 N. L. R. 361 at 370.* [2] (*1914*) *17 N. L. R. 279.*

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"descendants" the learned judge appears to mean children of the fiduciaries because in that case the gift was to three nephews and a niece and their issue with a devolution over failing issue. In *Abeyesinghe v. Perera*[1] where the fidei commissum was clearly confined to the legitimate children of the fiduciary, Chief Justice Wood Renton regarded *Soysa v. Mohideen* as a precedent and followed it. *Perera v. Marikar* and *Soysa v. Mohideen* were followed in *Ayamperumal v. Meeyan*[2]; *Fernando v. Alwis*[3]; *Wijetunga v. Rossie et al.*[4]; and *Vallipuram v. Gasperson*[5], which were all cases where the fidei commissary heirs were confined to children of the fiduciary donees. Reliance was placed by Counsel for the respondent on decisions in a contrary sense in *De Silva v. Thomis Appu*[6] and *Carolis v. Alwis*[7]. In the latter case Soertsz J. found himself able to distinguish the case in hand from *Perera v. Marikar* and *Mohideen v. Soysa*. For the reasons already given their Lordships think he was in error in thinking that the ratio of the decision in *Perera v. Marikar* proceeded on the view that it was a perpetual fidei-commissum. He also seems to have been in error in thinking that *Perera v. Marikar* was not a full Court decision.

The same view has been taken in South Africa in a case which is indistinguishable on its facts from the present case and on grounds substantially the same as those which appealed to the judges of the Ceylon Courts who followed the precedent of *Perera v. Marikar*. See *Exparte Orlandini & Others*[8]. Much stress, however, was placed by the respondent on a recent case in the Supreme Court of South Africa, *Crookes and Another v. Watson and Others*[9]. This was a case of an *inter vivos* trust, declared irrevocable, by which the settlor gifted certain shares to two trustees under trust to hold the same for the purposes, *inter alia*, of paying his daughter, on her attaining 25 years of age, the net income up to £1,000 per annum, to accumulate any balance of income and on the daughter's death to distribute the trust fund among her lawful issue equally, whom failing among her surviving brothers and the issue of any deceased brother and failing surviving brothers among her next of kin. The trustees were empowered to realise the shares and invest the proceeds. In the trust deed the trustees declared that they accepted the gifts in trust and the trust mentioned. After the daughter had reached the age of 25 years the settlor proposed to amend the trust deed to the effect of paying her £5,000 out of the trust fund and paying her the whole of the net income. The daughter's husband and her brothers consented for themselves and as guardians of their minor children. A curator *ad litem* was appointed to represent unborn issue and other unascertainable beneficiaries. The decision of the majority of the Court (Centlivres, C.J., Van den Heever, J.A. and Steyn, J.A., *diss.* Schreiner, J.A. and Fagan, J.A.) was that the ultimate beneficiaries acquired no rights under such a trust until they accepted and that the trust was revocable till accepted. It would appear that the daughter was regarded as having accepted the benefit conferred on her. The Court below had held that the trust was

[1] (*1915*) *18 N. L. R. 222.*
[2] (*1917*) *4 C. W. R. 182.*
[3] (*1935*) *37 N. L. R. 201 at 226.*
[4] (*1946*) *47 N. L. R. 361.*
[5] (*1950*) *52 N. L. R. 169.*
[6] (*1903*) *7 N. L. R. 123.*
[7] (*1944*) *45 N. L. R. 156.*
[8] [*1931*] *O. P. D. 141.*
[9] (*1950*) *1 S. A. L. R. 277.*

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" a contract for the benefit of third parties having the effect of a fidei-commissum " and that " in the case of the settlement of property in a family the acceptance of the first donee enures for the benefit of and is considered an acceptance by all the donees ". One member of the lower Court was prepared to support the judgment also on an additional ground which seems to have appealed to the minority in the Supreme Court but which it is not material to notice here. The English law of trusts, it should be noted, does not prevail in South Africa and an *inter vivos* trust appears to be regarded as a contract entered into between the settlor and the trustees for the benefit of third parties which in general may be revocable before acceptance by the third parties. The Court dealt *inter alia* with the question whether what was called the Perezius exception applied to exclude the general rule that acceptance was necessary. For various reasons the Supreme Court held it did not. The shares were not gifted to the daughter but to the ultimate beneficiaries who took them free of any fidei-commissum. The daughter took only the income up to £1,000 per annum and her acceptance of that could not be regarded as an acceptance by her of the corpus on behalf of the ultimate beneficiaries. The shares might be sold and so it could not be said that they came within the conception of Perezius and other authorities of a family settlement by which " the subject matter of the donation is inalienable and must remain intact ". Their Lordships are unable to find in the judgments of the majority any clear indication that in their view the Perezius exception is confined to the case of a perpetual fidei-commissum in favour of the family. Van den Heever, J.A. (p. 296), would appear to come nearest to that view. Centlivres, C.J. (p. 289) merely says, " In other words where there is a settlement in favour of a family and the first member of the family accepts, his acceptance enures for the benefit of all succeeding members of the family ". It appears to their Lordships that the ratio of the judgment did not require any consideration of whether the Perezius exception was confined to a perpetual fidei-commissum. The judgment did not bear to overrule the earlier case of *Orlandini* where it was not so limited. Their Lordships are unable to take the view that the decision is in conflict with the long tract of decision in Ceylon which, in any event, their Lordships think for the reasons stated should prevail.

If there was an irrevocable fidei-commissum of " The Priory " in favour of Jane's children by virtue of the gift and acceptance of 1883, the next question is whether that applies to " Sirinivasa " as a result of the proceedings that took place in 1896, when " The Priory " was exchanged for " Sirinivasa ". Mr. Justice Basnayake in the Supreme Court took the view that these proceedings were not initiated by the proper parties, but this view was not supported by counsel for the respondent before the Board. Their Lordships would only observe that they fail to understand why Siman as a person entitled to the possession and receipts of the rents and profits of " The Priory " as usufructuary should not come under the express language of section 5 of the Entail and Settlement Ordinance, 1876, as a person entitled to petition the Court and in any event the fiduciaries, Cecilia and Jane, were consenting parties to the Order made.

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A more important question is what was the effect of the Order of the Court. It directed, in accordance with the terms of the application that "the first and second respondents [Cecilia and Jane] shall not sell, mortgage or otherwise alienate the said premises except with the consent of the petitioners [Siman and Maria] or the survivor of them". No reference was made, as in the original gift, to the premises devolving after the death of Cecilia and Jane on their respective issue. Their Lordships would refer here to the provisions of sections 4, 7, and 8 of the Ordinance of 1876, so far as relevant. These are as follows :—

"4. Whenever any immovable property is now or shall hereafter be held under or subject to any entail, fidei commissum, or settlement, whereby the alienation of such property is prohibited or in any way restricted, it shall be lawful for the District Court of the district in which such property is situate, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under such entail, fidei commissum, or settlement, and subject to the provisions and restrictions hereinafter contained, from time to time to authorize a lease, exchange, or sale of the whole or any part or parts of such property, upon such terms and subject to such conditions as the said court shall deem expedient. . . . .

7. All money received under or by virtue of any sale effected under the authority of this Ordinance shall be applied, as the District Court shall from time to time direct, to some one or more of the following purposes, that is to say :—

(1) the discharge or redemption of any charge or incumbrance affecting the property, or affecting any other property subject to the same entail, *fideicommissum*, or settlement ; or

(2) the purchase of other immovable property to be settled in the same manner as the property in respect of which the money was paid ; or

(3) investments in the Loan Board or in Government securities the interest thereof being made payable to the party for the time being otherwise entitled to the rents and profits of the land sold ; or

(4) the payment to any person becoming absolutely entitled.

8. Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become subject to the same entail, *fideicommissum*, or settlement, as the property for which it was given in exchange was subject to at the time of such exchange."

In their Lordships' view it is clear from these provisions that the purpose and intendment of the Ordinance was to preserve in the event of

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any sale or exchange of premises subject to a fidei commissum the terms of the fidei commissum and to apply these to the land taken in exchange or to the price of the premises sold which was to be treated as a *surrogatum* of the original gift. In the present case it is section 8 that applies and, in their Lordships ' opinion, " Sirinivasa " when received in exchange for " The Priory " must be taken to have been held in terms of the original fidei commissum. This was the view also of the District Judge and of Mr. Justice Basnayake in the Supreme Court. It was argued for the defendant that the prohibition on alienation imposed on the fiduciaries except with the consent of their parents was a relaxation of the absolute prohibition imposed in the original gift and so defeated the fidei commissum, but for the reasons already given this would be contrary to the terms of the Ordinance and if such is the construction of the Order the terms of the Ordinance in their Lordships ' view must prevail. But, in their Lordships ' opinion, the better view is that the Order affected only the powers of the fiduciaries in respect of their own rights and interests in the land in question and it may be that, as they consented to the Order, it was competent to modify the terms of the original gift in this respect. But that could not affect the rights of the fidei commissaries.

It was argued that on the law as it was understood in 1896 there was no acceptance binding the donors and the fiduciaries in a question with the fidei commissaries then unborn, and that it was open to the donors and the donees and the Court to alter the terms of the original gift to the effect of cutting out, or revoking the gift to, the fidei-commissaries. Their Lordships are unable to hold, as already indicated, that this was understood to be the law in 1896 or that the Court in 1896 gave any consideration to the question. But in any event the effect of the ordinance of 1876 was to write the terms of the original fidei-commissum into the substituted gift and the consequences of what was done in 1883 must be considered to-day when the fidei commissaries make their claim and not in 1896 when there was none in existence.

It was further argued that the respondent, or her father who purchased the property, need not look further back in the chain of title than the Order of the Court in 1896 and was entitled to rely on the terms of that Order. Their Lordships are unable to assent to the argument in view of the imperative terms of section 8 of the Ordinance. Reference was made to the case of *Mirando v. Coudert* [1] in support of the respondent's contention. In their Lordships' view that case has no application to the circumstances here. That was a case where property had been sold many years previously under the Ordinance No. 11 of 1876. There were some irregularities in the procedure when the property was ordered to be sold and the Court apparently thought that it had been subject to a fidei-commissum. But the result was that until set aside the order could be regarded as a sale under section 7 of the Ordinance which would discharge the property of the fidei-commissum. The purchaser was

[1] *(1916) 19 N. L. R. 90.*

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held to have acquired a free and absolute title unless the whole proceedings were rescinded. Their Lordships see no reason to doubt the soundness of that decision. The ratio of this decision would apply, in thei Lordships' opinion, to " The Priory " which was exchanged free of any fidei-commissum for " Sirinivasa " but it could not affect " Sirinivasa " which was taken under burden of the fidei-commissum.

It was said also that the defendant's father was protected as being a *bona fide* purchaser without any notice of a defect in his title. Their Lordships are prepared to assume that the defendant's father was such a purchaser. But this cannot avail the defendant. Fidei commissa have long been recognised in the law of Ceylon and, apart from any question of prescription, or of prior registration in a case where a conveyance has been obtained from a fiduciary who may be taken to hold on an alternative title of intestacy, they have been held to prevail against a *bona fide* purchaser. A fiduciary though vested in the dominium of the property gifted has that dominium only during his life and cannot convey more than he enjoyed. On his death, or other event, the fidei commissary becomes the owner of the property. The doctrines of English law have no play in this sphere. This has already been recognised by this Board in the case of *Abdul Hameed Sitti Kadija v. De Saram* [1].

The remaining point in the appeal concerns the partition of " Sirinivasa " which took place between Jane and her father in 1900. When Cecilia conveyed to Siman her undivided moiety of " Sirinivasa " on 23 June, 1896, she parted with the dominium and, in their Lordships ' opinion, with all her rights and interest in the property. So long as she held her undivided share she could have made a partition agreement with her sister Jane and it is conceded that in such an event the fidei commissum would have attached to each of the divided portions for the benefit of Jane's issue and Cecilia's issue respectively. See *Abdul Cader v. Habibu Umma* [2]. In their Lordships' opinion Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane. He was a co-owner with Jane and had all the rights of a co-owner so long as Cecilia was alive, otherwise there was no one who could effect a partition with Jane. This was the view taken by the District Judge. It was suggested that there was no evidence that Cecilia was alive when the partition was made. But it is clear from the proceedings in the Courts below that it was the common assumption that Cecilia was alive and the District Judge held that the partition was good and binding on the fidei commissaries on that assumption. The Supreme Court did not have to deal with the question of partition on the view that it took of the question of acceptance. But it is clear that no point was taken for the respondent on appeal to the Supreme Court touching the question of Cecilia 's being dead. Nor is the point taken in the respondent 's case on appeal to this Board. The inference is that it was well known that Cecilia was alive at the date of the partition. But on any view their Lordships would not be prepared to allow the point to be taken now.

[1] [*1946*] *A. C. 208.* [2] (*1926*) *28 N. L. R. 92.*

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For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the judgment and decree of the Supreme Court and to restore the judgment and decree of the District Court. The respondent must pay the costs of the appeal to this Board and of the appeal to the Supreme Court of Ceylon.

Appeal allowed.

1956 *Present :* **K. D. de Silva, J., and Sansoni, J.**

RATGAMA PANNASEKERA NAYAKA THERO,
Appellant, *and* H. A. CALDERA *et al.*, Respondents

S. C. 350—D. C. Colombo, 448/Z

Charitable trust—Beneficiary's right to rents and profits—Enforcement—Trusts Ordinance, ss. 57, 63.

The 2nd and 3rd defendants, who were appointed as trustees to administer a charitable trust " for the sole use and for the purposes of defraying expenses for the support " of a Vihare, gave an informal lease of a portion of the trust property to the 1st defendant. It was possible to contend that the lease was an improvident one or that it amounted to a breach of trust. The plaintiff, who was the Viharadhipathi of the temple, instituted the present action for a declaration that the lease was null and void and to obtain an injunction restraining the 1st defendant from acting under the lease. He also claimed damages.

Held, that the action was maintainable under section 57, read with section 63, of the Trusts Ordinance.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *R. de Zoysa* and *M. L. S. Jayasekera* for the plaintiff appellant.

H. Wanigatunga, with *E. A. D. Atukorale*, for the 1st, 2nd and 4th defendants respondents.

Cur. adv. vult.

July 3, 1956. K. D. DE SILVA, J.—

One Don Magris de Silva Tillekeratne by his Last Will No. 954 dated 17.12.1855 (P1) created a Charitable Trust in the following terms :—

" I give and bequeath all the produce, rent and issues and income of the garden, situate at Borella on the high road within the gravets of

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Colombo, bounded on the North by the road leading to Slave Island' on the South by a road, on the East by a road leading to Maragahawatta *alias* Kanatta and on the West by the Cinnamon Garden for the sole use and for the purpose of defraying expenses for the support of the Buddhist Temples called Dadalle Walukarama Vihare situate at Dadalla and Ambagahapitiya Pansala both situate in Galle District and for the purpose of defraying expenses to keep a lamp light burning from 6 p.m to 6 a.m. during two nights in every month in the Kelaniya temple which should continue during the continuance of the said Temple . . . . "

This Last Will was admitted to probate. In D. C. Colombo Case No. 353 (Special) the 2nd and 3rd defendants were appointed trustees to administer this Charitable Trust. The plaintiff is the Viharadhipathi of Walukarama Vihare. The 2nd defendant is the Viharadhipathi and the 4th defendant is the trustee of Ambagahapitiya Pansala. The 2nd and 3rd defendants by informal agreement dated 10.10.1953 marked A purported to lease to the 1st defendant an extent of 3 roods and 10 perches of the land which is the subject matter of the trust at an annual rental of Rs. 25 for the purpose of putting up a school building. This informal lease also provided that the 1st defendant was also to pay to the lessors a sum of Rs. 10 for each coconut tree he may have to cut down to enable him to put up the building. It further provided that the lessee and his heirs were entitled to the school as long as it was conducted by them. But in the event of the lessee dying without heirs the school and the buildings were to become the property of the temple. The plaintiff instituted this action for a declaration that the said lease was null and void and to obtain an injunction restraining the 1st defendant from felling the trees or putting up buildings on the land. The plaintiff also claimed damages. The 1st, 2nd and 4th defendants filed answer denying, *inter alia*, the right of the plaintiff to maintain this action. Of the several issues framed at the trial the learned District Judge, on the motion of the Counsel of the 1st, 2nd and 4th defendants, proceeded to try issues 7 and 8 as preliminary issues. These two issues are the following :—

Issue No. 7. Is the plaintiff entitled to have and maintain this action against the 1st defendant ?

Issue No. 8. Does the plaint disclose a cause of action against all or any of the defendants ?

The learned District Judge held that the plaintiff was entitled only to the produce, rents and income from the garden and had nothing whatever to do with the landed property and that the persons who were liable to give the plaintiff his rents and income were the trustees. Accordingly he answered both issues against the plaintiff and dismissed his action with costs. The order made by the learned District Judge in my view is clearly wrong. A perusal of the informal lease P1 shows that its terms are rather detrimental to the interests of the beneficiaries one of whom

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admittedly is the plaintiff. The land in question is situate in a residential part of the City. It was stated by Mr. Jayawardene from the Bar that the property is a very valuable one. I have no reason to doubt that it is so. The felling of the coconut trees would naturally reduce the income and might diminish the value of the land. Already forty coconut trees have been cut down. The extent of the land leased is 3 roods and 10 perches but the annual rental payable is only Rs. 25. Section 57 of the Trusts Ordinance (Cap. 72) states :—

> " The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust property. "

The rents and profits contemplated by this section must mean reasonable rents and profits and not a ludicrous rent. According to section 63 of the Trusts Ordinance the beneficiary has a right to compel a trustee to perform his duty and restrain him from committing any contemplated or probable breach of trust. It may well be contended that a lease such as the one in question amounts to a breach of trust or that it is an improvident lease. These are questions of fact which have to be decided on evidence. If they are answered in favour of the plaintiff he would be entitled to maintain the action. I would therefore allow the appeal and set aside the order made by the learned District Judge The case would now proceed to trial on all the issues already framed. The 1st, 2nd and 3rd defendants will pay the costs of this appeal to the plaintiff.

Sansoni, J.—I agree.

Appeal allowed.

[In the Court of Criminal Appeal]

1956 *Present :* **Basnayake, C.J. (President), de Silva, J., and Sansoni, J.**

REGINA *v.* G. G. GUNEWARDENE

Appeal No. 5 of 1956 with Application No. 7

S. C. 1—M. C. Kurunegala, 4,793

Co-operative Societies Ordinance, as amended by Act No. 21 of 1949—Criminal breach of trust by officer—Section 50B—" Books of accounts ".

Held (by the majority of the Court), that a conviction for criminal breach of trust under section 50B of the Co-operative Societies Ordinance may be based on evidence furnished by not only the account books kept by the accused person but also by reference to documents other than those books.

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APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. S. Jayasekera*, for accused-appellant.

V. T. Thamotheram, Crown Counsel, for Attorney-General.

Cur. adv. vult.

May 7, 1956. BASNAYAKE, C.J.—

The appellant was indicted on four charges, one of them punishable under section 50B of the Co-operative Societies Ordinance as amended by Act, No. 21 of 1949, and the other three punishable under section 467 of the Penal Code. On the first charge he has been sentenced to ten years' rigorous imprisonment, on each of the second and third charges to seven years' rigorous imprisonment. He has been acquitted on the fourth charge.

His conviction on the second and third charges was challenged on the ground of misdirection. We are satisfied that there has been no substantial misdirection on any matter of law by the learned Commissioner, and the appeal in respect of the conviction of those charges is therefore dismissed.

The appeal on the first charge in the indictment was pressed on the ground that the charge has not been established by the prosecution.

The facts material to this charge are as follows :—

The accused was the Administrative Secretary of the Weuda Willi Hatpattu Co-operative Societies Union. On an audit on the account books, it was found that he should have had in his hands a cash balance of Rs. 144,329/55, whereas, in fact, he had in cash only a sum of Rs. 32,794/23. On 1.9.53 after an audit he signed a statement to the following effect :—

> "I, G. G. Gunewardene, Administrative Secretary of the Weuda Willi Hatpattu Co-operative Societies Union Ltd., do hereby certify that I produce before Mr. Hector Silva, Auditor, for the purpose of checking cheques to the value of Rs. 19,708/29, money orders for Rs 7,319/71 and cash Rs 5,766/23, making a total of Rs 32,794/23 (Rupees thirty-two thousand seven hundred and ninety-four, and cents twenty-three) out of a sum of Rs. 39,507/53 (Rupees thirty-nine thousand five hundred and seven, and cents fifty-three) the amount which should have been in my custody on 1.9.53 according to the cash book.
>
> (Sgd.) G. G. Gunewardene
> 1.9.53."

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On his own admission, out of a sum of Rs. 39,507/53 he was able to produce only Rs. 32,794/23. He was unable to account for two sums of Rs. 100,000 and Rs. 4,822/02. After a further audit examination he was called upon by the Commissioner for Co-operative Development on 26.11.53 to pay over a sum of Rs. 111,535/32 comprising the following items :—

	Rs.	*c.*
" (1) Balance in hand on 1.9.53 .. .. (According to cash book which was accepted by you)	39,507	53
Less amount produced by you	32,794	23
	6,713	30
(2) Amount by which you have increased the total in purchases column and in the general total column on 21.4.53 (vide p. 228 of cash book)	100,000	00
(3) Unsupported items of expenses on 21.4.53 (vide p. 230 of cash book)	4,822	02
	111,535	32

Section 50B of the Co-operative Societies Ordinance reads as follows :—

" *50B :* It shall be lawful for the Registrar, after the accounts of a Registered Society have been audited as provided in section 17 or after an inquiry or inspection into the affairs of a Registered Society has been held under section 35 to require any person, being a person entrusted with or having the dominion of any money in his capacity as an officer or a member or a servant of the Society to pay over or produce such amount of money or balance thereof which is shown in the books of accounts or statements kept or signed by such person as held or due from him as such officer, member, or servant ; and if such person, upon being so required, fails to pay over or produce such amount of money or balance thereof forthwith or to duly account therefor, he shall be guilty of the offence of criminal breach of trust, and shall on conviction be subject to imprisonment of either description for a term which may extend to 10 years and shall also be liable to a fine ".

It was contended on behalf of the appellant that the entire sum of Rs 111,535/32 was not shown in the books of accounts or statements kept or signed by the appellant within the meaning of section 50B of the Co-operative Societies Ordinance and that therefore the conviction was bad in law. It was conceded that the sum of Rs. 100,000 was shown in the books of accounts. It was also conceded that the sum of Rs. 6,713/30 was also shown in the books of accounts as due from the appellant and admitted by him as due from him. But it was contended that the item of Rs. 4,822/02 was not shown in the books as due from the

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appellant and that for the purpose of ascertaining whether that sum was due it was necessary to look at the books of a branch society—The Rambodagalla Society.

Learned Counsel contended that the words " shown in the books of accounts " mean appearing on the face of the books kept by the appellant and not ascertained by reference to documents other than those books.

The majority of us are unable to uphold this contention. The section authorises the Registrar to demand the amount shown in the books after an audit. For the purpose of an audit of the accounts of a society it is necessary to examine not only the books of accounts actually kept by the officer, member or servant but also other books and documents in order to ascertain whether the items in the books of account are supported by receipts, vouchers, bills, etc. It would be taking too narrow a view of the words " shown in the books of accounts or statements " if the section was confined to the interpretation submitted by Counsel. It would be impossible to carry out a satisfactory audit if the auditor were confined to the books of accounts kept by the officer, member or servant. Such a construction of the section would negative the whole object of an audit and enable an officer to so falsify the books as to conceal the fact that any money is due from him.

The majority of us are of opinion that the appeal on this Count also should be dismissed.

Appeal dismissed.

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1956 *Present :* **Basnayake, C.J., and Pulle, J.**

DAYANGANIE and another, Appellants, *and* SOMAWATHIE and another, Respondents

S.C. 203—D.C. (Inty.) Avissawella LA/279

Kandyan Law—Adoption—Inference from facts and circumstances—Oral public declaration not essential—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, s. 7.

Evidence of a public declaration by the adoptive parent on a formal occasion that a particular child was adopted for the purpose of inheriting his estate is not necessary in order to prove the fact of adoption of an heir under the Kandyan Law (prior to the commencement of the Kandyan Law Declaration and Amendment Ordinance). All that is needed is reliable, clear and unmistakable evidence in whatever form of the adoptive parent's intention to make the foster child his heir.

Tikiri Banda v. Loku Banda (1905) 2 Bal. R. 144 and *Tikiri Kumarihamy v. Punchi Banda* (1901) 2 Browne 299, not followed.

APPEAL from an order of the District Court, Avissawella.

Cyril E. S. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *T. B. Dissanayake* and *P. Ranasinghe*, for 2nd and 3rd Defendant-Appellants.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, *Walter Jayawardena* and *A. S. Vanigasooriyar*, for 1st and 4th Defendant-Respondents.

Cur. adv. vult.

December 20, 1956. BASNAYAKE, C.J.—

The 1st defendant is the widow of one Peter Appuhamy (hereinafter referred to as the deceased), a rich land-owner who died in 1947 intestate and issueless. The 2nd defendant is the deceased's niece, the 3rd defendant his brother's widow, and the 4th defendant his adopted daughter.

The only question for decision in this appeal is whether the 4th defendant was adopted by the deceased in order that she may be his heir and inherit his property. It arises in a reference made to the District Court under section 11 of the Land Acquisition Ordinance for a decision as to the respective rights of the defendants who are claimants to a land acquired under the Ordinance.

It is not disputed that the parties are governed by Kandyan law, and it is agreed that section 7 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, has no application to this case as the adoption in question was effected before the commencement of that Ordinance.

The 4th defendant claims that she was adopted by the deceased as his daughter in order that she may inherit his property and that according to Kandyan law she is entitled to succeed to the deceased's estate.

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2—J. N. B 65068—1,593 (4/57)

While admitting that the 4th defendant was brought up by the deceased, the 2nd and 3rd defendants dispute her right to succeed to the deceased's estate on the ground that her adoption lacks one of the essential features of a Kandyan adoption, namely, a public declaration on a formal occasion of an intention to make her the deceased's heir. It is convenient at this point to set out the evidence. Briefly it is as follows :—

According to the 1st defendant, the deceased adopted the 4th defendant when she was hardly a month old, as they were childless. The child at all times looked upon the deceased as her father and he regarded her at all times as his daughter. He gave her his " Ge " name and educated her at Musaeus College for about ten years. After she left school he took steps to arrange a suitable marriage for her and eventually she married one Reggie Perera, a person of equal social status with the deceased and a person who had been at one time a Member of Parliament. He gifted certain lands valued at Rs. 30,000 to her and in the deed of gift referred to her as his daughter. These are the very words of the instrument :—

> " Know all men by these Presents that Kuruwita Aratchillage Peter Appuhamy . . . . for and in consideration of the natural love and affection he has and bear unto his daughter Kuruwita Aratchillage Millie Yasoma Nona Mahatmaya of Imbulana aforesaid, and for divers other good causes and considerations hereunto moving, and in consideration of her future welfare, has hereby donated . . . . the properties and premises more fully described in the schedule . . . . "

In the invitations which were issued by the deceased and the 1st defendant, for the wedding of the 4th defendant, she was referred to as the daughter of Mr. & Mrs. K. A. Peter Appuhamy, and the deceased's residence was referred to as "the Bride's residence". After her marriage she continued to reside at her adoptive parent's house. In order to effect the change of " Ge " name the deceased gave evidence at an inquiry held by the Assistant Provincial Registrar appointed under the Births and Deaths Registration Ordinance and stated that he was adopting the 4th defendant and that he wished to give her his " Ge " name.

The other witnesses who give material evidence are an ex-Korale, aged 64, a man of standing who had held the office of Inquirer into Sudden Deaths and had also acted as Rate Mahatmaya and as President of Rural Courts—a friend of the deceased whom he had known for about 50 years ; L. B. Goonetilleke, an Assistant Superintendent of Police, and a friend of the family ; and Allan Senanayake, a Proctor of the Supreme Court, a Justice of the Peace, and an Unofficial Magistrate. The last named is an uncle of the 4th defendant's husband.

According to the ex-Korale, it was a well-known fact that the deceased adopted the 4th defendant as his daughter so that she may inherit his property. He states—

> " She was adopted by Peter Appuhamy as a daughter as he had no children. According to Kandyan custom she was adopted so that she may inherit any properties which Peter Appuhamy had. I also

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knew and generally all knew that she was adopted as a child to inherit Peter Appuhamy's properties. That was a well-known fact . . . .

" Generally people in the village knew that Peter Appuhamy had adopted this girl as a daughter. "

Both Goonetilleke and Senanayake state that it was well known that the deceased had adopted the 4th defendant in order that she may inherit his property. The former had at the instance of the deceased tried to arrange a marriage between one Bennet Jayawardena, whose family also he well knew, and the 4th defendant. When entrusting the matter to him the deceased said that at the time of the marriage he would give substantial dowry and that after his death his daughter would inherit all he had. The latter testified that he knew that the 4th defendant was the deceased's adopted daughter and that it was well known that she was adopted as his heir, that Reggie Perera who married the 4th defendant was his sister's son, and that he had occasion to discuss the matter of the 4th defendant's dowry with the deceased at his sister's instance.

On the day on which the notice of the 4th defendant's marriage was given the deceased announced to the assembled relations and friends that he was giving Rs. 10,000 in cash and 50 acres of rubber as dowry and that the 4th defendant would inherit the remainder of his property.

The evidence of the witnesses I have referred to has been accepted by the learned trial Judge.

Whether or not the deceased intended to adopt the 4th defendant as his heir is a question of fact and the learned District Judge has resolved that question in her favour. Learned counsel has challenged that finding and has invited us to reject the evidence of the witnesses called on her behalf.

The learned District Judge has had the advantage of seeing and hearing the witnesses in the witness box and watching their demeanour. Learned counsel has not satisfied us that the trial Judge has failed to make proper use of that advantage, nor has he convinced us that the trial Judge is wrong. Sitting in appeal without that advantage we are not prepared to disturb the judgment of the trial Judge.

The principles that should guide an appellate Court in the exercise of its functions have been stated over and over again by this Court and by the Courts in England and elsewhere. It will be sufficient for the purpose of this appeal if I were to quote the words of Lord Shaw in the case of *Clerke v. Edinburgh and District Tramways* [1]—

" When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that Judgment is entitled to great respect, and that quite

[1] *(1919) S. C. (H. L.) 35 at 36 and 37.*

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irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of Justice. In Courts of Justice in the ordinary cases things are much more evenly divided, witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of the appellate Court ? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question : Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong ? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

Counsel also submitted that the evidence which the learned Judge has accepted does not establish all the ingredients necessary for constituting an adoption for the purpose of inheriting the estate of the adoptive parent. He submitted that under Kandyan law an adopted child does not become entitled to succeed to the property of the adoptive parent unless there has been a public declaration by the adoptive parent on a formal occasion that the particular child was adopted for the purpose of inheriting his estate. I do not agree that the Kandyan law of adoption requires such a declaration on a formal occasion. Though such a declaration is not required by law, the learned trial Judge has found as a fact that such a declaration was made. We see no reason to disturb that finding.

I think I have now dealt with the facts sufficiently for the purposes of this case. I shall therefore turn to the law. We have had the advantage of a full and able argument from both sides.

No legal treatises on Kandyan law written in the times of the Kandyan kings are extant and in order to ascertain the Kandyan law on any particular topic we have to turn to the compilations of Kandyan Law made immediately after the establishment of the British Government in the Kandyan Kingdom. They are Sawers' Memoranda of the Laws of Inheritance, later known as Sawers' Digest, Armour's Grammar of Kandyan Law, and the *Niti Nighanduva.*

The first named was prepared about the year 1821. Sawers made his collection as a member of the Board of Commissioners constituted in 1816 to administer the affairs of the Kandyan Provinces at the request

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of the British Government. The collection contains information gathered from the Chiefs of the Kandyan Provinces and others who acted as Assessors to the Board in its judicial administration. It was first published in 1839 and a second time in 1860 under the title of Sawers' Digest of the Kandyan Law.

The second named is a collection of Kandyan Law under the title of Grammar of Kandyan Law by John Armour who, prior to his elevation to the office of District Judge of Tangalle, later of Matara and finally of the Seven Korales, officiated as the Secretary of the District Court of Kandy. Armour's knowledge of Sinhalese gave him an advantage over other compilers of Kandyan Law and it is regrettable that he did not write his Grammar of Kandyan Law in Sinhalese. We would then have had the law stated in the very language of those from whom he ascertained it.

The third compilation known as the *Niti Nighanduva* was first written in Sinhalese and it was not translated till 1880. Both the Sinhalese text and the English translations have been printed at the Government Press under Government aegis. Both versions are now out of print. It is the only collection of Kandyan Law in the Sinhalese language, and was compiled after the cession of the Kandyan Kingdom. The compiler introduce his book thus—

> "In this Island of Lanka there are three kinds of law. Of these, Royal law and Sacred law have been from ancient times set forth in books, but that kind of law which is called Traditional law has not as yet been committed to writing.
>
> "As the law therefore must have been doubtful and uncertain, in the interests of the Sinhalese community, that the dispensers of justice may learn what is, and avoid bias in their investigations, and that Sinhalese law may be better known, I undertake this work.
>
> "It is called Niti-Nighanduva, and is compiled from the archives of the Court of Kandy with the help of elders versed in the ancient law." *

I shall now set out the relevant text of each of these sources of Kandyan Law.

Sawers :

Laws which regulate the Adoption of Children

1. A regularly adopted child, if the adopting parent had no issue of his or her own body, inherits the whole estate of the parent adopting him or her ; but should the adopting parent have issue, male or female, of his or her own body, in that case, the adopted child will have but an inferior portion of the estate with the issue of the parent.

* Translation by Le Mesurier and Panabokke, Ceylon Government Press, 1880.

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N. B. The Chiefs are not prepared to say what proportion such share should bear to the share of one of the issue, but they think it should be a fourth of the share, which falls to such issue.

2. A regular adoption must be publicly declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir of the adopting parent's estate.

3. The adopted child must be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the hereditary property of the parent.

4. A child being reared in a family, even if a near relative, is not to be construed into a regular adoption, without its having been openly avowed and clearly understood that the child was adopted on purpose to inherit the property.

Armour :

Chapter III—PARENTS AND CHILDREN

Section 10—What Constitutes Adoption :

There are no prescribed forms and ceremonies of affiliation and therefore it is not practicable to ascertain in every instance whether an orphan child, or a child who was removed from the parent's care in its infancy and who was educated by another person, was merely a foster child and protege of that person, or whether the said child was adopted and affiliated by that person.

However, this much is certain, that unless the child, and the person who had brought up and educated that child, were of the same caste, and unless that person had publicly declared that he or she adopted that child and resolved that the said child should be an heir to his or her estate, that child will not be recognised as adopted and affiliated, and will not therefore be admitted as an heir to the estate of the patron or foster-parent, on the ground of adoption.

Section 11. What is not sufficient to constitute a regular Adoption :

If the patron or foster-father permitted the protege to remain in his house after having attained the years of discretion, and even to contract a marriage and to continue to dwell, with his wife, in the house of the patron ; if the protege was also employed by the patron to manage the cultivation of his lands and to perform the *Rajakaria* services on account thereof ; yet after all, if the patron did not publicly declare that he had adopted the said protege as a child, to be an heir to his estate, he the said protege will have no right to any portion of that estate, on the ground of adoption.

If a daughter who was married and settled in *Beena* in her father's house, died before her father, leaving issue, a daughter for instance, if the father then permitted the son-in-law to remain in his house, and

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there to contract a second marriage ; if the son-in-law with his second family continued to dwell in that house until the death of the father-in-law : yet for all that, the said son-in-law and the issue of his second marriage will not be recognised as heirs by adoption to any portion of the deceased's estate, which will devolve entirely to the aforesaid grandchild.

If the son died before his mother, leaving a widow and children ; if the son's widow continued to dwell in her mother-in-law's house and was even allowed to contract a second marriage and to leave (*sic*) with her second husband in that house ; for all that, the said son's widow will not be recognised as an adopted heiress of her mother-in-law, and she will therefore have no right to a share of the mother-in-law's estate ; the whole estate will devolve to the son's children to the exclusion of their mother and their mother's other children, born to the second husband.

Section 12. What may in some instances be deemed Adoption :

If a son, who had a wife in *Deega* in his father's house, died before his father, without issue ; if the father then detained his son's widow and had her married again and settled in his own house, and if the daughter-in-law continued to dwell there and rendered assistance to her father-in-law until his demise, these facts will warrant the conclusion that the deceased had decidedly adopted his daughter-in-law and she will therefore be entitled to inherit her father-in-law's estates if he died intestate and left no issue.

But if the father-in-law did leave legitimate issue, a son or a grandson, in that case the daughter-in-law will be entitled only to that portion of the estate which her father-in-law may have specially allotted or bequeathed to her. ''

Niti Nighanduva. As the original of this compilation is in Sinhalese I shall quote the relevant text in that language first and then set out its translation below.

ඇතිකරගත් දරුවන්ගේ උරුමය

1. තවද වස්තුහිමි පුරුෂයාට ජාතකනොවූ වස්තුහිමි ස්ත්‍රියද නොවැදූ අයලත් ඇතැම් සන්ධිවලදී පියඋරුමයද මව්උරුමයද පිහිටනවා ඇත. යම්කෙනෙක් විසින් සමකුලයෙහි ලදරුවෙක් භාරගෙණ මෙවැනි දරුවා මා නැතිකල මගේ නම ගම දියුණු වන පිණිස '' මගේම දරුවාය කියාද මගේඋරුමක්කාරයා කියාද මා විසින් ඇතිකරගන්නවා කියාද '' ලොවට දන්වා ඇතිකරගත්තේවිනම් එවැනි දරුවාට ඇතිකරගත් මව්පියන්ගේ වස්තු ඔවුන් නැතිකළ උරුමවෙනවා ඇත.

2. එහෙත් මේප්‍රකාර ඇතිකරගන්නා බව ලොවට දැන්නෙව්වොත් මිස යම් කෙනෙක් විසින් ලදරුවෙක් අරගෙන ඔහු වැඩිවිය පැමිනිකළ සහයකුත් කරදීලා සිටියේවිනුමුත් ඒ ආරක්ෂාකාරයාගේ ඉඩමේදී එවැනි අයට දරුවමුත් ඉපද සිටියේවී නුමුත් ඇතිකරගත් දරුවෙක්සේ ඔහුට ඉහතකී ආරක්ෂකයාගෙන් පියඋරුමයක් පිහිටන්නේ නැත.

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(Translation)

"*How adopted children inherit Lands*

In some instances the paternal and maternal right of inheritance will devolve on persons who have not been begotten by the proprietor or born of the proprietress.

If any person takes charge of and adopts a child of equal caste, and in order that the child may at his death inherit his name and lands, makes known to the world that the child is his, his heir, and that he has adopted him, that child will inherit the property of his adopting parents at their death. But, unless the fact of such adoption is made known to the world, even though a child has been taken charge of by any person and a marriage has been contracted for it when of age by that person; even though issue has been born on the permises of the guardian; the child will not, like an adopted child, be entitled to the paternal inheritance of the abovementioned guardian."

I shall now proceed to examine the statements of each of the writers I have quoted above in order to ascertain what are the essentials of a Kandyan adoption as heir. Sawers states that a "regularly adopted child" is entitled to inherit the estate of the parent adopting him. He then goes on to state the requirements of a regular adoption. The child must be of the same caste. The fact that the child is being adopted in order to succeed to the property of the adoptive parent must —

(*a*) be publicly declared and acknowledged, and

(*b*) have been declared and generally understood, and

(*c*) have been openly avowed and clearly understood.

The statements do not indicate what is required with clarity and exactness. The import of the expression "publicly declared and acknowledged" is not the same as "declared and generally understood" nor is it the same as "openly avowed and clearly understood". A fact can be declared and generally understood without a public declaration. Again "generally understood" and "clearly understood" are not the same. A clear understanding of a fact can exist among a few while a fact cannot be said to be "generally understood" unless a relatively large number understand the fact. Besides what is generally understood need not necessarily be clearly understood. The requirement of a public declaration and a public acknowledgment without an indication of the forum before which the declaration and acknowledgment are to be made renders the requirement unworkable and of little practical value.

These words are responsible for the course some of the judgments of this Court on the subject of adoption have taken. I think that when Sawers' entire statement is read, with emphasis on the spirit and not on the mere words, it reduces itself to this—that the fact that a child has been adopted in order that he may inherit the property of his adoptive parent should be known and the adoptive parent should have indicated

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his intention clearly. It is not necessary that the adoptive parent should go before any public authority and make a solemn declaration or acknowledgment nor is it necessary that he should make a formal, oral or written declaration. It is sufficient if his intention has been made known, whether it be in the course of conversation or otherwise.

This view of the matter finds support in Armour's statement which I shall now consider. He states : "There are no prescribed forms and ceremonies of affiliation." For that reason, he says, it is not practicable to ascertain in every instance whether a child who was brought up and educated by a person other than one of its parents was merely a foster child and protege of that person or whether the child was adopted by that person. He goes on to state that a child who was so brought up will not be recognized as adopted "unless that person had publicly declared that he or she adopted that child and resolved that the said child should be an heir to his or her estate."

Even this statement is not free from ambiguity. Undoubtedly, to begin with, there should be in existence a child that is being brought up by a person other than its parent. Next there must be an intention to make that child his heir and a public declaration that the person had adopted the child and resolved that the child should be his heir. There being no prescribed forms and ceremonies, before whom is the public declaration to be made ? No functionary is prescribed and there will always be a dispute as to whether a particular statement is a declaration and whether it is public. Is a statement made in the course of conversation a declaration ? What is the amount of publicity that a statement should receive ? As no forms and ceremonies are required there is always a difficulty in ascertaining from any one single act of his the intention of the adoptive parent. A person who has brought up a foster child and at one moment intended that the child should be his heir is not tied down to that intention. He is free to change has mind. He can say : "I once meant to make this foster child my heir, but I do not now propose to do so. I have changed my mind." It would appear therefore that a statement however formal and public that the adoptive parent meant to adopt the foster child as heir is not by itself sufficient, because its maker can change his mind, and, if he does so, not all the public statements will have any effect. We must therefore read Sawers' statement as conveying no other idea than that conveyed by Armour. The public declaration Sawers refers to is not a formal statement on a public occasion, but an unqualified disclosure of the parent's intention to adopt the foster child as his heir. The disclosure must be evident to those who matter in his circle. The disclosure might be by word or overt act and the intention must be one that persists from the date of adoption throughout the life of the adoptive parent, especially at the time of his death. The question of succession is one that arises after the death of the adoptive parent, and as he is not alive his mind has to be ascertained from his words, written or oral, and overt acts. The law requires that he should have made known his intention in unmistakable terms to those whose evidence as to his intention can be relied on and acted upon.

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I now come to the last named of the compilations I have cited above. As I said before we have the advantage of having in the *Niti Nighanduva* the law stated in the very language of those who were custodians of it. In this work the Sinhalese for what Sawers and Armour translate as "publicly declared" is "ලොවට දන්වා". The literal rendering of these words in English is "made known to the world" or "made known to all" or "indicated to the public" or "letting others know". The law as stated in this work does not bring in the idea of a "public declaration" and in my opinion rightly. All that is needed in a Kandyan adoption is that the adoptive parent should manifest his intention to make the foster child his heir. This manifestation can be done in a variety of ways and whether he has so manifested his intention is a question of fact which has to be ascertained by examining all the circumstances relating to the adoption. What the adoptive parent said in regard to his foster child and his attitude and conduct towards him would have an important bearing on the question at issue, namely, whether he intended to make him his heir.

In my opinion the law as stated in the Sinhalese version of the *Niti Nighanduva* is a correct statement of the law and the statements of Sawers and Armour (which are not expressed in the very language in which the chiefs and others versed in Kandyan customary law conveyed it to them) that the adoption must be pubicly declared and acknowledged must be understood in the sense of "ලොවට දන්වා". As the work was not translated till 1880 the earlier judgments of this Court make no reference to it. It is a matter for regret that this only legal publication in Sinhalese is and has been out of print for quite a long time.

Learned counsel submitted that the *Niti Nighanduva* should not be regarded as authoritative and he called in aid the following observations of Burnside C.J. in *Siriya v. Kalua*[1] :—

> "I cannot regard the dicta in Marshall and Armour, and even the Niti Nighanduva, whatever may be its pretensions as a legal authority, as sufficient to disturb a solemn decision of the Court."

These observations cannot be regarded as a pronouncement that the customary law of the Kandyans on the question of adoption is not correctly recorded in the *Niti Nighanduva*. Burnside C.J. has dealt with Marshall and Armour in the same breath. It has never been suggested that this observation has affected the value of Armour's Kandyan Law.

The view I have expressed above finds support in Chapter III, section 12, of Armour. There he gives the case of a *deega* married woman living in her husband's father's house who, after her husband's death, is detained in his house by her father-in-law, who arranges a second marriage for her and allows her to remain in his house and render assistance to him till his death. Armour states : "These facts will warrant the conclusion that the deceased has decidedly adopted his daughter-in-law, and she will therefore be entitled to inherit her father-in-law's estate if he died

[1] *(1889) 9 S C. C. 45.*

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intestate and left no issue." This statement shows that an oral public declaration is not essential to a Kandyan adoption, and that an adoption as heir may be inferred from circumstances.

I shall now proceed to consider the previous decisions of this Court on the subject of adoption as heir in Kandyan law. They are conflicting and do not indicate that there has been a consistent attitude towards the essentials of the adoption of an heir under Kandyan law. Some of the earlier cases take what I hold to be the true view, while others have taken too literal a view of the statements in Sawers, Armour or Solomons [1].

In one of the earliest reported decisions [2] the declaration of adoption in a deed was accepted as sufficient proof of adoption as heir. This view that an oral public declaration was not essential was maintained in the case reported in *Grenier's Reports* (1873), Part III, pages 117–119, wherein this Court approved the judgment of Cayley (afterwards Sir Richard Cayley), District Judge of Kandy, who later became a Judge of this Court, in which he stated as follows :—

> "There being no special formalities to constitute a valid adoption prescribed by the law, some kind of public declaration only being required, and as it appears that the Basnaike Nillemey himself always considered the 1st defendant to have been adopted by him, and stated such to be the case at an important family discussion, and that the relatives always recognised the 1st defendant as his adopted daughter : I think that it may be presumed that the adoption was sufficiently declared and made public to satisfy the requirements of the Kandyan Law, with which these people must be supposed to have been acquainted."

It would appear from District Judge Cayley's judgment that a declaration may be presumed from facts and circumstances.

In a later case reported in *Ramanathan's Reports* (1877) pages 251–255, Lawrie (afterwards Sir Archibald Lawrie) who at the time was District Judge of Kandy and later became a Judge of this Court, took the same view as Cayley, viz., that adoption may be inferred from facts and circumstances. In his judgment he stated :

> "Then as to publicity of the declaration, can it be maintained that a public declaration is necessary, after the decision of the Supreme Court in the cases 53309 and 55778. In the one case the declaration was only a conversation between the adopter and another Chief who had come to solicit the child as wife for his son. In the other case, the declaration was made when giving instructions to draw up a deed of gift. I think these cases warrant the conclusion that a public declaration is not necessary. But is it the Kandyan Law that there must be even a private declaration by the adopter ? I shall assume

[1] *Manual of Kandyan Law.* [2] *Beven and Siebel's Reports 61 (1860).*

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for a moment that it is, and I find in this case the uncontradicted evidence of the second plaintiff, that the deceased called him son and that he told him to take care of the lands, and that there is no one else who will get them. I am entitled to hold it proved, because, as I said, there is no contradiction of this, that the conduct of the deceased to the plaintiffs was a continual declaration by acts, though not by words, that they were his adopted sons and heirs. It is consistent with Kandyan Law to infer adoption from facts and circumstances, apart from declarations by the adopter. The authority for that is the 12th section of *Armour* (Perera's Edn., p. 39) where it is said that certain given facts will warrant a conclusion that the deceased had decidedly adopted his daughter-in-law."

The view that adoption as heir may be presumed or inferred from facts and circumstances seemed established till 1883 when it was disturbed by the case of *Karunaratne v. Andrewewe* [1]. In that case, Clarence J. stated that unless a statement of the fact of adoption as heir was made in public or on a notable occasion the requirement of the law was not satisfied. He refused to regard a statement made by the deceased to a friend of his, a mohandiram, as sufficient in law. It is difficult to reconcile the observations of Dias J., the other Judge who heard the appeal, with the decision in the case. He said :

"According to Kandyan Law, as I understand it, the intention to adopt must be clearly evidenced by declarations or other overt acts made in as public a manner as possible. *Henry Martyn* seems to have been a man of intelligence, above the average Kandyan, and if he really intended to follow the old fashioned law of adoption he would have done it by some writing about which there could be no dispute."

The above observations indicate that oral public declarations of the fact of adoption are not essential and that overt acts other than oral declarations or a writing declaring the fact of adoption will afford sufficient proof of adoption. The observations of Dias J. failed to influence the decision of *Tikiri Kumarihamy v. Punchi Banda* [2], where despite clear and definite evidence of adoption of a child as heir the Court rejected the claim of adoption on the technical ground that the deceased had said that he would "give" his property to the adopted child and that he did not say that the child would "inherit" his property. The appellant was the nephew of the deceased who was childless and who adopted him when quite a boy. When the appellant had grown to manhood the deceased negotiated a marriage for him, and, when discussing the marriage proposal with the bride's parents, the deceased stated to them that he had adopted the appellant as his son, and intended "giving" him his property. The widow of the adoptive parent did not at first contest the appellant's right to inherit ; but subsequently she did so though she admitted that the deceased's intention when he adopted the appellant was that the appellant should "inherit" the property of the deceased upon his death. Upon his death-bed the deceased sent for a notary and

[1] *(1883) Wendt's Reports 285.* [2] *(1901) 2 Browne 299.*

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instructed him to draw up a deed of gift in favour of the appellant of all his property. On these facts this Court held against the appellant. Bonser C.J. upheld the District Judge's view that the conversations between the deceased and the appellant's bride's parents were insufficient proof of adoption for the purpose of inheritance. Referring to the conversations the District Judge stated :

> " Both the witnesses agree that the intestate did not say that the appellant was to *inherit* his property, but that he would *give* him his property, which is quite another matter . . . . The witnesses are supported in what they say by the appellant, who stated that the intestate sent for a notary a few days before he died, and instructed him to prepare a deed in the appellant's favour, which would have been unnecessary if he had adopted him to inherit his property. "

In this case both Bonser C.J. and Moncrieff J. quoted with approval the judgment of District Judge Cayley. It is difficult to reconcile their adherence to the principles enunciated by him with the decision in this case. Their observations are also inconsistent with the conclusion reached by them. Moncrieff J. took the view that even accepting the evidence on behalf of the appellant as true the adoption lacked " the essential requisites of publicity and of clear expression of the fact that the adoption was made with a view to inheritance ".

His observations which I quote below are somewhat puzzling and leave me in doubt as to what his view of the Kandyan Law of adoption was :—

> " I think that the *dictum* of Dias J., to the effect that the intestate he spoke of, if he had meant to adopt, would have made his intention clear by putting it in writing, was not so extravagant as is pretended. The intestate in this case was a man of position. He must have known the absolute necessity of publicity, and publicity of the fact that the adoption was made with a view to inheritance. It is to my mind curious that during a period of forty years he should have abstained from either putting his intention in writing, or expressing it on occasions which could be described as public. "

On account of its infirmities *Tikiri Kumarihamy's* case has not been treated as a decision that should be followed.

In the subsequent case of *Loku Banda v. Dehigama Kumarihami*[1], Middleton J. departed from the highly technical view taken in the cases of *Karunaratne* (*supra*) and *Tikiri Kumarihamy* (*supra*), and reverted to what I shall call the true view that, what is important is not the form in which the intention of the deceased was conveyed, but a clear indication of his intention to adopt as heir. In his judgment In Review he stated :—

> " In my opinion there should be no doubt whatever as to the happening of an event the consequence of which would be so important to a family as adoption for inheritance. There should be clear and

[1] *(1904) 10 N. L. R. 100.*

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unmistakable evidence of a deceased's intention to put a person in place of an heir who without such a nomination would have no right whatever in the property of the deceased."

In the very next decision what I have herein termed the true view suffered a reverse. Wood Renton J. in *Tikiri Banda v. Loku Banda* [1] reverted to the old technical view where he refused to recognise an adoption because the deceased had not used the word "inherit". Despite strong and clear evidence of the adoptive parents' intention to adopt the child as heir the claim of the adopted child was rejected. It would be helpful if I were to state the facts. The widow of the deceased, Medduma Banda, whose adopted child the plaintiff claimed to be, stated in evidence that as they had no children they wished to adopt a child who would look after them in their illness and who would inherit their property. They went to her elder sister, and asked her to let them adopt her child, the plaintiff, who was then about 4 years of age. Medduma Banda told his sister and his brother-in-law: "You must give us this son (meaning the plaintiff) because we have no one to render us help during our illness, and no one to give our lands to". The plaintiff's parents agreed, and then Medduma Banda took the plaintiff to his house. When the plaintiff grew up, Medduma Banda got him a wife. The plaintiff's father-in-law (Loku Banda Basnayake Nilame) said that Medduma Banda proposed that the plaintiff, his adopted son, should marry his (the Basnayake Nilame's) daughter. He asked them: "How did the adopted child become possessed of landed property", whereupon Medduma Banda replied: "We have adopted the child intending to give all our property to him". The Basnayake Nilame then consented to the marriage. Some days afterwards he went to Medduma Banda's house and spoke to him and his wife and said: "I have come to see about the child's matter." They both replied: "We are adopting the child to give all our property. Do not be afraid." On these facts this Court held that there was no proof of adoption. In his judgment Wood Renton J. stated :—

> "The intention to adopt him, as heir, if expressed, was not communicated to anybody. The word 'inherit' was never used in the negotiations with the bride's parents. These negotiations merely amounted to an assurance of the intention of the appellant's adoptive parents to provide for him."

The statement that the intention to adopt as heir was not communicated to anybody cannot be reconciled with the evidence. It was communicated, as in the case of D. C. Kandy Case No. 53309 [2] on the occasion of a marriage proposal. The fact of adoption is not dependent so much on the use of words as "inherit", "tanagatta", "ayithiwende" as on the clear manifestation of the intention of the adoptive parent to make the adopted child his heir.

[1] (*1905*) *2 Balasingham's Reports 144.*

[2] (*1872*) *3 Grenier 117.*

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In *Ukku v. Sinna* [1] statements made to two Korales and a Vel Vidane were accepted as sufficient proof of adoption as heir. It does not lay down any important rule of law, but the following observations of Ennis J. seem to indicate that he had difficulty in accepting the decision in *Tikiri Kumarihamy's* case (*supra*).

> " The previous decisions on this subject indicate that an adoption for the purpose of inheritance must be made publicly, formally and openly. The exact scope of these terms is not so easy to understand. In one case (2 Browne 299) where the evidence consisted of conversations as in this case, the decision was based on the use of the word " give " instead of " inherit " used in conversation by the deceased when speaking of the ultimate disposal of the property, rather than the publicity, formality and openness of the conversations. "

In the case of *D. Davidu Peries v. Benedict Fernando* [2] Wood Renton C. J. and De Sampayo J. righted the situation created by a rigid adherence to technicalities in *Tikiri Kumarihamy's* case (*supra*) and *Tikiri Banda's* case (*supra*). Wood Renton C.J. observed :—

> " It is not to be expected that witnesses of this class should describe the ceremony of adoption for purposes of inheritance with the detail or the accuracy that we should expect in a treatise on Kandyan Law. But their evidence clearly establishes two vital points, viz., the fact of adoption and the intention of the adopting parent that the adopted child should be his heir.

De Sampayo J. said :—

> " It appears that at the same time he said that he had intended to give a deed to her but he had failed to do so, and this fact is strongly pressed as negativing the idea of an adoption according to Kandyan Law. Nothing is said as to the kind of deed which Punchirala had in his mind. It may after all be one containing the very declaration he made before the persons whom he called together for the purpose. But even if it was to be a deed of gift, I do not see that such a gift, would have detracted from the legal status of Bandi Etena . . . . an adopted child under the Kandyan Law would not be affected by the fact of the adoptive parent having intended to gift to him what he would otherwise have got as heir. "

Wood Renton C.J. disposed of *Tikiri Kumarihamy's* case (*supra*), which was cited in support of the argument that the deceased's intention to execute a deed in favour of the adopted child negatived the theory of adoption, with the observation that it does not enunciate a general principle, and that it was a mere ruling on the particular facts of that case. De Sampayo J. also refused to follow that case. He said that the fact of adoption was always a matter of evidence, and that each case must depend on its own circumstances.

[1] *(1913) 1 Balasingham's Notes of Cases 75.* [2] *(1915) 1 C. W. R. 1.*

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The view that an oral public declaration or a public statement on a formal occasion was not an essential of a Kandyan adoption as heir was gaining ground despite the setbacks it had in *Tikiri Kumarihamy's* case (*supra*) and *Tikiri Banda's* case (*supra*), and in the case of *Dunuwille v. Kumarihamy* [1] this Court went to the extent of holding that a statement in a will that a legatee was the testator's adopted son was sufficient proof of adoption. Ennis J. expressed his view thus :—

> " The 1st plaintiff, in giving evidence, said that the testator had left property to Dullewe Loku Banda ' as adopted heir ' and this clearly appears to have been the testator's intention. The will is not capable of any other construction and the adoptive parent could hardly have taken a more effective way of showing that he had adopted Dullewe Loku Banda as his heir, than by executing a will describing him as an adopted son and leaving him all the residue of the estate. Whether or not a person has been adopted as heir is a question of fact only. "

He went on to say :—

> " A will, however, is a definite declaration of the intention of the testator for the devolution of his property on his death and the appointment of an adopted son as residuary legatee to the exclusion of all other heirs, shows, in my opinion, that the adopted son was adopted for the purpose of inheriting the adoptive parent's property. "

A survey of the cases leaves one with the impression that *Tikiri Banda v. Loku Banda* (*supra*) and *Tikiri Kumarihamy v. Punhi Banda* (*supra*) do not contain a true view of the law and have been regarded as decisions that should not be followed, and I think rightly. In *Tikiri Kumarihamy v. Niyarapola et al.* [2] Maartensz J. in pointing out that *Tikiri Banda's* case (*supra*) and *Tikiri Kumarihamy's* case (*supra*) had adopted too technical a view of the law observed as follows :—

> " With all due deference, I think the learned Judges in the last two cases have attached too much importance to the actual words used and not considered the circumstances in which they were used. A child may be brought up in a house as an act of charity or adopted for the purpose of inheriting the property of the adoptive parent. If an adoptive parent on an occasion, as a proposal of marriage, says : ' I have adopted the child to give him my property ', I cannot see what other inference there can be but that the adoption of the child was for the purpose of the child inheriting the property of the adoptive parent."

He held that the intestate's statement to the schoolmaster that she was bringing up the children and that she intended to give her property to the children was a manifestation of his intention to adopt the children with a view to making them her heirs. He also expressed the view that what Sawers meant when he stated that the adoption must be publicly

[1] *(1917) 4 C. W. R. 99.* [2] *(1937) 44 N. L. R. 476.*

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declared was that there must be evidence of persons to whom the fact of adoption was expressed. I am in entire agreement with the opinion that the Kandyan Law does not require that the fact of adoption should be " formally declared ". In his judgment in the same case Hearne J. rightly observed :

> " I am unable to find any authority for the view that declarations made in the course of conversation do not amount to such declarations as a Court of Law would act upon. "

He summed up his view of the various dicta in the cases referred to him thus :—

> " If no particular formalities are necessary the declaration need not be according to a particular formula as long as it is clearly understood that the adoption was for purposes of inheritance ; if no ceremonies are prescribed the declaration need not be made on a " ceremonious occasion ". It is agreed that the declaration need not be made when members of the public are assembled together for the purpose of hearing the declaration or that the declaration need be made in a public place. "

Although I agree with Hearne J. in the main, I find myself unable to agree with his view that the fact of adoption must be communicated by spoken words to members of the public as distinct from members of the adoptive parent's household or relatives or even persons interested in the question of the adoption. I have already expressed my opinion in the earlier part of this judgment that all that is required is a clear and open manifestation of the fact of adoption of a child as heir whether the fact is made to appear by either word or conduct or both.

The view taken by Maartensz and Hearne JJ. was approved by a Bench of three Judges in the case of *Ukku Banda Ambahera et al. v. Somawathie Kumarihamy* [1]. The cases of *Kobbekaduwa v. Seneviratne* [2] and *Herat v. Amunugama* [3] to which counsel referred us proceeded on the assumption that the law was settled by the case of *Ukku Banda Ambahera v. Somawathie Kumarihamy* and therefore need no discussion.

I have referred to all the reported cases that matter, on the subject of adoption, and to my mind it is clear that the true view of the Kandyan Law of adoption is that set out in the *Niti Nighanduva*. No oral declaration whether public or not or on a formal occasion or otherwise is necessary. All that is needed is reliable, clear and unmistakable evidence in whatever form of the deceased's intention to adopt the adopted child as his heir.

For the above reasons the appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

[1] *(1943) 44 N. L. R. 457.* [2] *(1951) 53 N. L. R. 354*
[3] *(1955) 56 N. L. R. 529.*

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1957 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

P. ANNAMALAI, Appellant, *and* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 159 of 1956

In the matter of an Appeal under Section 15 of the Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration—Order of refusal—Procedure that must be followed—Power of Supreme Court to order fresh inquiry—Sections 9, 10, 11, 12, 13, 14 (6) and (7), 15.

An order refusing an application for registration under the Indian and Pakistani Residents (Citizenship) Act will not be valid if it is made only after holding an inquiry in purported pursuance of section 13 and without compliance with the procedure prescribed in section 9. In such a case the Supreme Court can, by virtue of the appellate jurisdiction conferred by section 15, order that the proper steps be taken*.

Obiter : The power to hold an inquiry under section 13 cannot be exercised at any stage after the publication of a statutory notice under section 10.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act.

Walter Jayawardena, with *M. Sanmuganathan*, for the applicant-appellant.

J. W. Subasinghe, Crown Counsel, for the respondent.

Cur. adv. vult.

February 12, 1957. H. N. G. FERNANDO, J.—

This appeal raises a question of some difficulty and importance concerning the procedure which should be followed in the consideration and disposal of applications for Registration under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. The first step in the procedure (prescribed by section 8) is that an application shall on receipt be referred to an investigating officer for a report in which that officer will *inter alia* set out a statement of facts and conclusions relevant to the application ; his report must be taken into consideration when the application is dealt with. It is necessary to set out the text of sections 9 to 12 of the Act, and of sub-sections (6) and (7) of section 14 before I refer to the point in dispute. (References to the " Commissioner " in each case should be construed as being applicable to the Deputy Commissioner who deals with the particular application.)

* *This ruling was subsequently confirmed in Mohamed Ali v. Commissioner for Registration of Indian and Pakistani Residents (Citizenship Case No. 255, Application No. C 4607, S. C. Minutes of March 28, 1957).*—Ed.

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"s. 9. (1) Where, upon the consideration of any application, the Commissioner is of opinion that a *prima facie* case has not been established, he shall cause to be served on the applicant a notice setting out the grounds on which the application will be refused and giving the applicant an opportunity to show cause to the contrary within a period of three months from the date of the notice.

(2) Where no cause is shown by the applicant within the aforesaid period, the Commissioner shall make order refusing the application and cause a copy of the order to be served on the applicant.

(3) Where cause is shown by the applicant within the aforesaid period, the Commissioner may either—

(*a*) make an order appointing the time and place for an inquiry and cause a copy of that order to be served on the applicant ;

or

(*b*) take the steps he is hereinafter authorised to take whenever there is a *prima facie* case for allowing an application.

s. 10. Where, upon the consideration of an application, the Commissioner is of opinion that there is a *prima facie* case for allowing the application, he shall give public notice in the prescribed manner that an order allowing the application will be made unless any written objection to the making of such order together with a statement of the grounds or facts on which such objection is based, is received by him from any member of the public within a period of one month from the date on which the notice is published.

s. 11. Where no objection is received in response to the notice within the period specified therein, the Commissioner shall forthwith make an order allowing the application.

s. 12. Where any objection is received within the period specified in the notice, the Commissioner shall make order appointing the date and the place for an inquiry into the matter of the objection.

A copy of such objection and of the statement referred to in section 10 and of the order shall in every case be served on the applicant.

s. 14. (6) Save as otherwise provided in sub-section (7), at the close of an inquiry the Commissioner shall make order allowing or refusing the application, or give notice of the date on which he proposes to make such order. Where he gives such notice he shall make the order on that date.

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(7) At the close of an inquiry held in pursuance of section 9 (3) (*a*) or of section 13, the Commissioner shall either—

(*a*) take the steps he is hereinbefore authorised to take whenever there is a *prima facie* case for allowing an application ;
or

(*b*) make order refusing the application. "

No difficulty should be experienced in understanding and following the procedure which is contemplated in sections 9 to 12. If the Commissioner forms the opinion that a *prima facie* case has *not* been established, notice must issue on the applicant stating the grounds on which the application will be refused and affording an opportunity for cause to be shown to the contrary within three months ; if no such cause is shown the application is refused ; but if cause is duly shown the Commissioner will either fix the matter for inquiry or else if he now thinks a *prima facie* case to be established, will take further steps accordingly. It will be seen that the applicant has a right under section 9 to know whether and why it is proposed to refuse his application and to show cause why it should not be refused, and that the Commissioner cannot make an order of refusal until he (the Commissioner) performs his corresponding duty. If after that duty is performed, cause is shown within the prescribed time, the Commissioner cannot refuse the application except after inquiry appointed in pursuance of section 9 (3) (*a*) ; the only alternative to such an inquiry is that the Commissioner will change his mind and decide for the time being that the application should be granted.

Sections 10 to 12 deal with the case converse to that contemplated in section 9. Where his opinion is that a *prima facie* case *is* estabilshed, he will give public notice of the intention to allow the application and any member of the public can object to the allowance within one month of the notice ; if no objection is received the Commissioner must allow the application ; but if objection is duly received then again he must appoint a date for inquiry into the objection. These sections also apply when the Commissioner forms a favourable opinion after cause is shown, or an inquiry is held, under section 9.

I shall now refer firstly to sub-section (7) of section 14 in order to ascertain what follows after the Commissioner has under section 9 (3) (*a*) held an inquiry. Sub-section (7) provides only two alternatives : the Commissioner *shall* either refuse the application (paragraph *b*), or where as a result of the inquiry he changes his mind and decides that a *prima facie* case has been established, he will proceed under section 10 in the same way as though he had originally thought a *prima facie* case to be established.

Where an inquiry has been held under section 12 into any objection, sub-section (6) of section 14 will apply and the ultimate order after that inquiry must be one either allowing or else refusing the application.

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It will be seen from this examination of the sections to which I have already referred that an order of refusal can only be made in the cases which for convenience I enumerate in the following paragraphs :—

(i) Where, after notice of intended refusal is served under section 9 (3) (*a*), the applicant fails to show cause in response to the notice (section 9 (2)).

(ii) Where, after cause is shown and after the inquiry referred to in section 9 (3) (*a*), the Commissioner decides to refuse the application (section 14 (7) (*b*)).

(iii) Where the Commissioner has published a notice under section 10 of his intention to allow the application and objection has been duly made, and, after the inquiry held in pursuance of section 12 into that objection, the Commissioner decides to refuse the application (section 14 (6)). (This stage may be reached if the Commissioner's opinion was favourable to the applicant either upon his first consideration, or upon cause having been shown, or upon inquiry under section 9 (3) (*a*) into the cause shown.)

(iv) I should add that there is probably another ground for refusal contemplated in these sections, namely that after a time has been appointed for an inquiry under section 9 (3) (*a*) the applicant fails to appear at the inquiry and to support the cause he desires to urge in favour of his application.

The substantial complaint of the appellant in the present case is that the order refusing his application was not made in any of the circumstances which I have mentioned above and was therefore invalid, What has occurred in this case and in certain others, the appeals in which have been laid by pending our decision, is that the Deputy Commissioner refused the application without taking the steps prescribed in the provisions of the Act to which I have so far referred, but only after holding an inquiry in purported pursuance of section 13, which is in the following terms :—

" s. 13. Where, in considering any application, the Commissioner is of opinion that any matter or matters arising therefrom or connected therewith should be further investigated, he may of his own motion order an inquiry and specify in the order each matter which is to be inquired into and the date and the place appointed by him for the inquiry."

Notice was served on the applicant informing him that his application was fixed for inquiry under section 13 ; an inquiry was held in pursuance of that notice, and after the inquiry the Deputy Commissioner made a reasoned order refusing the application.

The submission for the appellant has been that an order of refusal cannot lawfully be made if the only step taken by the Deputy

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Commissioner was to hold such an inquiry. Crown Counsel on the other hand has contended that section 13 empowers the Commissioner to take action under it *in considering an application*, that is to say at a stage before he comes to form either the adverse opinion referred to in section 9 or the favourable opinion referred to in section 10. In this contention the reference in section 13 to a matter being *further* investigated would mean an investigation further to that conducted by an investigating officer under section 8. In other words Crown Counsel argues that when an application is being considered, the Deputy Commissioner, if he finds himself unable to reach a *prima facie* conclusion either way can conduct an investigation by means of an inquiry under section 13 and act upon the result of that inquiry ; the provisions of sub-section (7) of section 14 would apply at the termination of the inquiry and the Commissioner would thereupon have the duty either to take further action by public notice under section 10 *or else to refuse the application.*

If such had been the Legislature's intention, section 13 seems to be out of place : if it was contemplated that an inquiry be held by the Commissioner in order merely to supplement the investigation already conducted under section 8 by an investigating officer, one would have expected to find that intention set down in the section which immediately followed section 8. But that is not the only consideration against Crown Counsel's view, nor do I consider it an important consideration. Far more important is the consideration that in that view the Commissioner can by deciding to hold an inquiry under section 13 render inapplicable the explicit and important provisions in section 9 which ensure that an application will not be refused except in the circumstances which I have enumerated earlier, the essential prerequisite for refusal being the notice of intended refusal on specified grounds and the opportunity to show cause against a refusal within three months of the notice. I find myself quite unable to subscribe to the view that in enacting section 13 the Legislature intended to qualify in any way the conditions precedent to an order of refusal which it had already laid down explicitly in section 9. This opinion in reality concludes the argument on the particular question raised in this appeal as to the validity of the present order of refusal ; but as the matter has been fully argued we should, I think, examine section 13 with a view to interpreting the intention of the Legislature as to the application of the section.

In principle there would be no objection to the holding of an inquiry by the Commissioner *before* he forms an opinion whether or not a *prima facie* case has been established ; indeed it may be desirable in some cases that particular matters be thus investigated at an early stage. Hence it is not at first sight unreasonable to suppose that section 13 contemplates an inquiry being held prior to the making of a tentative order under section 9 or section 10, as the case may be. What renders such a supposition unreasonable, however, is the provision in sub-section (7) of section 14 which compels the Commissioner at the termination of an inquiry under section 13 to make an order of refusal where the material then before him has not in his opinion established a prima facie case.

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Of course if the opinion formed by the Commissioner upon an inquiry is favourable to the applicant and the step of publishing notice of an intention to allow the application were to be taken, no inconsistency with the other sections, and no prejudice to an applicant or even to the public would arise. But this consideration is of little or no importance or assistance having regard to the fact that sub-section (7) of section 14 prescribes the alternative step of refusal which for reasons already stated would create both inconsistency and injustice. I hold therefore that an inquiry *under section 13* cannot precede, or be held in substitution for, the procedure envisaged in section 9. Whether, however, an inquiry, *which is not in purported pursuance of section 13*, into any relevant matter, can be conducted by the Commissioner in order to assist him to reach one of the two alternative opinions referred to in section 9 and section 10 respectively, is a question which I do not consider it necessary to examine.

Can then the Legislature have intended an inquiry under section 13 to be held *after* the procedure envisaged in section 9 or in section 10 has been followed ? Let me consider first the case where an inquiry has been fixed under section 9 (3) (*a*) and has been concluded. Sub-section (7) of section 14 requires the Commissioner to make his order at the close of the inquiry or upon a date which he must fix at the close of the inquiry. If he makes the order forthwith there would clearly seem to be no scope thereafter for action under section 13 ; if, however, he only appoints a date for his order, a course which would be taken whenever the mind of the Commissioner is not made up at the close of the inquiry under section 9 (3) (*a*), an occasion may arise for the utilisation of the power conferred by section 13. Thus if some matter had been overlooked, or not adequately investigated at the first inquiry, then section 13 would fulfil an useful purpose in providing for the further investigation of that matter before the ultimate order is made under sub-section (7) of section 14. No difficulty or prejudice would to my mind arise from this construction since the alternative orders, one of which must be made at the termination of the inquiry under section 13, are the same as would have to be made after the inquiry under section 9 (3) (*a*). In passing I should mention that I doubt whether the making of the ultimate order can by this means be postponed beyond the date originally fixed by the Commissioner at the close of the inquiry under section 9 (3) (*a*).

I have also to consider whether there would be scope for the utilisation of section 13 in a similar manner in a case where an inquiry has been held under section 12 into an objection duly lodged after the notice under section 10. The holding of an inquiry under section 13 into some matter after order has been reserved under sub-section (6) of section 14 in an inquiry into an objection may in some instances be desirable for the same reasons to which I have referred in the preceding paragraphs. But I experience some difficulty in so construing the statute for the reason that one of the two alternative steps which must follow the holding of an inquiry under section 13, namely the step referred to in paragraph (*a*) of sub-section 7 of section 14, would be quite inappropriate in the circumstances. Once notice has been published under section 10 of an intention to allow

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an application and an inquiry is held into an objection lodged within one month of that notice, it would be very nearly absurd that the identical step of publishing a notice under section 10 giving another opportunity for objections should again be taken.

Apart from the absurdity which can result if section 13 is utilised after action is taken under section 10, general considerations also appear to arise. Section 11 confers on an applicant a statutory right that his application will be allowed if no objection is received within one month; and where objection is duly received all that section 12 contemplates is *an inquiry into the matter of the objection;* if I may put it in that way, the effect of a notice under section 10 is that the statute assures the applicant of success, subject only to the decision of the Commissioner upon any objection duly lodged and substantiated. In the absence of express provision in section 13 qualifying that assurance, the powers conferred by that section should not in my opinion be construed to affect that statutory right in any way or to authorise the Commissioner to investigate any matter other than a matter duly raised in an objection. Hence one is forced to the conclusion that the power to hold an inquiry under section 13 cannot be exercised at any stage after the publication of a statutory notice under section 10.

The order in the present case refusing the appellant's application, not having been made in accordance with the procedure set out in section 9, is invalid. In *Solamuthu v. The Commissioner for Registration of Indian and Pakistani Residents* [1] my brother Gunasekara stated "there has been no proper inquiry into the appellant's application and an order cannot be made upon it until such an inquiry has been held." That language is particularly appropriate to the present case where an essential step in the prescribed procedure has been completely ignored by the Deputy Commissioner. Once the order appealed from is set aside on such ground it must follow in my opinion that the steps hitherto taken upon the application were a nullity, and that proper steps must now be taken by the Commissioner even without a direction from this Court on that behalf. But I entirely agree with my brother Gunasekara's views as to the implied power of this Court which flows from the jurisdiction conferred by section 15 of the Act. The order appealed from is set aside and I direct the Commissioner to consider and deal with the application under the provisions of sections 9 and 10 of the Act. The respondent will pay to the appellant costs fixed at Rs. 262·50.

T. S. FERNANDO, J.—

I agree with the views expressed by my brother in his judgment and also agree that the order indicated by him should be made.

Order set aside.

[1] (1956) 58 N. L. R. 157.

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[In the Privy Council]

1956 *Present:* **Earl Jowitt, Lord Oaksey, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

THE COLOMBO APOTHECARIES COMPANY LIMITED, Appellant, *and* M. A. PEIRIS and others, Respondents

Privy Council Appeal No. 25 of 1955

S. C. 358—D. C. Colombo, 5143

Registration of deeds—Transfer of immovable property—Registration of deed at a time when it passed no interest—Subsequent acquisition of title by grantor—Right of grantee to defeat the provisions of an earlier unregistered deed—Land Registration Ordinance, No 8 of 1863, ss. 38, 39 (re-enacted as ss. 16 and 17 of the Land Registration Ordinance, No. 14 of 1891)—Registration of Documents Ordinance, 1927 (Cap. 101)—Res judicata.

(i) The description of instruments contained in section 38 of the Land Registration Ordinance No. 8 of 1863 is wide, and sufficient to cover instruments which though they are ineffective at the time of execution may become effective at a later date. The Registration of Documents Ordinance of 1927 makes no difference to this conclusion.

Thus, when a deed of transfer of immovable property is executed at a time when the grantor has no title to the property, the subsequent acquisition of title by the grantor would not only give the benefit of such title to the instrument already executed but would also give the grantee the benefit of priority by the registration of that instrument ; if the competing instrument remained unregistered at the time of the acquisition of title, the subsequent instrument, even though it was registered at a time before the grantor acquired his title, would prevail over the unregistered deed.

(ii) One Solomon was originally the owner of certain premises. In 1870, by deed P1 he gifted the premises to his son Lorenzo, reserving a life interest to himself and creating a fideicommissum in favour of Lorenzo's descendants for four generations. During Lorenzo's life time, his son Lawrenti, although he had only a contingent fideicommissary interest in the property, transferred the whole of the premises to one Dias by deed 6D1 executed on December 21, 1895. In case No. 11,739 Lorenzo sued Dias for a declaration of title to and ejectment from the premises in question. The question in controversy in case No. 11,739 was whether deed P1 conveyed an interest directly to Lawrenti or whether it did not, and it was held that deed P1 prevailed over deed 6D1. The question as to what Dias may have received on 6D1 from Lawrenti by reason of inheritance by Lawrenti from Lorenzo was expressly left open by the Court.

In the present case the plaintiff, who was a son of Lawrenti, claimed title to the premises as against the defendant, who was the successor-in-title of Dias. At the time when the case was instituted Solomon and Lorenzo had died intestate. It was shown that deed P1 had never been registered whereas deed 6D1 had been registered on December 31, 1895, when Lorenzo was still alive.

Held, that the decree in case No. 11,739 could not operate as *res judicata* in the present case.

2——J. N. B 65397—1,593 (5/57)

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APPEAL from a judgment of the Supreme Court.

Raymond Walton, with *E. S. Amerasinghe* and *L. Kadirgamar*, for the 6th defendant-appellant.

Ralph Milner, for the plaintiff-respondent.

December 11, 1956. [*Delivered by* MR. L. M. D. DE SILVA]—

The plaintiff in this case (a respondent to this appeal) instituted the action in the District Court of Colombo for a sale under the Partition Ordinance (Chapter 56, Legislative Enactments of Ceylon) of certain premises situated in Colombo. He pleaded that he and the first five defendants (also respondents to this appeal) were entitled to the property as co-owners. He further pleaded that the 6th defendant (the present appellant) had no right to the premises and was in wrongful possession thereof.

The learned District Judge in an able and careful judgment held that the respondents had no title to the land and dismissed the action. On appeal the Supreme Court held that the plaintiff-respondent and the first defendant-respondent had certain fiduciary rights to the land under a deed of gift of 1870 creating a *fidei commissum*, and that the second to the fifth defendants-respondents also had had certain rights which they had lost owing to prescriptive possession by the appellant. The Supreme Court entered decree accordingly.

The appellant now asks that the decree of the District Court dismissing the action be restored.

It is common ground that one Solomon Rodrigo was originally the owner of the premises. His sole issue was his son Lorenzo Rodrigo. In 1870 by deed No. 8,550 (referred to in the proceedings as P1) Solomon gifted the premises to Lorenzo, reserving a life interst to himself and creating a *fidei commissum* in favour of Lorenzo's descendants, which, as the deed was executed in 1870, was effective for four generations. Solomon died intestate in 1873. Lorenzo died intestate in 1899 leaving issue a daughter Madalena and a son Lawrenti. Madalena died in 1934 intestate and leaving as issue the 2nd to the 5th defendants-respondents. Lawrenti died in 1939 intestate and leaving as issue the plaintiff-respondent and the 1st defendant-respondent. Lawrenti on 21st December, 1895, when his father Lorenzo was still alive, by deed No. 5249 (referred to in the proceedings as 6D1) transferred the whole of the premises to one Dias. It is not disputed that the interest, if any, in the premises which passed to Dias on 6D1 either at the time of execution of 6D1, or at any time thereafter, has, upon a series of instruments, passed to the appellant. It is convenient before dealing with the rest of the case to examine what interest if any the appellant acquired on this series of instruments.

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At the time 6D1 was executed Lawrenti had no title to the whole of the premises which he purported to convey or to any interest at all therein because his father Lorenzo was still alive. The deed 6D1 was registered on the 31st December, 1895. The Deed of Gift No. 8,550 (P1) was not registered at the time and was in fact unregistered at the date of action. Sections 38 and 39 of the Land Registration Ordinance, No. 8 of 1863 (re-enacted as sections 16 and 17 of the Land Registration Ordinance 14 of 1891) are to the following effect :—

38. " From and after the time when this Ordinance shall come into operation, every Deed or other instrument of sale Purchase, Transfer, Assignment or Mortgage, of any land or other immovable property, or of Promise, Bargain, Contract or Agreement, for effecting any such object, or for establishing or transferring any security, interest or encumbrance affecting such land or property (other than a Lease at will or for any period not exceeding one month), or of Contract or Agreement for the future sale or purchase or transfer of any such land or property ; and every Deed or Act of Release, Surrender or Annulment, of or affecting any such Deed or other instrument, and the Probate of any Will, and every grant of Administration affecting any such land or property and every Judgment or Order of Court affecting any such land or property shall, if executed made granted or pronounced after the time when this Ordinance shall have come into operation, be registered in the Branch Office of the District or Province in which such land or . . . property is situate. . . . "

39. " Every Deed, Judgment Order or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order or other instrument, which shall have been duly registered as aforesaid. Provided however that fraud or collusion in obtaining such last mentioned deed, judgment, order or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder, and that nothing herein contained shall be deemed to give any greater effect or different construction to any deed , judgment, order or other instrument registered in pursuance hereof, save the priority hereby conferred on it. "

Parties are agreed (subject to the possibility of the intervention of another principle of law discussed later) that, according to the law of Ceylon, had Lorenzo been dead at the time of execution and registration of 6D1, the deed, by reason of registration, would have passed from Lawrenti to Dias such interest as Lawrenti would have had if both his father Lorenzo and grandfather Solomon had died intestate and the grandfather had not executed deed No. 8,550. The registration of 6D1 would have wiped out the provisions of deed No. 8,550. It is also not disputed that under the

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law of Ceylon by reason of the application of the doctrine *exceptio rei venditae* any interest which Lawrenti would have inherited from Lorenzo after the execution of 6D1 would pass on 6D1 to the transferee although at the time of execution of 6D1 Lawrenti had had no interest. The question which arises is whether the registration of 6D1 at a time when it passed no interest is sufficient to enable the transferee to defeat the provisions of Deed No. 8,550. It is not disputed that if 6D1 had been registered after the death of Lorenzo (instead of being registered before the death) it would have defeated Deed No. 8,550. Upon this point the learned District Judge said :—

> " What I wish to emphasize is, that the same instrument though executed at a time when the grantor had no title, is made use of to complete the title of the grantee ; cannot then, this same instrument, though it had been duly registered before the grantor acquired his title, be made use of to give priority by registration over an earlier deed, which is not registered at all or registered subsequent to the acquisition of such title. My answer to this is in the affirmative.
>
> " If the subsequent instrument can be made use of to give title, why cannot the registration of the same instrument confer priority, provided all the other requirements to confer such priority, are present : the subsequent acquisition of title would not only give the benefit of such title to the instrument already executed, but would also in my opinion give the grantee the benefit of priority by the registration of that instrument ; the position can however be different if the competing deed had been registered before the subsequent acquisition of title ; but if the competing instrument remained unregistered at the time of the acquisition of title, then, I do think that the subsequent, but duly registered, instrument prevails over the unregistered deed. "

Their Lordships agree. It was argued that as at the time 6D1 was registered it did not pass any interest it was not an instrument coming within the range of the documents described in section 38 and that, in consequence, the registration was ineffective at the time it was made and remained ineffective ever after. Their Lordships cannot accept this argument as the description of instruments contained in section 38 is wide, and sufficient to cover instruments which though they are ineffective at the time of execution may become effective at a later date. Moreover 6D1 remained on the register from the time it was registered and was on the register at the point of time of, and after, Lorenzo's death. Their Lordships are of opinion that the character of being a registered instrument at that point of time is not avoided or diminished by reason of the fact that it had been on the register before then.

Both sides referred to the ordinances mentioned above in the course of argument and it was not suggested that the Registration Ordinance 1927 made any difference to the conclusions drawn.

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On appeal the Supreme Court did not consider the matters discussed in the preceding paragraph because it thought that the intervention of another principle of law made them irrelevant. It took the view :—

> " The main argument addressed to us on behalf of the 6th defendant was that Lawrenti's purported conveyance 6D1 of 1895 was entitled to prevail over the earlier deed P1 by virtue of prior registration. On this point, the learned Judge held in favour of the 6th defendant. In my opinion, however, the issue of prior registration has no application to the facts of this case. An earlier decree P6 of the District Court of Colombo, which was upheld by this Court on appeal, decided that P1 prevailed over 6D1 and this decision operates as *res adjudicata* against the 6th defendant who is the successor-in-title of the unsuccessful party in those proceedings. "

The decree referred to was the decree in case No. 11,739 of the District Court of Colombo. In that case Lorenzo sued Dias, the transferee on 6D1, for a declaration of title to and ejectment from the premises in question. The original of Deed No. 8,550 was unobtainable for the purposes of case 11,739 and Dias raised the defence that by that deed Solomon had gifted the premises directly to his grandson Lawrenti subject to an interst in Lorenzo which had expired. On secondary evidence the contents of deed 8,550 were established to be what now appears in the document P1, which, as stated earlier, is a conveyance by Solomon to Lorenzo reserving a life interest in Solomon and creating a *fidei commissum* in favour of Lorenzo's descendants. Lorenzo would have been entitled to succeed when it became clear that deed 8,550 conveyed nothing directly to Lawrenti as contended by Dias. There was however a finding that deed 8,550 contained a *fidei commissum* and this finding though correct was purely incidental. Upon appeal the decision that Lorenzo was entitled to a declaration of title and possession was affirmed but a finding by the District Court (unnecessary for Lorenzo's success) that the deed of transfer 6D1 from Lawrenti to Dias was null and void was deleted. The deed was restored to its " pristine condition " and, Lorenzo having died during the pendency of the appeal, the question as to what Dias may have received on 6D1 from Lawrenti by reason of " inheritance " by Lawrenti from Lorenzo was expressly left open by the Supreme Court. This is the very question discussed in previous paragraphs. As it was expressly left open nothing that happened in Case No. 11,739 could have given rise to a plea of *res judicata* upon it.

In the present case the Supreme Court on the question of *res judicata* said :—

> " The effect and true meaning of P1 was prominently raised in issue between the parties to those proceedings. The basis of the decree against Dias in favour of Lorenzo was (1) that P1 created a valid *fidei commissum* in favour of Lorenzo and his ' descendants ' and (2) that Lawrenti had, at the time when 6D1 was executed during his father's lifetime, only a contingent fidei commissary interest in the

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property. It follows that the 6th defendant, as the successor-in-title of the purchaser under 6D1, is bound by the decision that P1 prevailed over 6D1. "

It is true that in Case No. 11,739 P1 prevailed and 6D1 did not prevail. The question in controversy there was, whether, as stated by the defendant (in that case), P1 conveyed an interest directly to Lawrenti or whether it did not. When P1 was reconstructed on secondary evidence it was clear that P1 conveyed no such direct interest and consequently 6D1 (in which the transferor was Lawrenti) became totally ineffective during the lifetime of Lorenzo. It was no doubt held that P1 created a *fidei commissum*. That fact is not, and has never been, denied by the appellant in the present case, and the decision that P1 created a *fidei commissum* is not material to the considerations in the present case. The question whether it created a *fidei commissum* is not, and has never been, in controversy in this case. What is in controversy is whether in the completely altered circumstances prevailing on the death of Lorenzo, 6D1 could be said to be a duly registered instrument passing title. The questions involved in this controversy did not arise (and indeed could not have arisen) in case 11,739. All that can be said of the decision in Case No. 11,739 is that it fixed Dias with notice of the *fidei commissum* but this fact appears to be immaterial for the purpose of their Lordships' decision. It was said for the appellant that under the law of Ceylon notice of a prior deed does not alter the effect of the registration of a subsequent deed. This view has not been challenged and it follows that there is nothing in the decision in Case No. 11,739 which detracts from the normal consequences of the registration of 6D1 discussed in previous paragraphs. Upon the series of instruments referred to in those paragraphs the appellant became entitled to an undivided half share of the premises.

The 2nd to the 5th defendants-respondents claimed the remaining half share of the premises as fiduciaries under the deed of gift P1 on the death of Madalena in 1934. The learned District Judge held that the appellant who had been in possession for 26 years had prescribed to the interests of these respondents. This finding was not disturbed by the Supreme Court and has not been challenged on this appeal.

It follows from what has been said that the plaintiff-respondent has no interest in the premises in respect of which she brought this action. Her action must therefore be dismissed.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, that the decree of the Supreme Court be set aside and that the decree of the District Court be restored. The plaintiff-respondent, who was the only appellant to the Supreme Court and who was the only respondent represented on this appeal, must pay the costs of this appeal and the costs of the appeal to the Supreme Court.

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Appeal allowed.

1956 *Present :* **Pulle, J., and Weerasooriya, J.**

SABAPATHIPILLAI, Appellant, *and* RAMUPILLAI, Respondent

S. C. 551—D. C. Vavuniya, 1,120

Landlord and tenant—Informal lease bond—Its effect as contract of monthly tenancy—Sale of leased premises—Right of purchaser to sue tenant for rent—Attornment.

When a person is in occupation of land as lessee under an informal document which does not comply with the provisions of section 2 of the Prevention of Frauds Ordinance, the lease must be regarded as from month to month and not for any longer period stated in the document.

When leased premises have been sold by the landlord, the tenant who receives notice of the purchaser's election to recognise him as tenant is not entitled to deny his attornment to the purchaser if he continues to be in occupation without informing the purchaser that he does not elect to attorn to him.

APPEAL from a judgment of the District Court, Vavuniya.

T. Arulanandam, with *S. Sharvananda*, for the defendant-appellant.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

March 16, 1956. WEERASOORIYA, J.—

The plaintiff-respondent brought this action against the defendant-appellant for a declaration of title to a paddy land called Puliyadikani more fully described in the schedule to the plaint. The plaintiff based his title to it on deed of sale P1 dated the 1st December, 1951, by which one Ulaganathan conveyed it to him. Ulaganathan had previously on an informal document D6 dated the 13th May, 1950, leased the same land to the appellant for a period of five years, and at the time of the execution of P1 the appellant was in occupation of the land as lessee under Ulaganathan.

Although one of the causes of action set out in the plaint was the appellant's denial of the respondent's title to the land, the finding of the trial Judge that the respondent is the owner was not canvassed by Mr. Sharvananda who appeared for the appellant at the hearing before us. He confined the appeal to grounds (6), (8) and (10) of paragraph five of the petition of appeal the relevant portions of which read as follows :—

(6) " The learned District Judge holds that the defendant-appellant paid to M. Ulaganathan (the defendant-appellant's lessor) the

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rent for the cultivation year 1952 to 1953 (Issue 20). Yet he holds that the defendant-appellant is liable to pay damage to the plaintiff-respondent for that period also ".

(8) " ..... The learned District Judge erred in law in awarding damages to the plaintiff-respondent for the Kalapokam season 1953–1954 when admittedly the land was not cultivated by him ".

(10) " The tenancy created by D6 has not been lawfully terminated by due notice nor has there been any attornment of any contract by the defendant-appellant ".

In order to arrive at a finding on these grounds it becomes necessary to consider the respective rights and obligations of the appellant, as the lessee on D6, and the respondent who became the purchaser of the leased land while the lease was in operation. As the document D6 does not comply with the provisions of Section 2 of the Prevention of Frauds Ordinance (Cap. 57) the lease must be regarded as from month to month, and not for the five years stated in D6, *Ukkuwa v. Fernando* [1]. The position of a purchaser to whom the original landlord has sold the premises which, at the date of sale, are in the occupation of a tenant under an existing lease has been considered in a number of decisions of this Court. In the case of *Allis v. Sigera* [2] it was held by Withers J. (sitting alone) that where a land which was subject to a lease was sold the purchaser acquired the right to the payment by the lessee of the rent due under the lease and could sue him for the same provided the latter had notice of the sale. It is not clear from the judgment, however, whether the decision implies that the tenant is bound to continue as tenant under the purchaser without any option. In the case of *Silva v. Silva* [3], which is a decision of two Judges, Pereira J. expressly refrained from deciding (for the reason, as stated by him, that the question did not arise in that case) whether the tenant is left with no option but to accept the purchaser as his landlord. But certain observations in the separate judgment of de Sampayo J. in the same case appear to suggest the view that even in the absence of an attornment by the tenant to the purchaser the latter has the right not only to claim the rent from the tenant but also to enforce against him the other covenants in the lease or claim damages for a breach of them. In the case of *Wijesinghe et al. v. Charles* [4] (also a decision of two Judges) de Sampayo J. who delivered the judgment of the Court observed that although the purchaser could enforce payment of the rent and the performance by the tenant of his other obligations under the lease he was not compelled to be content to take possession of the land subject to the tenant's right to occupation and he therefore could, if he elected, bring an action against the vendor to implement the sale by giving him free and exclusive possession ; and it was held that in such a case the contract of tenancy between the vendor and the tenant continues and, notwithstanding the sale, the vendor (and not the purchaser) could terminate the contract after notice to the tenant. He further observed that the tenant also had the option either

[1] (*1936*) *38 N. L. R. 125.*
[2] (*1897*) *3 N. L. R. 5.*
[3] (*1913*) *16 N. L. R. 315.*
[4] (*1915*) *18 N. L. R. 168.*

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to remain as tenant under the purchaser or cancel the lease. These observations, however, do not appear to be fully reconcilable with the view also expressed by him in the judgment that it was open to the purchaser to sue the tenant in ejectment, and it is not clear whether he intended to say that this right accrues to the purchaser even where the tenant had expressly elected not to attorn to the purchaser but to continue as tenant under the original lessor (the vendor). While, therefore, the position of a purchaser *vis a vis* a tenant who has not attorned to him may need clarification in an appropriate case in view of these decisions, I can find nothing in them which runs counter to the well recognised rule that where the tenant has attorned to the purchaser the latter is entitled to look to the former for payment of the rent.

In a more recent case, *de Alwis v. Perera*[1], Gratiaen J. on a consideration of the earlier decisions to which I have referred, took the view that when the purchaser elects to recognise the tenant but the tenant does not specifically attorn to him, the tenant who remains in occupation (with notice of the purchaser's election) may legitimately be regarded as having attorned to the purchaser. This view, presumably, is on the basis that a tenant who has received notice of a subsequent purchaser's election to recognise him as tenant cannot be heard to say that he did not attorn to the purchaser if he continued to be in occupation without informing the purchaser that he did not elect to attorn to him. The position in the present case is precisely this.

The learned trial Judge has found that within a few months of the respondent's purchase of this land he informed the appellant about it but the appellant without expressly denying the respondent's right to the lease rent led him on " with vague promises and hopes " which he (the appellant) did not intend to fulfil. These findings are amply borne out by the evidence of the respondent which the learned Judge seems to have accepted even though he did not accept his evidence of a fresh oral lease entered into between himself and the appellant in July 1952 under which the appellant is alleged to have undertaken to pay him 36 marakkals of paddy as lease rent in respect of the ensuing cultivation periods. In my opinion, on these findings the appellant cannot be heard to say that prior to the cultivation period 1952–1953 he had not attorned to the respondent as the purchaser from the original lessor. Mr. Sharvananda relied on the Judge's answer in the negative to issue No. 9 (whether the appellant was liable in law as the respondent's tenant) as a finding that even in the circumstances accepted by the Judge there was no attornment by the appellant to the respondent. But for the reasons already given by me I think that the answer to this issue should have been in the affirmative.

The position, therefore, is that the payment by the appellant of the rent for the cultivation period 1952–1953 to Ulaganathan did not absolve the appellant from payment of that rent to the respondent. Although the rent for the period is only 12 marakkals of paddy, the learned Judge

[1] *(1951) 52 N. L. R. 433 ; 44 C. L. W. 100.*

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has awarded the respondent the value of 36 marakkals of paddy, instead, as damages. This award cannot be supported, and the respondent will be entitled to only the value of 12 marakkals of paddy for that period.

As regards the cultivation period 1953–1954, even on the finding of the learned Judge that the appellant abandoned the land some time after the 15th September, 1953, the appellant would be liable to pay the respondent the rent for that period as no prior notice determining the tenancy had been given to the respondent. In respect of this period too the respondent was awarded the value of 36 marakkals of paddy as damages. This award is also wrong as the respondent is entitled to the value of only 12 marakkals of paddy.

Although the learned trial Judge found that the appellant had abandoned the land some time after the 15th September, 1953, he also held that the respondent is entitled to a decree in ejectment of the appellant and to damages at the rate of 36 marakkals per year till the appellant is restored to possession. But at the trial the respondent in the course of his evidence restricted his claim for damages to the two cultivation periods 1952–1953 and 1953–1954. That part of the judgment and decree awarding him damages in respect of any period subsequent to the 1953–1954 cultivation period cannot, therefore, stand.

At the hearing before us Mr. Sharvananda cited certain other decisions which deal with the question of attornment. I need refer to only one of them, *Ukkuwa v. Fernando* (supra), where the earlier cases are discussed. This case dealt with the respective rights of a monthly tenant and a person who had a subsequent notarial lease from the same landlord. It was held that in the absence of attornment by the monthly tenant to the tenant under the notarial lease or an assignment in favour of the latter by the landlord of the contract of monthly tenancy with notice to the monthly tenant, it was not open to the tenant under the notarial lease to determine the monthly tenancy. In view, however, of the conclusion reached by me that the appellant must be regarded as having attorned to the respondent, it is not necessary to examine in detail this and the other cases cited by Mr. Sharvananda all of which deal with the rights of several lessees under the same landlord and do not appear to be completely analagous to the case of a purchaser of land which is subject to a lease.

The judgment and decree appealed from are varied so that for each of the cultivation periods 1952–1953 and 1953–1954 the appellant will pay to the respondent the value of 12 marakkals of paddy instead of 36 marakkals, and no damages will be payable thereafter. In the result the respondent's right to a declaration of title to the land and to a writ ejecting the appellant therefrom (if he is still in occupation) and to costs of suit will not be affected by this variation. Since the appellant has succeeded in this appeal only in part he will be entitled to half his costs of the appeal from the respondent.

PULLE, J.—I agree.

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Decree varied.

1956 *Present :* **Gratiaen, J.**

K. NAGALINGAM *et al.*, Appellants, *and* KATHIRASIPILLAI *et al.*, Respondents

S. C. 4—C. R. Jaffna, 1,970A

Servitude—Right of way—Splitting up of a land—Right of each portion to outlet.

Where a land, one of the boundaries of which is a public lane, is split up into two or more portions, the back portion, which would otherwise be land-locked, must retain its outlet to the public lane over the front portion, even in the absence of an express reservation of a servitude. The splitting of the land cannot impose a servitude upon the neighbours.

APPEAL from a judgment of the Court of Requests, Jaffna.

C. Ranganathan, with *P. Naguleswaram*, for the 2nd to 4th defendants appellants.

A. Sambandan, with *S. Thangarajah*, for the plaintiff respondent.

Cur. adv. vult.

March 22, 1956. GRATIAEN, J.—

This is an appeal against a judgment declaring the plaintiff, as owner of a divided allotment of land described in schedule A to his plaint, entitled as against the appellants to a right of way of necessity over a path (described in schedule B) leading to a public lane (hereafter called " the Eastern lane ").

The relevant facts are best understood by reference to the sketch P4 filed of record. The plaintiff's allotment (Lot 4) had originally formed part of a larger land (including Lots 1, 2, and 3) belonging to her parents. The Northern boundary of this larger land was a different public lane (hereafter referred to as " the Northern lane "), and the entire property was later subdivided between members of the plaintiff's family. The conveyance in favour of the plaintiff (P1 of 1928) passed title to her in respect of Lots 3 and 4 together with, *inter alia*, a right of way and water-course leading to a well (situated on Lot 1) which almost adjoins the Northern lane. The plaintiff later conveyed Lot 3 to her daughter in 1944 together with similar servitudes.

The right of way now claimed by the plaintiff is along a path which lies immediately to the South of Lot 4. This path had at one stage formed part of a different land, owned in common by the appellants and others, which was the subject matter of a final decree for partition dated 31st October 1944 in D. C. Jaffna No. 16799. The footpath was reserved for the common use of the proprietors of the several divided allotments dealt with by the decree in order to give them access to the Eastern lane.

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It is admittedly immaterial to the plaintiff whether he should have access from Lot 4 to the Northern lane or to the Eastern lane. The basis of his claim is that the owners of Lots 1 and 2 will not permit him a right of way over their lands, so that he must of necessity be granted a servitude along the path which is the common property of the appellants. The learned Commissioner accepted this argument and entered judgment in his favour as prayed for.

The plaintiff's claim clearly cannot be sustained. Lot 4 originally formed part of a larger land which was admittedly served by the Northern lane. Upon the subdivision of the larger land, each person who received an allotment which would otherwise be land-locked automatically became entitled under the Roman Dutch Law to a right of way over the allotment or allotments adjoining the public lane. *Maasdorp (Edn. 7th) II, pp. 182–183.* As was pointed out in *Wilhelm v. Norton* [1]:

> "When a piece of land is split up into two or more portions, the back portion must retain its outlet over the front portion even though nothing was said about it, because the splitting of the land cannot impose a servitude upon the neighbours."

This very sensible principle would have applied in the present case even in the absence of an express reservation of a servitude. But I observe that the conveyance P1 in favour of the plaintiff did reserve to her, as owner of Lots 3 and 4, a right of way leading to the well on Lot 1, so that all that remains for him is to vindicate against his relatives who now own Lot 1 his right of access to the Northern lane which lies only a few yards beyond the well. Accordingly, the foundation to her claim to a right of way over the appellant's common property disappears. I allow the appeal, and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.

1957 *Present :* **Pulle, J., and Sansoni, J.**

RATNAM PILLAI, Petitioner, *and* ABDUL LATIFF, Respondent

S. C. 551—Application for revision in D. C. Kandy, M. R. 6,329

Civil Procedure Code—Section 84—Non-appearance of plaintiff—Decree nisi—Proper Form.

Where a decree nisi for non-appearance of plaintiff recited that the action was dismissed "unless sufficient cause be shown to the contrary within *one month* from the date hereof to Court"—

Held, that the decree nisi was not in conformity with Form No. 21 in the First Schedule to the Civil Procedure Code.

[1] *(1935) E. D. L. 143 at 169.*

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APPLICATION to revise a decree entered by the District Court, Kandy.

A. C. Nadarajah, for the plaintiff-petitioner.

Siva Rajaratnam, for the defendant-respondent.

January 30, 1957. PULLE, J.—

The decree entered in this case is not in conformity with Form No. 21 in the First Schedule to the Civil Procedure Code inasmuch as it recites that the action is dismissed by Court " unless sufficient cause be shown to the contrary within *one month* from the date hereof to Court ". The " Decree Nisi " is, therefore, set aside and the case remitted to the District Court with the direction that a fresh " Decree Nisi " in conformity with Form No. 21 be entered up and bearing the date on which it is actually signed. It would thereafter be open to the plaintiff to take the necessary steps, if he is so advised, to have it set aside. There will be no costs.

SANSONI, J.—I agree.

Decree set aside.

1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

L. M. ELLIS, Appellant, *and* L. D. K. PARANAVITANE, Respondent

S. C. 357—D. C. Gampaha, 3,792/M

Delict—Master and servant—" Course of employment ".

A master is not responsible for the negligence of his servant where the latter is about his own business with the permission but not at the request of or on the direction or order of the master. Therefore, if A permits B, who is a car driver in A's employment, to drive A's car for B's own purposes, A is not liable in damages for B's negligence in doing so.

APPEAL from a judgment of the District Court, Gampaha.

B. A. R. Candappa, with *Vernon Martyn*, for the defendant-appellant.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

December 5, 1956. T. S. FERNANDO, J.—

As a result of a motor car belonging to the defendant coming into collision with a motor car of the plaintiff in which she was being driven the plaintiff received injuries and her car was badly damaged. The collision

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was admitted by the defendant to have been due to the negligent driving of her car by one Perera, a car driver in her employment. In this action instituted by the plaintiff against the defendant for recovery of damages suffered by reason of the negligence of the defendant's servant acting " within the scope of his usual employment ", the learned District Judge has estimated the damages suffered by the plaintiff on account of the injuries caused to her person at Rs. 500 and the damages to her car at Rs. 3,500 and awarded her the sum of Rs. 4,000. The defendant had however denied liability on the ground that at the time of the collision Perera was not driving the car within the scope of his employment. It is this defence that arises for consideration on this appeal.

According to the evidence, the car was maintained by the defendant for the purpose of sending her children to school and bringing them back home. On the day of the collision, after the children had been brought back home from school, Perera made a request to the defendant that he be allowed to drive away in the car to enable him to pay a visit to his wife who was ill at the time. The request was granted by the defendant. This evidence was not challenged in cross-examination and has not been doubted by the learned District Judge. Indeed, an acceptance of the truth of this evidence is implicit in his judgment. Nevertheless, the learned District Judge has held the defendant liable in damages on account of the negligence of her servant Perera on the ground that (1) Perera's function was to drive her car, and (2) he was in fact driving her car at the time of the collision. The learned judge has also found that the driving of the car at the relevant time was with the full knowledge and authority of the defendant and has held that the mere fact that the purpose of the particular trip in which Perera was engaged in at the time of the collision between the two cars was one in which the defendant was not interested did not absolve her from liability.

The fact that the defendant knew that the car was to be used for a particular purpose by Perera and authorised its use for that purpose in the sense that she permitted its use is not, in my opinion, sufficient to attach liability to the defendant for the tort of her servant Perera. To attach liability the circumstances in which Perera drove the car must be such as to constitute a driving within the scope of his *employment* as a driver. The evidence does not warrant the inference that there was anything in the nature of a request, a direction or an order emanating from the defendant to her servant to drive the car on this occasion so as to constitute the occasion one on which he was *employed* by her to drive the car. I would refer in this connection to the following passage appearing in the standard work on *Torts* by Salmond, (11th. ed), at page 115 :—

> " A master is not responsible for the negligence of his servant while engaged in doing something which he is *permitted* to do for his own purposes, but not *employed* to do for his master. I am liable only for what I employ my servant to do for me, not for what I allow him to do for himself. If I permit my servant for his own ends to drive my car, I am not liable for his negligence in doing so. In this respect he is not my servant, but a mere bailee to whom I have lent my property ; and there is no more reason why I should answer for his conduct in such a

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matter than reason why I should answer for that of my friends or my children to whom, without personal negligence on my part, I lend or intrust property that may be made the instrument of mischief."

I should perhaps add that the plaintiff was not represented at the hearing of the appeal before us, and such researches into case law as we have ourselves been able to undertake have not led us to a previous decision where a court has attached liability to a master in damages for the negligence of his servant where the latter was about his own business or the business of a person other than his master with the permission but not at the request of or on the direction or order of the master.

In reaching a decision in favour of the plaintiff, the learned District Judge has purported to follow the South African case of *Limason v. Leyland Motors* [1] referred to in Negligence in Delict by Macintosh and Scoble, 2nd. ed., at page 100. Quite apart from the fact that McKerron in his treatise on the law of Delict (see 4th. ed., at page 131) submits reasons why the decision in that case was wrong, that case is distinguishable from the present case as there the use of the car by the servant could have been said to have been in furtherance of his employer's business. The facts of the present case approximate more closely to those in the English case of *Higbid v. Hammett Limited* [2] contrasted with *Limason v. Leyland Motors* by the learned authors on the very same page 100. In *Higbid's* case it was held that when an employee, for his own purposes, used his employer's bicycle, by the employer's permission, the employer was not liable for the employee's negligence. The reason for the decision was that the employee was not doing something in the course of the employer's business at the time of the negligent act.

That there is no difference between the Roman-Dutch law and the English law on the point that arises in this case is apparent not only on a consideration of cases decided in South Africa and in England, but is also clear from the judgment of Innes J. A., in the leading case of *Mkize v. Martens*, [3] in the course of which he stated :

"The principle generally adopted by those (South African) courts is that expressed by Pothier as follows : 'Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed'. In effect it is identical with the English rule that a master is answerable for the torts of a servant committed in the course of his employment. The reason underlying this important exception to the maxim *poena suos tenet auctores* has been differently expressed by different writers. But perhaps the most satisfactory statement of it is that given by Pollock on *Torts* founded upon a pronouncement of Chief Justice Shaw of Massachusetts : 'I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.' However that may be, we may, for practical pur-

[1] *(1929) C. P. D. 348.*
[2] *(1932) 49 T. L. R. 104.*
[3] *S. A. L. R. (1914) App. Div. 382 at 390.*

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poses, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment.'

The same principle is echoed in the words of Wessels J. A., in *Estate Van Der Byl v. Swanepol* [1],

"What, however, the employer can say is: 'when my servant did the act complained of he was not about my affairs and he did not do the act whilst looking after my affairs or in the course of my employment, but he did it whilst on his own business and for his own purposes'."

Apart from *Higbid's* case referred to already by me, there are other decisions of the English courts giving effect to the same principle. In *Britt v. Galmoye and Nevill* [2], the facts were that the first defendant, who had the second defendant in his employment as a van-driver, lent him his private motor car after the day's work was finished, to take friends to a theatre. The second defendant by his negligent driving injured the plaintiff. One of the reasons given by Shearman J. in awarding judgment in favour of the first defendant was that the journey not being on the master's business the latter was not liable for his servant's act. The principle was more vividly exemplified in the judgment of the Court of Appeal in the case of *Hewitt v. Bonvin et al.*[3] where the facts were that a son obtained from his mother, who had authority to grant it, permission to drive his father's motor car. The son wanted the car for his own purposes in order to drive two girl friends to their homes. Neither the father nor the mother knew the girls and it was no concern of either of them that the girls should be taken to their homes. On the way, through the negligent driving of the son, the car was upset and a friend who had accompanied the party was killed. In an action by the administrator of the deceased man against the father, the owner of the car, it was held that the son was not driving the car as his father's servant or agent or for his father's purposes, and that therefore the father was not liable for the son's tortious act. MacKinnon L.J., reversing the judgment of Lewis J., stated as follows:—

"The essential passage in the judgment of Lewis J. is the following sentence: 'It seems to me clear that the boy was driving this car with the consent of the owner. Therefore he was on that journey the servant or agent—the agent—of the owner'. I am quite sure that this is an erroneous statement of the law."

Again, in the recent case of *Ormrod v. Crossville Motor Services Ltd.* [4], the principle was set out by Denning L.J. in the following words:—

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter

[1] *S. A. L. R. (1927) App : Div. 141 at 150.*
[2] *(1928) 44 T. L. R. 294.*
[3] *(1940) L. R. 1 K. B. D. 188.*
[4] *(1953) 2 A. E. R. at 755.*

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whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. *The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.*"

In the present case, the learned District Judge's finding that the function of Perera was to drive the defendant's car does not appear to me to be complete, if it stands unqualified. To put it accurately, the finding should have been that it was Perera's function to drive the defendant's car for the defendant's purposes, and the question of the defendant's liability is dependent on the answer to the further question whether at the time of the collision Perera was driving the car for the defendant's purposes or about her business. The learned District Judge has found that at the time of the collision Perera was driving the defendant's car the use of which he had obtained from the defendant—after his normal work was over—for the purpose of enabling him to visit his sick wife. Having regard to this finding which must form the basis for the application of the relevant law, I am clearly of opinion that Perera, having been allowed to take the car for his own purposes, was not at the time of the collision driving the car for the defendant's purposes or about her business and was not acting within the scope of his employment. In the circumstances no liability attached to the defendant in law, and the plaintiff's action should have been dismissed. I would therefore allow the appeal and direct that the plaintiff's action be dismissed with costs in both courts.

H. N. G. Fernando, J.—I agree.

Appeal allowed.

1956 *Present :* **K. D. de Silva, J.**

P. R. KONE, Appellant, *and* L. ILLUKUMBURA (S. I. Police) Respondent

S. C. 539—M. C. Kurunegala, 21,125

Excise Ordinance (Cap. 42)—Section 55—Ayurvedic physician—Is he a "medical practitioner" ?—Indigenous Medicine Ordinance, No. 17 of 1941, s.9—Medical Ordinance (Cap. 90), s. 32, 35–40, 68.

A practitioner of indigenous medicine registered under section 8 of the Indigenous Medicine Ordinance is not a medical practitioner within the meaning of that term as used in section 55 of the Excise Ordinance.

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APPEAL from a judgment of the Magistrate's Court, Kurunegala.

K. C. Nadarajah, for the accused-appellant.

P. Weerasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 20, 1956. K. D. DE SILVA, J.—

The accused appellant was convicted of two charges under section 44 of the Excise Ordinance (Cap. 42) and sentenced to pay a fine of Rs. 50. The first charge was that he did possess an excisable article to wit 3,600 drams of "Jeewanamirtha Asawam" an unlawfully manufactured liquor without a licence. The second charge related to the transport of the said 3600 drams of "Jeewanamirtha Asawam" without lawful authority. This quantity of "Jeewanamirtha Asawam" was contained in 600 bottles. The possession and transport of these 600 bottles were admitted by the appellant. He however contended that "Jeewanamirtha Asawam" is a recognized tonic prepared by Ayurvedic practitioners according to prescriptions set out in text books on Ayurvedic Medicine. It was the case of the appellant that the "Asawam" in question was manufactured by the witness Krishnan who is a registered practitioner of Indigenous Medicines under Ordinance 17 of 1941. It was so set out on the labels which were affixed to the bottles in question. That evidence stands uncontradicted. Krishnan also stated that this was a bona fide medicated article manufactured by him for the treatment of rheumatic troubles, piles and nervous disorders. The Registrar of the College of Indigenous Medicine deposed to the fact that Krishnan appeared before the Board of Examination set up under Ordinance 17 of 1941 and was registered as a practitioner. The learned Magistrate held that the "Asawam" in question was a bona fide medical preparation.

On an analysis of a sample of this "Asawam" the Government Analyst found that it contained 5·8 per cent. by volume of alcohol. Therefore it is an excisable article as defined by provisions of the Excise Ordinance. It is conceded by the defence that no licence or permit was obtained from the proper authority to manufacture or transport the "Asawam" in question. But it was argued that this was not an excisable article inasmuch as it was a bona fide medicated article to which section 44 does not apply. The appellant seeks to avail himself of the 1st part of section 55 which reads :—

> "Nothing in the foregoing provisions of this Ordinance applies to the import, manufacture, possession, sale, or supply of any bona fide medicated article for medicinal purposes by medical practitioners, chemists, druggists, pharmacists, apothecaries or keepers of dispensaries ;"

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The learned Counsel for the appellant argued that Krishnan who manufactured this bona fide medicated article was a medical practitioner or at least a keeper of a dispensary as contemplated by section 55. If that contention is correct the appellant cannot be held to have committed an offence. The learned Crown Counsel submitted that the "Medical Practitioner" contemplated by section 55 is a Medical Practitioner registered under the provisions of the Medical Practitioners, Pharmacists and Midwives Ordinance (Cap. 90). Section 32 of that Ordinance provides *inter alia* that no person shall be registered as a Medical Practitioner unless he,

(*a*) is registered or qualified to be registered under the Medical Acts, or

(*b*) holds a Diploma in Medicine and Surgery issued by the College Council.

The Medical Acts referred to here means the Medical Act (21 and 22 Vict. c. 90) of the Imperial Parliament, and any Act amending that Act while the "College Council" refers to the Ceylon Medical College Council. Therefore Krishnan is not a person who is entitled to be registered as a Medical Practitioner under this Ordinance (Cap. 90). But the term used in section 55 of the Excise Ordinance is "medical practitioner" and not a registered medical practitioner. Therefore one is tempted to argue that section 55 of the Excise Ordinance covers a wider category of medical practitioners than that contemplated by the Medical Practitioners, etc. Ordinance (Cap. 90). Sections 36, 37 and 39. however refer to a medical practitioner but the next section, i.e section 40 provides :—

"Nothing in this Ordinance shall make it unlawful for a vederala to practise medicine or surgery according to the indigenous or ayurvedic systems or prevent him from recovering his charges for services rendered or medicine or goods supplied by him in the course of his practice."

This section would have been superfluous if the term "medical practitioner" contemplated by sections 36, 37, 38 and 39 included a "vederala" who is a practitioner of Ayurvedic medicine. In fact the interpretation section No. 68 states that "medical practitioner" means a person who is registered as a medical practitioner under the Ordinance. Section 35 provides :—

"In any written law, whether passed or made before or after the commencement of this Ordinance, the words "legally qualified medical practitioner" or "duly qualified medical practitioner" or "registered

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medical practitioner" or any words importing a person recognized by law as a practitioner in medicine or surgery shall be construed as meaning a medical practitioner registered under this Ordinance."

It was held by a bench of three Judges (De Sampayo A. J. dissenting) in *Amarasekera v. Lebbe* [1] that a "vederala" is not a medical practitioner within the meaning of that term as used in section 55 of that Ordinance. In that case it was further held that "chemists, druggists, apothecaries or keepers of dispensaries" applied only to persons dealing with drugs according to modern scientific methods and not to vederalas. That authority is binding on me sitting alone. In *Fernando v. Goonewardene* [2] Swan J. held that a "vederala" is not entitled to claim the exemption under section 55 of the Excise Ordinance. Krishnan who manufactured this "Asawam" or "Arishta" is only a practitioner of indigenous medicine registered under section 9 of the Indigenous Medicine Ordinance 17 of 1941 but he is not a medical practitioner contemplated by section 55 of the Excise Ordinance. Hence the Magistrate rightly found the appellant guilty of the charge framed against him.

It is indeed very ludicrous that the bona fide manufacture of an "Arishta" in this country is penalised by law. It is recognised by all persons who are even a little acquainted with the Ayurvedic system of Medicine as practised in this country that "Arishta" forms a very important item of its pharmacopoeia. It is widely prescribed in the treatment of various kinds of diseases. Fermentation is a necessary part of the preparation of "Arishta" as stated by Dr. Wickramasinghe, the Registrar of Practitioners of Indigenous Medicine, and consequently alcohol is present in it. Therefore whenever an Ayurvedic practitioner, however eminent he may be, prepares an "Arishta" he commits a breach of the Excise Ordinance. That this should be so is most unfortunate in a country where from the dawn of its history, Ayurveda has held sway for many centuries. Mahavamsa records that King Pandukabhaya (Circa 246 B. C.) built a lying-in home and a hospital in the city of Anuradhapura. Can one doubt that "Arishta" was freely prescribed in those institutions ? But now the manufacture and possession of this article of medicine contravene the law of the land. Legislation alone can put an end to this anomalous situation. Undoubtedly effective safeguards for the prevention of the manufacture of spurious "Arishtas" are also necessary.

In the circumstances of this case it would be sufficient to impose a nominal fine on the appellant. Accordingly I affirm the conviction and reduce the fine to Rs. 5.

Conviction affirmed.

Sentence reduced.

[1] *(1914) 17 N. L. R. 321.* [2] *(1953) 56 N. L. R. 238.*

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1956 *Present :* **Sinnetamby, J.**

P. KARIYAWASAM (Inspector of Labour), Appellant, *and*
S. A. RAFEEK, Respondent

S. C. 689—M. C. Balapitiya, 13,919

Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—Prosecution thereunder—Power of Assistant Commissioner to sanction it—Sections 46, 64, 68—Evidence Ordinance, s. 114 (d)—Criminal Procedure Code, s. 393.

Where a prosecution under the Shop and Office Employees (Regulation of Employment and Remuneration) Act was sanctioned by an Assistant Commissioner of Labour—

Held, that an Assistant Commissioner was entitled to sanction the prosecution unless the Commissioner gave direction to the contrary. In such a case, it is not necessary for the complainant to prove that no limitation was placed upon the power of the Assistant Commissioner.

APPEAL from a judgment of the Magistrate's Court, Balapitiya.

V. T. Thamotheram, Senior Crown Counsel, for the complainant-appellant.

N. E. Weerasooria, Q.C., with *D. E. V. Dissanayaka* and *E. D. Wikramanayake*, for the accused-respondent.

Cur. adv. vult.

October 30, 1956. SINNETAMBY, J.—

The accused-appellant was charged in this case under the Shop and Office Employees (Regulation of Employment and Remuneration) Act, with having kept his shop open after hours and with serving a customer who had come there to purchase goods. The learned Magistrate found that the accused had contravened the provisions of the Act but, nevertheless, proceeded to acquit him on the ground that the prosecution had not been sanctioned by the Commissioner of Labour as required by section 64 of the Act. The appeal is against this finding.

It would appear that the prosecution was in fact sanctioned by the Assistant Commissioner. The proceedings do not show that any exception was taken to the prosecution till the final stages of the trial presumably when Counsel addressed the Court. Section 68 of the Act provides that the word "Commissioner" includes "subject to any direction given by the Commissioner under section 46 (2) any Deputy or Assistant Commissioner". I reproduce the entirety of section 46 from which it is apparent that there is a distinction drawn between a Deputy or Assistant Commissioner and an officer appointed under sub-section 3 :

Section 46.—(1) The Commissioner of Labour shall be the officer-in-charge of the general administration of this Act.

(2) Subject to any general or special directions of the Commissioner, any Deputy or Assistant Commissioner of Labour may exercise, perform or discharge any power duty or function of the Commissioner under this Act or under any regulation.

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(3) There may be appointed such number of officers and servants as may from time to time be required for the purpose of carrying out or giving effect to the provisions of this Act.

(4) The Commissioner may either generally or specially authorise any officer appointed under sub-section (3) to exercise, perform or discharge any power, duty or function of the Commissioner under this Act or under any regulation.

Sub-section 2 empowers a Deputy or Assistant Commissioner to exercise the function of a Commissioner subject to the proviso that it can be modified or restricted by general or special direction of the Commissioner. Sub-section 4 does not give this general power to the officer appointed under sub-section 3 but such officer can exercise that power only if he is specially authorised to do so. It will thus be seen that a Deputy or Assistant Commissioner derives his authority by virtue of his office but this is subject to a limitation which may be placed upon it. The special officer, on the other hand, derives his power from the authority granted to him by the Commissioner. Before, therefore, such a special officer can exercise the functions of a Commissioner he must first show that he has the authority. It is obvious that in such a case a prosecution launched with the sanction of such an officer must on the face of it show that the officer had the authority granted to him.

The case of the Deputy Commissioner is otherwise. Normally he can exercise the functions of a Commissioner unless prevented from doing so by special directions. Where, therefore, a prosecution is authorised by an Assistant Commissioner it would be reasonable to infer that no limitation had been placed upon his powers. His act is an official act and in my view the presumption created by section 114, illustration D, of the Evidence Ordinance would apply. Section 114, illustration D, is to the following effect :—

"The Court may presume that judicial and official acts have been regularly performed."

If therefore an official purports to act by virtue of his office there is presumption that he did so regularly without any limitation being placed upon his powers. He derives his power by virtue of his office unlike a person appointed under section 46 (3) where the right is derived from the authority that is given. In my view therefore it was not necessary for the prosecution to prove the negative fact that no limitation had been placed upon the normal powers which an Assistant Commissioner is empowered to exercise.

Learned Crown Counsel drew my attention to section 393 of the Criminal Procedure Code in regard to the delegation of the Attorney-General's powers. Under that section the Solicitor-General and Crown Counsel derive their authority on a special or general direction from the Attorney-General. In that respect it is somewhat similar to the case of a special officer appointed under section 46 (3). But even in such a case where no objection was taken at the trial the Supreme Court has applied the

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principle embodied in section 114, illustration D, of the Evidence Ordinance following the maxim, "omnia praesumuntur rite esse acta." (Vide *5 Balasingham's Notes 19*).

I accordingly hold that the prosecution was in order and duly sanctioned. I therefore set aside the order of acquittal and remit the case to the magistrate for him to deal with the accused according to law.

Acquittal set aside.

1956 *Present :* **Sinnetamby, J.**

K. VALLIAMMAI, Appellant, *and* F. D. T. WEBER (Inspector of Police), Respondent

S. C. 834—M. C. Kalmunai, 22,531

Evidence—Expert—Must he always give reasons for his opinion ?—Evidence Ordinance s. 51—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 22, 76.

In a prosecution for unlawful possession of parts of a hemp plant, an Excise Inspector who was specially trained to identify parts of hemp plants expressed the view that a parcel which was in the possession of the accused contained parts of the hemp plant botanically called *canabis sativa*. No objection was taken to the evidence of the expert.

Held, that the evidence of the expert could not be rejected merely because he did not state the grounds upon which he based his opinion.

APPEAL from a judgment of the Magistrate's Court, Kalmunai.

C. T. Olegasegarem, for the accused-appellant.

B. E. de Silva, Crown Counsel, for the Attorney-General.

October 31, 1956. SINNETAMBY, J.—

The accused in this case is charged with having been in possession of a quantity of ganja in contravention of section 76 read with 22 of Chapter 172 of the Legislative Enactments. She was convicted and sentenced to pay a fine of Rs. 400.

The evidence of the police sergeant is that he found a parcel on the lap of the accused when he stopped bus No. CV 1738 on certain information and examined it. At his request, the accused handed the parcel to him and he found that it contained parts of a hemp plant. The accused denied that any parcel was taken from her lap. On the contrary, she says that the police sergeant picked up a parcel from inside the front seat. The driver of the bus was called to support her evidence. He admitted that the police sergeant took a parcel when he examined the bus. The parcel, he said, was taken from under the seat immediately preceding the accused's seat.

On the question of fact as to whether the parcel was taken from under the seat in front of the accused's seat or from the accused's lap, the learned Magistrate has held that the police sergeant's evidence is true. I see no reason to interfere with that finding.

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Learned Counsel also contended that the evidence in regard to whether the parcel contained hemp plants was unsatisfactory and for that reason his client was entitled to an acquittal. The evidence of an Excise Inspector who was specially trained to identify parts of hemp plants was led. That officer in the course of his evidence, examined the hemp plant in Court after breaking the seal and opening the parcel. He expressed the view that the contents of that parcel are parts of the hemp plant botanically called *canabis sativa*. Learned Counsel contended that this evidence is insufficient. His argument is that before the evidence of an expert can be called, the expert must in terms of section 51 of the Evidence Act state to Court the ground on which his opinion was based, so that it will enable the Court to test it. He relied upon the case of *Ramke Ram Singh v. Emperor* [1] reported in 36 Criminal Law Journal, 1935, page 511. It is not known whether in that case the objection was taken to the evidence of the expert in the original Court, but it would appear that the Court had not ascertained the grounds on which the expert based his opinion.

In the present case, the expert has not stated the grounds upon which he came to the conclusion that the parcel contained parts of the hemp plant but in the trial Court his evidence was not questioned, indeed he was not cross-examined at all.

The question now is whether in that state of affairs, the Appeal Court can reject an expert's evidence merely because he had not stated the grounds upon which he based his opinion. Learned Crown Counsel cited several cases in which this Court has acted upon opinions expressed by experts who have not stated the grounds on which they based their opinion. Some of these cases are unreported. I would refer to two of them. In S. C. Minutes 565 of 1956, in M. C. Colombo, 26949/A the Supreme Court refused to interfere. Likewise, in a case reported in *31 N.L.R., page 332* in the absence of a contest as to the capacity of an officer to identify excisable articles, the Supreme Court refused to set aside the conviction.

There is also a case reported in the Excise Judgments File bearing No. 4 of the E. V. O. 38, S. C. Minutes 945, M. C. Ratnapura 10,277. In that case this Court once again accepted the evidence of an Excise Inspector who professed to possess expert knowledge in regard to the manufacture of various liquors on the ground that the defence did not at the trial challenge the competency of the Inspector to speak on these technical subjects.

Having regard to the line of local cases, in which our Courts have accepted the evidence of an expert who did not state the grounds on which he bases his opinion, I do not think I should follow the Indian case if in that case the objection was raised for the first time in appeal and upheld.

[His Lordship then considered the question of sentence, and concluded :—]

I am satisfied that the evidence on record justified the conclusion which the learned Magistrate has reached. The appeal is accordingly dismissed.

Appeal dismissed.

[1] *36 Criminal Law Journal 511.*

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1956 *Present :* **Basnayake, C.J., and de Silva, J.**

VELUPILLAI, Appellant, *and* SUBASINGHE and another, Respondents

S. C. 152—D. C. Kurunegala, 5,320

Servitude—Right of way—Right of a lessee to acquire it by prescription—Way of necessity.

A servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Therefore, where a land is divided by its owner into two portions and each portion is given on lease to a different person, the lessee of one portion cannot claim from the other lessee a right of way by prescription over the other portion. Nor is he entitled to claim a way of necessity.

APPEAL from a judgment of the District Court, Kurunegala.

E. G. Wikramanayake, Q.C., with *T. B. Dissanayake*, for plaintiff-appellant.

H. V. Perera, Q.C., with *Kingsley Herat* and *Stanley Perera*, for defendants-respondents.

March 1, 1956. BASNAYAKE, C.J.—

By an indenture of lease dated 10th February 1897 two bhikkhus by name Parusselle Dhammajoti and his pupil Akwatte Dewamitta of Malwatta Vihare leased to Jeronis William Charles de Soysa a land called Aturukultenne in extent 1077A 3R 36P for a term of sixty years. On 20th July 1907 the lessee entered into an agreement with the successors in title of the original lessors by which he retained 402 acres 1 rood 13 perches and surrendered the rest of the land. The rest of the land in extent 675 acres was on 19th November 1936, leased to the plaintiff. The present dispute is between the plaintiff and the defendants who have succeeded to the rights of Jeronis William Charles de Soysa. The plaintiff claims the right to use the cart way over the land leased to the defendants in order to get to the high road. He bases his claim on prescription and alternatively he asks for a right of way of necessity.

He also claims damages in a sum of Rs. 250 up to the date of the institution of the action and further damages at Rs. 250 per week from the date of action until the use of the road, which he alleges was unlawfully obstructed by the defendants, is restored.

The defendants deny that the plaintiff was entitled to the right of the cart-way he claims either by virtue of prescriptive user or by way of necessity.

At the trial as many as 22 issues were framed but on the invitation of Counsel for the defendants, the learned trial Judge first tried two of the

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issues of law that went to the root of the case. Those issues are as follows :—

"14. Even if issue No. 5 is answered in the affirmative can the plaintiff acquire and claim a servitude of cart-way either by prescription or by way of necessity ?

15. If issue No. 14 is answered in the negative has the plaintiff any cause of action and can he maintain the present action ".

After hearing Counsel's submissions on the law the learned trial Judge answered issues 14 and 15 in the negative. This appeal is from that decision.

The kind of servitude claimed in the instant case is a real or praedial servitude. Such a servitude cannot exist without a dominant tenement to which rights are owed and a servient tenement which owes them. A servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Here the plaintiff who is the lessee and not the owner of the land claims a servitude from the defendant who is also not the owner but the lessee of the land. The owners of both tenements are one and the same group of persons. A praedial servitude is a right for all time and cannot be acquired except for the benefit of the lessor by the lessee whose rights are limited by the terms of the lease. It is unnecessary to refer to all the authorities cited by learned Counsel. It is sufficient to refer to the case of *City Deep v. McCalgan*[1], where this very question arose for decision and it has been held that a lessee in *longum tempus* cannot acquire a praedial servitude by prescription over the property of his lessor. That case refers to the case of *Jansen and Thorn v. Ysel*[2], in which Kotze, C.J., held that a lessee cannot acquire a real servitude for himself. We therefore hold that the learned trial Judge rightly decided this point against the appellant.

The other question that remains for decision is whether the appellant is entitled to a right of way of necessity. *Voet*[3] in dealing with rights of necessary ways states the law thus :—

"In addition to right of way to be established or refused at the discretion of the owner of a servient tenement, there is furthermore a right of way which must be granted of necessity by the owner of a servient tenement when the neighbouring farm has no access or egress. It is commonly called a ' way of necessity ' ".

It would appear from this passage that a person who is entitled to claim a way of necessity is the person who is the owner alone. The appellant is therefore not entitled to succeed in his claim for a right of way of necessity.

We accordingly dismiss this appeal with costs.

DE SILVA, J.—I agree.

Appeal dismissed.

[1] *(1924) W. L. D. 276.*

[2] *1 S. A. R. 6.*

[3] *VIII, 3, 4.*

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1955 *Present :* **Gratiaen, J., and Sansoni, J.**

S. THAMBIPILLAI and others, Appellants, *and*
A. MUTHUCUMARASAMY and others, Respondents

S. C. 524—D. C. Jaffna, 5,752

Sale of immovable property—Option of repurchase—Importance of time limit—No room for application of principle " once a mortgage, always a mortgage ".

Time is of the essence of the contract in a *pactum de retrovendendo*. In such a contract it is not open to the Court to take the view that the transaction was in reality a mortgage and not a sale.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *A. Nagendra*, for the 1st and 2nd defendants appellants.

C. Ranganathan, with *Balasubramaniam* and *P. Naguleswaran*, for the 3rd, 4th and 5th defendants respondents.

Cur. adv. vult.

March 9, 1955. GRATIAEN, J.—

A woman named Sellammah had at one time been the owner of the land in dispute. On 30th August 1944 she and her husband (the 5th defendant) had apparently conveyed the land to two other persons subject to their right to obtain a reconveyance within three years. Before this period elapsed, a new arrangement was arrived at which is embodied in the notarial conveyance P 2 dated 1st February 1947.

The terms of the written instrument P 2 are clear and unambiguous, and (according to the law of Ceylon) oral evidence of the " surrounding circumstances " cannot be admitted as a guide to its interpretation. P 2 operated as an " absolute sale " of the land by Sellammah, the 5th defendant and their previous vendors (under the deed of 30th August 1944) in favour of the appellants, but subject to two important conditions :—

(1) the appellants were obliged to reconvey the land to Sellammah and the 5th defendant within a period of $2\frac{1}{2}$ years (i.e., before the end of July 1949) for a consideration equivalent to a sum of Rs. 10,000/together with interest thereon calculated at 6 per cent. from 1st February 1947 up to the date of repurchase ;

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(2) the appellants' right to enter into occupation of the land as owners was by agreement postponed until the expiry of the $2\frac{1}{2}$ year period; if, however, the option of repurchase was duly exercised, Sellammah and the 5th defendant would of course continue in occupation under the later contract of sale.

Neither of these conditions is in any way inconsistent with the incidence of a contract of sale (as opposed to a contract of mortgage). The first condition constituted a *pactum de retrovendendo* which is well recognised in Roman-Dutch law. *Voet 18–3–7*. The second condition represents an agreed and perfectly permissible departure from the normal right of a purchaser to obtain immediate possession of the property sold to him.

Sellammah died in February 1947 leaving her husband (the 5th defendant) and three children (one of whom is the plaintiff). It would appear that attempts to exercise this option of repurchase for the benefit of the entire family within the stipulated period failed. Eventually the plaintiff, as one of Sellammah's intestate heirs, called upon the appellants to convey the property to him to the exclusion of the other heirs. As I interpret the judgment under appeal, however, the plaintiff did not tender the full consideration stipulated within the stipulated period. The evidence of proctor Karalasingham, which was accepted by the learned trial Judge, shows that at the time of the alleged tender, only Rs. 8,000 was available for payment; no doubt the appellants in their turn claimed slightly more than they were entitled to demand, but this circumstance could not give efficacy to a tender which was itself inadequate. The plaintiff has not affirmatively proved that the proper amount would and could have been available before 31st July, 1949.

In due course, the plaintiff instituted this action claiming a conveyance of the land from the appellants on payment of the purchase price which was not however deposited in Court and is apparently not yet forthcoming. Time is of the essence of the contract in a *pactum de retrovendendo*, and the plaintiff's failure to tender the stipulated consideration within time is therefore fatal to his claim. The learned Judge took the view, however, that the transaction was in reality a mortgage and not a sale. I would reject this conclusion for the same reasons as those recorded in the recent judgments of my brother Sansoni and myself in *Setuwa v. Ukku* [1]. Accordingly, there is no room for the application of the principle " once a mortgage, always a mortgage ".

It is unnecessary to consider whether in any event the plaintiff could alone have exercised the option of repurchase. His claim fails *in limine* owing to his omission to make a valid tender within the time fixed in P 2. I would therefore set aside the judgment under appeal and dismiss the plaintiff's action with costs (in favour of the appellants) in both Courts.

SANSONI, J.—I agree.

Appeal allowed.

[1] *(1955) 56 N. L. R. 337.*

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1957 *Present :* **H. N. G. Fernando, J.**

M. A. NOORBHOY, Appellant, *and* SELLAPPA CHETTIAR *et al.*, Respondents

S. C. 26—C. R. Colombo, 51,797

Rent Restriction Act—Purpose for which landlord requires premises—Difference between averment in plaint and issue raised at trial—Effect on bona fides *of landlord's claim—Alternative accommodation—Should sub-tenants' needs be considered ?*

The fact that the plaintiff stated at the trial that he required the premises as a place of residence and proceeded to trial upon that footing without objection, though in his plaint he had stated that he required them as a place of business, is not a circumstance that negatives the *bona fides* of the plaintiff's claim.

The premises were occupied by the 1st defendant as tenant, who had sublet portions of them to the 2nd and 3rd defendants. No attempt was made by the tenant to get alternative accommodation for himself alone, but it was said that alternative accommodation for him and his sub-tenants was not available.

Held, that in determining the reasonable needs of the plaintiff as against the tenant, the needs of the sub-tenants should not be taken into consideration.

APPEAL from a judgment of the Court of Requests, Colombo.

Sir Lalita Rajapakse, Q.C., with *Carl Jayasinghe* and *D. C. W. Wickremesekara*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *C. Manohara* and *P. Ranasinghe*, for the defendants-respondents.

Cur. adv. vult.

March 21, 1957. H. N. G. FERNANDO, J.—

In this case the landlord, who presently resides and carries on business in Galle, seeks to eject his tenant the 1st defendant from premises at Silversmith Street, Colombo, on the ground that the landlord requires the premises for occupation as a residence. The learned Commissioner has dismissed the action holding that the plaintiff's claim that he requires the premises for a residence is not *bona fide*.

One reason for this opinion is that in his plaint the plaintiff had averred that he required the premises for occupation as a place of business, but at the commencement of the trial plaintiff's counsel put in issue the question whether the premises are required for purposes of residence ; no objection was taken to this issue and a large volume of evidence relevant to it was given at the trial. In these circumstances I do not think it is open to the defendants at the end of the trial to rely on the different averment in the plaint ; if that averment had been mistaken and if objection had been taken to the issue, the plaintiff would have been able without risk of criticism to amend his plaint on terms as to costs.

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Another reason on which the learned Commissioner thought that the claim was not *bona fide* requires some explanation. The plaintiff is also the owner of premises adjoining those now in suit and had instituted an action for ejectment of the tenant of those premises on the ground that he required it for purposes of residence. At the time of the present trial he had obtained decree for ejectment in the other action. The learned Commissioner seems to have thought that having succeeded in that other action, the plaintiff has changed his original ground in the present one by going to trial on the issue (not raised in the plaint) that he requires those premises also for purposes of residence. I do not quite understand this reasoning. If the plaintiff had originally intended to seek ejectment in order in the one case to reside in the premises and in the present case to carry on his business, his chances of success in the present one would have been greater provided he showed a *bona fide* desire to carry on business at these premises. But by now seeking ejectment of the tenant of these premises also on the same ground, the plaintiff has, if at all, to rely on less strong ground.

The evidence is that plaintiff owns considerable property in Colombo from which he derives a fairly substantial income. His family consists of his wife and six children, the eldest of whom is married and independent. Of the other five, four are daughters. The apartment in which they now live in Galle adjoins the premises in which the plaintiff carries on a business in cement. He states that he has decided to leave that apartment because the cement dust makes the living quarters unhealthy. He also wishes to educate his children at a school in Colombo for Borah people, there being no similar school in Galle, and he has made arrangements to admit his teen-age son to Zahira College, Colombo. While it is true that the whole family presently occupies a single room in Galle, there is nothing inherently suspicious or *mala fide* in the evidence that the plaintiff now desires to live in greater comfort and to educate his family in Colombo. For these reasons I am unable to agree with the learned Commissioner that the present action is not a *bona fide* one.

In the view taken by the Commissioner the question of comparative needs did not directly arise, but it is indirectly referred to in the judgment. The 1st defendant is a member of the Chetty community who carries on business in Colombo as a pawnbroker. He left for India four years before the trial and has not returned to Ceylon since. He is himself an Indian citizen and carries on business through his attorney who also is an Indian citizen whose temporary residence permit has expired. The second defendant is a sub-tenant under the first defendant. He also is not a resident of Ceylon and carries on business through an attorney whose temporary residence permit has also expired. The 3rd defendant is similarly an attorney, whose temporary residence permit has now expired, of a non-resident money-lender. It must be assumed in the absence of evidence to the contrary that the persons who actually carry on business in Ceylon on behalf of these principals are lawfully resident despite the expiration of their permits. But I do not think that the needs of the 2nd and 3rd defendants should be taken into account in determining whether as against the plaintiff the premises are reasonably required by the tenant who is the 1st defendant. As to this tenant,

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the attorney's evidence is that all three principals carry on their business in these premises and that the employees of all the principals reside there. The evidence shows that the principals consider it desirable "for protection's sake" that the business of the three principals should be carried on in one place and that the employees should reside together. I doubt whether this desire should be allowed to weigh in balance against the plaintiff's desire to have a residence in Colombo for his family. So far as the tenant himself is concerned, his attorney searched for premises for all three businesses and all the employees. He stated quite frankly "If I got a place only for my occupation, I would not have taken it." This shows that the tenant has made no serious attempt to secure alternative accommodation and it has therefore not been proved that suitable alternative accommodation is not in fact available for the tenant. That being so, the plaintiff has made out a case for ejectment which has not been rebutted by his tenant.

I think therefore that this appeal must be allowed with costs in both Courts. Decree will be entered for the ejectment of the defendants from the premises in suit, but writ will not issue until 1st January, 1958.

Appeal allowed.

1957 *Present:* **Sinnetamby, J.**

A. MURUGIAH, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 136—Application 2,103

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration thereunder—Piecemeal inquiry not permissible—Sections 9 (3) (a), 14 (7).

Where the Commissioner holds an inquiry under section 9 (3) (*a*) of the Indian and Pakistani Residents (Citizenship) Act pursuant to a notice issued under section 9 (1) calling upon the applicant to satisfy him in regard to certain issues, it is his duty to adjudicate upon those matters all at the same time and not by piecemeal investigation. It is not open to him to hold against the applicant on one issue and not deal with the other issues on the ground that it is not necessary to answer them in view of his finding on the issue which he has already considered. Section 14 (7) of the Act contemplates one order, either allowing or refusing the application.

APPEAL under the Indian and Pakistani Residents (Citizenship) Act.

S. Nadesan, Q.C., with *A. Deva Rajah*, for the applicant-appellant.

B. C. F. Jayaratne, Crown Counsel, for the respondent.

Cur. adv. vult.

March 12, 1957. SINNETAMBY, J.—

In this case the appellant sought registration under the Act in respect of himself and two minor children dependent on him.

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After due inquiry by the Investigating officer the Deputy Commissioner served on the applicant a notice in terms of Section 9 (1) of the Act calling upon him to prove, (1) his residence from 1939 to 1942, (2) residence of his wife from January, 1939, to March, 1941, and from April, 1943, to June, 1946, (3) the residence of his children for certain stated periods, and (4) that he was permanently resident in Ceylon. The applicant showed cause and the Deputy Commissioner in terms of Section 9 (3) (*a*) made an order appointing the time and place for inquiry into these matters. The applicant appeared on the due date and the Deputy Commissioner opened his inquiry into item (1) only of the several matters which the applicant was called upon to establish. Having heard the evidence of several witnesses the Deputy Commissioner made order that the item (1) was proved. He then proceeded to fix a date for inquiry into the other matters. But before doing so he served another notice under Section 9 (3) (*a*) limiting the inquiry into the three matters which were not disposed of at the earlier inquiry. These matters were duly fixed for inquiry and the applicant led further evidence. At the conclusion of the hearing the Deputy Commissioner reserved his order and finally held that the applicant had failed to prove the requirement in respect of his wife's residence but did not give his findings in respect of the other matters fixed for inquiry. He did not deliver his order in respect of items (3) and (4) of the original notice under Section 9 (3) (*a*).

Presumably, the Deputy Commissioner did not consider it necessary to adjudicate upon all these matters in view of his findings in respect of the residence of his wife. The learned Counsel who appeared for the appellant, apart from contesting the correctness of the Deputy Commissioner's findings in respect of the wife's residence, also contended that the proceedings were a nullity inasmuch as the Deputy Commissioner held a piecemeal investigation into the application. Section 9 certainly does not contemplate anything but one inquiry and one order. The matters which an applicant may be called upon to prove are invariably so connected with each other that piecemeal adjudication would cause prejudice. The evidence, for instance, in respect of husband's residence would certainly be very relevant and pertinent to the question of his wife's residence, and to consider separately the evidence in respect of the wife's residence independent of the evidence of the husband's residence may in certain cases lead to a wrong conclusion. In this case it is not known whether the Deputy Commissioner in considering the issues raised in requirements 2, 3 and 4 of the notice under Section 9 (3) (*a*) took into consideration the evidence in respect of requirement (1). The scheme of the Act contemplates one application and one adjudication in respect of the matters which an applicant must prove before he can proceed in a claim for registration. Section 7 provides for the application being in a prescribed form containing all relevant particulars and answers for which provision is made in the form.

Section 7 (2) provides for the applicant including in his application a request that his wife and minor children dependent on him should be registered simultaneously with himself. This is subject to certain

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exceptions. If the applicant failed to prove the residence of his wife and children at the time of the application he is permitted to do so at any time before the final disposal of his application by Section 7 (2) (6). Section 8 provides that the Commissioner shall refer the application " for verification of particular statements therein " to an Investigating Officer. Section 9 (1) provides that where the Commissioner is of opinion that the *prima facie* case has not been established he shall cause to be served on the applicant a notice setting out the ground on which the application will be refused giving the applicant an opportunity to show cause to the contrary. In this connection, it is relevant to consider the provisions of Section 6 which stipulates what conditions have to be established before an application can be allowed. *Inter alia* the applicant must establish that apart from himself and his wife, his dependent minor children were also resident in Ceylon.

It is obvious that the inquiry must take place in respect of the residence not only of the applicant but also of his wife and children. Section 14 (7) prescribes what the Commissioner should do at the close of the inquiry. One of two alternative courses are open to him : if he is satisfied that " there is a *prima facie* case " established he has to take the steps prescribed by Section 10. But if he is not so satisfied he may " make an order refusing the application ". There is also provision in the same Sub-Section that the order must be made forthwith " upon the conclusion of the inquiry ". But if he is unable to do so he may give a date on which he proposes to make the inquiry and shall make the order on that day.

It is obvious, therefore, that the Act contemplates one inquiry, considers an application as one application, and contemplates only one order by the Commissioner. The object of this, it will be reasonable to assume, is to avoid a multiplicity of inquiries which apart from additional costs which applicants may have to incur would result in the Commissioner not having before him all the facts in regard to all the matters which an applicant must establish before he can successfully obtain registration. In my view the Commissioner in not complying with the requirements of the Act must be held to have failed to hold a proper inquiry. The learned Crown Counsel stated that he could not contend the steps taken by the Commissioner were in accordance with the law. What is still more unsatisfactory is that the Deputy Commissioner imagined that his conclusions in regard to requirement (2) was conclusive and final, and that, therefore, it was not necessary for him to give his findings in regard to requirements (3) and (4). He did not appreciate that his findings in regard to requirement (2) may be reversed in an appeal. The appeal comes up before this Court without any findings by the Deputy Commissioner on requirements (3) and (4). It is not open to a Commissioner to act in that way.

I accordingly set aside the order of the Deputy Commissioner and send the case back for steps to be taken in accordance with the law. The appellant will be entitled to costs of appeal which is fixed at Rs. 105.

Order set aside.

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1957 *Present :* **Sansoni, J.**

MARKANDU, Appellant, *and* RAJADURAI, Respondent

S. C. 310—C. R. Jaffna, 2,980

Thesawalamai Pre-emption Ordinance No. 59 of 1947—Section 2—" Heirs ".

Persons who claim to come within section 2 (1) (*b*) of the Thesawalamai Pre-emption Ordinance, No. 59 of 1947, must first satisfy the condition that they would be heirs of the intending vendor if he should then die intestate : that condition having been satisfied, they must also satisfy the condition that they are descendants, ascendants or collaterals within the third degree of succession.

APPEAL from a judgment of the Court of Requests, Jaffna.

C. Renganathan, with *A. C. Krishnarajah*, for the 2nd defendant-appellant.

A. Nagendra, for the plaintiff respondent.

Cur. adv. vult.

March 7, 1957. SANSONI, J.—

This is an action for pre-emption which involves the interpretation of section 2 of the Thesawalamai Pre-emption Ordinance No. 59 of 1947. The 1st defendant-appellant sold a 1/6th share of the land in question to the 2nd defendant, his maternal uncle. But the 1st defendant has children, and the plaintiff claimed that he as a co-owner was entitled to pre-empt that 1/6th share. The 2nd defendant claims that he as the maternal uncle was an heir who also had the right of pre-emption and he relies on section 2 of the Ordinance which reads :—

(1) " When any immovable property subject to the Thesawalamai is to be sold, the right of pre-emption over such property, that is to say, the right in preference to all other persons whomsoever to buy the property for the price proposed or at the market value, shall be restricted to the following persons or classes of persons :—

(*a*) the persons who are co-owners with the intending vendor of the property which is to be sold, and

(*b*) the persons who in the event of the intestacy of the intending vendor will be his heirs.

(2) For the purpose of this Ordinance, the term " heirs " means all descendants, ascendants and collaterals up to the third degree of succession, and includes—

(*a*) children, grandchildren and great-grandchildren ;

(*b*) parents, grandparents on both the paternal and maternal sides and great-grandparents on all sides ;

(*c*) brothers and sisters whether full or of the half blood ;

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(*d*) uncles and aunts, and nephews and nieces, both on the paternal and maternal sides, and whether of the full or of the half blood ".

It will be noticed that the right is restricted to co-owners and *persons who in the event of the intestacy of the intending vendor will be* his heirs.

Mr. Renganathan for the 2nd defendant-appellant submitted that as the term " heirs " has been defined in the section no other meaning can be given to it, and certainly not the meaning which de Sampayo, J., gave it in *Ponniah v. Kandiah* [1]. The learned Judge there said :—

" The word I think refers to persons who would be heirs if the owner should now die ".

Mr. Renganathan would give the word a much wider meaning and include all those persons who are mentioned in section 2 (2) of the Ordinance. He relied on the definition of the words " means " and " means and includes " in Stroud's Judicial Dictionary and submitted that the definition of the word " heirs " was exhaustive.

Now if one were to substitute for the word " heirs " in section 2 (1) (*b*) the definition appearing in section 2 (2), the result would be unintelligible. Again, section 2 (1) (*b*) does not read " the persons who are the heirs of the intending vendor " : if it did, the substitution of the persons mentioned in the clause defining " heirs " would provide the result for which Mr. Renganathan contends. Obviously the heirs contemplated in section 2 (1) (*b*) are those persons whom de Sampayo, J., referred to as " persons who would be heirs if the owner should now die ". It is for that reason, I think, that the word " heirs " in section 2 (1) (*b*) is qualified by the phrase " in the event of the intestacy of the intending vendor " : and it is for that reason that one cannot include all those persons falling within the clause defining the term " heirs " simpliciter as persons who have the right of pre-emption.

Under the law as it stood before the Ordinance was passed there was no limitation as to the degree of succession within which heirs who claimed the right of pre-emption should fall. The Ordinance, however, restricted the right to those who were within the third degree of succession. The reason, I think, is because the report of the Thesawalamai Commission, dated 12th December, 1929 (Sessional Paper III of 1930) contained a recommendation that the right should be restricted " to those who would be heirs of the vendor up to the third degree in the case of intestacy ".

My view, then, is that persons who claim to come within section 2 (1) (*b*) must first satisfy the condition that they would be heirs of the intending vendor if he should then die intestate : that condition having been satisfied, they must also satisfy the condition that they are descendants, ascendants or collaterals within the third degree of succession. Only in this way can full effect be given to all the words of section 2 (1) (*b*) and section 2 (2).

As the 2nd defendant-appellant is not an heir of the 1st defendant according to this interpretation of section 2, I agree with the learned District Judge that he had no right of pre-emption.

The appeal is dismissed with costs.

Appeal dismissed.

[1] *(1920) 21 N. L. R. 327.*

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1956 *Present :* **Pulle, J.**

DR. M. C. M. KALEEL, Petitioner, *and* M. S. THEMIS *et al.*, Respondents

Election Petition No. 2 of 1956

IN THE MATTER OF THE CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL, 1946, ELECTION FOR ELECTORAL DISTRICT NO. 2—COLOMBO CENTRAL—HOLDEN ON THE 5TH DAY OF APRIL, 1956

Election petition—Miscount of ballot papers alleged by unsuccessful candidate—Validity of such ground—Discretion of Court—Multiple member electoral district—Necessary parties—Amendment of petition by supplementary affidavits—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 48 (7) (8), 49 (1) (5), 80 (b) (c), 83, 86 (2)—Parliamentary Election Petition Rules, 1946, rules 4 (1) (b), 5.

Miscount of ballot papers is a valid ground on which an election judge may grant relief under section 80 (*b*) and (*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946. The provisions of sub-sections 1 and 5 of section 49 and of sub-sections 7 and 8 of section 48 do not necessarily point to the non-existence of a jurisdiction to order a recount of ballot papers.

Where an unsuccessful candidate presents an election petition against a successful candidate on the ground that as between them there was a miscount of votes, the other candidates who were returned at the same time to the same electoral district and who received a greater number of votes than the respondent need not be made parties to the petition. In such a case, the averment in the petition that " there has been a miscount of the votes cast at the said election " cannot be said to be vague and entirely devoid of content when the petitioner seeks relief under section 80 (*b*) and (*c*) of the Parliamentary Elections Order in Council.

It is not requisite to a valid election petition based on a miscount of votes that it should set out how and why such miscount occurred. The word " miscount " in the context of an election petition presented by a candidate on the ground that he had a majority of votes and should be declared to be duly elected bears a restricted meaning.

Where a candidate or his election agent failed to make an application to the returning officer for a recount of the ballot papers under the proviso to sub-section 7 of section 48 of the Order in Council, it would, generally speaking, be undesirable for an election court in its discretion to order a recount.

Obiter : If an election petition is bad on the date it is presented, it cannot be retrospectively made good by any affidavit filed after the time limit prescribed by section 83 of the Order in Council.

ELECTION petition No. 2 of 1956, Colombo Central.

Izadeen Mohamed, with *Carl Jayasinghe*, for the petitioner.

G. E. Chitty, Q.C., with *G. T. Samerawickreme*, *Prins Gunasekera* and *K. D. P. Wickremasinghe*, for the 1st respondent.

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M. Rafeek, with *L. G. Weeramantry*, for the 2nd respondent.

A. C. Nadarajah, with *S. Ponniah*, for the 3rd respondent.

M. Tiruchelvam, Acting Solicitor-General, with *V. Tennekoon*, Senior Crown Counsel, and *M. Kanagasundaram*, Crown Counsel, for the 4th respondent.

Cur. adv. vult.

October 24, 1956. PULLE, J.—

The petitioner was one of the seven candidates at the last general election who sought to be elected for the Electoral District No. 2—Colombo Central—which has to return three members to serve in the House of Representatives. There are four respondents to the petition of whom the 4th is the returning officer who made a return under section 50 of the Ceylon (Parliamentary Elections) Order in Council, 1946, that the 2nd, 3rd and the 1st respondents, in that order, received the majority of votes lawfully given.

The petition states that the returning officer declared that the 2nd respondent received 45,296 votes, the 3rd respondent 26,522, the 1st respondent 20,375 and the petitioner 20,338. It further states in paragraph 5 " that there has been a miscount of the votes cast at the said election " and in paragraph 6 that the petitioner had a majority of valid and lawful votes as against the 1st respondent. While no relief is claimed against the 2nd, 3rd and 4th respondents the petitioner prays, *inter alia*,

(*a*) that a recount be allowed of the votes given and counted at the election ;

(*b*) that a declaration be made that the 1st respondent was not duly elected or returned ;

and

(*c*) that it be declared that the petitioner was duly elected and ought to have been returned as the third member to represent the Colombo Central electorate.

On the 27th September, 1956, three affidavits were filed on behalf of the petitioner, one made by him, a second from his counting agent and the third from one of the defeated candidates. It is not necessary to examine at any length at this stage the contents of these affidavits. It is sufficient to state that the deponents alleged that the counting took place under such circumstances that errors were almost inevitable.

When the hearing of the petition was taken up on the 1st October, learned counsel for the petitioner, in pursuance of a motion filed on the 28th September, moved to have the 2nd, 3rd and 4th respondents discharged from the proceedings. The 2nd and 3rd respondents had no objection provided their costs were paid. The 1st respondent also had no objection, subject to the right being reserved to him to submit that upon the discharge of the 2nd and 3rd respondents the petition had to fail for want of necessary parties. The learned acting Solicitor-General

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opposed the discharge of the 4th respondent, the returning officer, on the ground that the affidavits in effect alleged a failure of duty on his part to make a proper count of the votes. Although Mr. Izadeen Mohamed for the petitioner repeatedly assured that he did not impute either misconduct or negligence to the returning officer and his assistants and clerks I declined to discharge the 4th respondent. The 2nd and 3rd respondents were discharged with costs agreed on at Rs. 1,050 to each.

It would be convenient at this stage to set out the grounds on which the petition is resisted. An examination of the submissions made thereon will also cover the grounds on which the petition was supported.

Learned counsel for the 1st respondent submitted that the petition ought to fail for one or more of the following reasons :

(*a*) There is no provision in the Order in Council enabling an election judge to make declarations under section 80 (*b*) and (*c*) solely on the ground of miscount of ballot papers.

(*b*) The petition is bad because it has failed to state in conformity with the requirements of the Parliamentary Election Petition Rules, 1946, " the facts and grounds relied on to sustain the prayer "—rule 4 (1) (*b*).

(*c*) If the facts and grounds required by rule 4 (1) (*b*) are not stated in the petition, it is not permissible to sustain it by stating such facts and grounds in affidavits filed after the time prescribed for filing the petition had expired.

(*d*) The discharge of the 2nd and 3rd respondents on the invitation of the petitioner has resulted in the petition being improperly constituted for want of necessary parties whose rights might be adversely affected, if a recount is allowed and the petitioner granted declarations under section 80 sub-sections (*b*) and (*c*).

(*e*) The affidavits do not disclose facts on which an election judge would be justified, in the exercise of his discretion, in ordering a recount of the ballot papers.

Save in regard to jurisdiction and the contention that by reason of the discharge of the 2nd and 3rd respondents the petition fails for want of necessary parties the acting Solicitor-General supported the submissions made on behalf of the 1st respondent.

In regard to jurisdiction it is urged that while in England a petition may be presented claiming a seat on the ground of miscount of ballot papers the framers of the Ceylon (Parliamentary Elections) Order in Council, 1946, did not intend to confer a similar right and have by implication provided that a count made by the returning officer is final and cannot be challenged on an election petition. The basis on which relief is granted in England is section 5 of the Parliamentary Elections Act, 1868, which entitles a person claiming to have had a right to be returned at an election to present a petition complaining of an " undue return ". Section 80 (*b*) of the Order in Council is clear that a petitioner is entitled to ask for a declaration that the return of the person elected was undue.

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It is, however, argued that the petitioner cannot call in aid section 80 (*b*) because having regard to other provisions in the Order in Council he has no right to claim a recount.

Reliance is first placed on section 49 (1) which I shall quote in full :

" The returning officer shall reject as invalid the following ballot papers only, namely, any ballot paper—

(*a*) which is not stamped or perforated with the official mark ;

(*b*) on which votes are given for more than one candidate ;

(*c*) on which anything is written or marked by which the voter can be identified except the printed number on the back ;

(*d*) which is unmarked ;

(*e*) which is void for uncertainty."

Section 2 of the Ballot Act, 1872, read with rule 36 in the First Schedule (Part I) to the Act, enabled a returning officer in England to reject ballot papers for reasons identical with those set out in section 49 quoted above. Sub-section 5 of section 49 provides that the decision of the returning officer whether or not any ballot paper shall be rejected shall be final and *shall not be questioned on an election petition.* It is pointed out that both under the Ballot Act, 1872, and the recent Representation of the People Act, 1949, while an election court in England has, on a petition questioning an election or return, the power to reverse the decision of a returning officer rejecting a ballot paper, a specific provision to the contrary is embodied in the Order in Council. The question then is asked whether any purpose can be served in a mechanical count under the supervision of the court of what has already been counted, when what has been wrongfully rejected cannot be restored to either candidate. Undoubtedly, if the court has the power to order a recount the field of inquiry is confined to much narrower limits than in England. Does section 49 (1) and (5), therefore, point to the non-existence of a jurisdiction to order a recount ? I do not think so. It is possible to visualize a situation when, leaving the rejected ballot papers out of reckoning, a recount would reveal in the plainest manner and beyond contest that a petitioner had a majority of votes. I cannot believe that the Legislature contemplated that in those circumstances it would not be within the power of the court to make a declaration under section 80 (*c*) that the petitioner was duly elected and ought to have been returned. The acting Solicitor-General gave as an instance a case in which a petitioner satisfies the court that a number of counting assistants by reason of their association with the candidate who was returned were so biassed against the petitioner that they purposely counted the votes cast for a petitioner in favour of his opponent. He conceded, and in my opinion rightly, that upon proof of those allegations and having regard, perhaps, to a narrow majority, the court would have the power to order a recount. At the argument I put to counsel a yet simpler case of a returning officer in perfect good faith but owing, admittedly, to an oversight making a return under section 50 that candidate A received the majority of votes whereas in

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fact his opponent B received the majority. Surely in such a case the court ought to have the power to order a recount for the purpose of making a declaration in favour of B under section 80 (*c*).

A great deal of stress was laid on the proviso to sub-section 7 of section 48 which requires the returning officer to make a recount upon the application of any candidate or his counting agent. It is pointed out that no such compulsion is enjoined on a returning officer in England who has a discretion whether to make a recount or not. This is relied on as an additional reason for the submission that it was the intention of the framers of the Order in Council that the result of the counting by the returning officer must be regarded as final and conclusive and not open to challenge on an election petition. In my opinion the additional right given to a candidate in Ceylon by section 48 (7) to compel a recount cannot be regarded as part of a scheme to deny him the right, in appropriate circumstances, to petition for a recount by the election court. In England the right to a recount has been recognized since the case of *Renfrew* [1] in 1874. The basic principles of our election law are borrowed from the English counterpart and where it is the intention to depart therefrom one finds express provision in the Order in Council. If it was the intention not to give the right of asking for a recount on an election petition, a short section could easily have been written into the Order in Council.

Towards the close of Mr. Chitty's reply on behalf of the 1st respondent he drew my attention to section 48 (8) which provides for a procedure to determine which of two candidates found by the returning officer to have received an equality of votes is to be declared elected. The Order in Council is silent as to what an election court should do if, upon a recount ordered by it, there results an equality of votes. On the other hand the Representation of the People Act, 1949, section 122 (6) (*b*) lays down that upon an equality of votes being found to exist the court shall decide by lot which of the candidates should receive an additional vote. The absence of a provision in our law analogous to section 122 (6) is urged as an additional reason pointing to the absence of any jurisdiction to order a recount. In spite of the fact that I have not had the advantage of hearing a reply to this argument, I am satisfied that it has no merit. It is not my intention to pronounce on what the procedure ought to be if an equality of votes results on a recount. It may be that the answer to the difficulty is found in section 86 (2) which reads :

> " 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. "

Section 122 of the Representation of the People Act, 1949, it may be noted, occurs under the heading " *Procedure on all Election Trials* ". I have not been able to find the counterpart of section 122 in any English legislation prior to 1949. If, as I believe, there was none, the argument put

[1] (*1874*) *2 O'M. & H. 213.*

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forward on behalf of the 1st respondent is weakened in the face of the question how prior to 1949 the election courts in Britain consistently exercised the jurisdiction which the petitioner seeks to invoke in the present case. It is interesting to note that in 1893 in the case of *Cirencester Division* [1] the court held the election void on the ground that the votes given for the respondent and petitioner and allowed by the court were equal.

In the *Nivitigala* [2] case where a recount was ordered the jurisdiction of the court does not appear to have been canvassed but the learned Judge who tried the case did give his mind to the question and he acted on the statement at p. 171 of *Rogers on Elections* (20th edition) as setting out the law applicable to Ceylon. I respectfully agree and hold that in the present case the petition does not fail for want of jurisdiction.

Before I deal with the objection taken on behalf of the 1st and 4th respondents that the petition is on the face of it bad I think I ought to say at once that the proposition is unexceptionable that, if the petition was bad at the time it was presented, it cannot retrospectively be made good by any affidavit filed after the time limit prescribed by section 83. A consideration of public policy that a contest on an election petition is not to be regarded purely as a proceeding *inter partes* and that the court owes a duty to the voters and to the public to see that those duly elected should be declared to have been returned cannot arrest the consequences of a failure to comply with a mandatory provision of the statute.

The principal argument adduced against the petition is that it does not contain allegations on which claims for relief under section 80 (*b*) and (*c*) can be based. In other words, borrowing the language of pleadings in civil cases, it is said that the petition does not disclose a cause of action. Criticism has been specially directed to paragraph 5 of the petition which reads,

> " And your petitioner further states that there has been a miscount of the votes cast at the said election."

The objection to this paragraph is that it is vague and entirely devoid of content relevant to the reliefs claimed. The resulting position is that if the petition is to be read without paragraph 5, it must necessarily fail, and so it would. When paragraph 5 is closely analysed there is implied in it much that is irrelevant or even harmful to the case that the petitioner is seeking to make out. Among the diversity of meanings that could be extracted from paragraph 5 one certainly is that votes cast for the 3rd respondent were counted in favour of the 2nd and *vice versa*. That would have no relevance in a case where the return of either of those respondents is not challenged. Another possible meaning is that votes cast for the 1st respondent were counted in favour of the petitioner which would be a singularly damaging admission. Mr. Izadeen Mohamed frankly stated that he could not by any means claim for paragraph 5 the merit of precision but submitted that if the petition is read as a whole, in the background of the law on which a recount is claimed and granted, there are

[1] *(1893) 4 O'M. & H. 194.*

[2] *(1948) 49 N. L. R. 201.*

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sufficient averments to sustain the petition and that the preliminary objection must fail.

The answer to the preliminary objection was somewhat on the following lines. According to the petition the returning officer, after the counting of the votes, declared that the 1st respondent had received 20,375 votes and the petitioner 20,338. The ground on which the petitioner claims to have been elected is that as against the 1st respondent he had the majority of votes and the fact on which he relies is that there was a " miscount " of the votes. The reasonable construction of paragraph 5, when read with the allegation in paragraph 6 that the petitioner had a majority of votes as against the 1st respondent, is that the word " miscount " amounts to a statement that votes cast for the petitioner had been counted as votes for the 1st respondent or for one or more of the other opposing candidates. Reliance was again placed on the *Nivitigala* case in which a recount was allowed. There were four candidates who contested one seat. All that the petitioner said in that case in support of a recount which was granted (there was also a claim for scrutiny) was :

> " Your petitioner states that there has been a miscount of the votes by the returning officer, the 2nd respondent, and that the return of the 1st respondent was undue."

I must confess that in the process of weighing the contentions of either side my opinion has fluctuated considerably. I do not think it would be fair to throw out a petition because an examination of its language, as strictly as one would examine the penal provisions of a statute, reveals matters which have no bearing on the reliefs claimed. There is implicit in paragraph 5 much that is irrelevant but there is also a small residuum of what is germane to the reliefs claimed, namely, that votes that should have been counted for the petitioner were counted for his rivals.

In regard to another part of the objection I should state that it is not requisite to a valid petition based on a miscount that it should set out how and why it occurred. One is familiar with election petitions in Ceylon where following the form in *Rogers on Elections* (20th edition, Vol. II, p. 523) the substance of the allegation is set out succinctly as, for example, that the respondent was by himself and his agents guilty of the corrupt practices of bribery, treating, etc. The Order in Council has expressly put a curb on prolixity by requiring in rule 4 (1) (*b*) of the Parliamentary Election Petition Rules, 1946, that a petition shall state *briefly* the facts and grounds relied. The allegation that there was a miscount is an allegation of fact, the proof of which is a matter of evidence which under rule 5 need not be stated in the petition. It is true that the word " miscount " is not defined like " personation ", " treating " and " bribery " but I think it has passed into the dictionary of election law and bears a restricted meaning and not a multitude of meanings in the context of a claim by a candidate, who was not returned, that he had a majority of votes and should be declared to be duly elected. I have come to the conclusion, though with some hesitation, that the petition should not be thrown out on the ground that it does not disclose

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any cause for relief or that it has failed to conform to the requirements of the Order in Council.

The next objection is based on the order discharging the 2nd and 3rd respondents. It is contended only by Mr. Chitty that without these respondents the petition is improperly constituted because persons who might be adversely affected if the petition succeeds are not before court. It is said that if upon a recount it is found that either the 2nd or 3rd respondent or both were not entitled to be returned they may be in peril of losing their seats. I must say that these respondents did not take the same pessimistic view. Almost before a word of argument was spoken in the case they departed willingly with an order for costs in their favour.

It would be helpful if in the first instance I deal with some authorities cited at the argument. In *Line v. Warren*[1] an election petition was presented under the Municipal Corporations Act, 1882, against only three out of four persons who were elected to fill vacancies in the town council of a borough. It was common ground that three candidates were wrongully refused nomination and were thereby prevented from going to the poll with the result that the whole election might have been declared void had the fourth member, one Thomas Harris, been a party to the petition.

Mathew, J., in giving judgment for the petitioners and holding that the respondents had not been duly elected stated,

> " The first question raised is whether the election of the respondents can be questioned by petition in the absence of Thomas Harris, who was elected at the said election and who has not been made a party to these proceedings . . . . The argument is that, inasmuch as the same objection might have been made to Harris's election, the court cannot do anything in the absence of Harris, because it cannot in such a case declare the election void as to three of the persons elected without doing so to the fourth also. I cannot see any foundation whatever for that contention. It seems to me that the scope of the legislation on the subject is to enable the election of particular persons to be challenged by petition. It is the duty of the court to pronounce on the prayer of such petition, but it can only deal with the case of the persons whose election is objected to. Harris's election was not objected to by the petition and it is clear that he must now be treated as duly elected, because there has been no petition presented against him within the time limited for that purpose. "

Day, J., concurred in this judgment which was upheld in the Court of Appeal before a bench consisting of Brett, M.R., Cotton, L.J., and Lindley, L.J.

The case of *Lord Monkswell and others v. Thompson*[2] was also one under the Municipal Corporation Act, 1882. Eight candidates contested five seats. A petition was presented against Thompson who had polled

[1] *(1884–5) 14 Q. B. D. 548.*

[2] *(1898) 1 Q. B. D. 479.*

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13, 221 votes and his seat was claimed for one Johnson who had polled 13,218 votes on the ground that he was duly elected and ought to have been returned. On a recount the court in declaring that Johnson was elected in place of Thompson held it was enough for the former to establish that he had more votes than Thompson and that it was unnecessary for him to recount the votes given for the first four candidates. Channell, J., says in his judgment,

> " Then if you start with the returning officer's figures, who is it who says they are wrong ? The petitioners do not. They say that the figures of the first four are right and that it is only those of the fifth and sixth that are wrong. But he has given no evidence in support of that suggestion. If, indeed, he had shown that those figures were wrong—subject to the question as to the way in which he must have shown it, whether in this petition or in another petition—and that any one of those four had a less number of votes than he has now been ascertained to have, then I think that he could not be unseated. "

A clear principle emerges from these authorities that once the period of twenty-one days prescribed by section 83 (1) had elapsed the 2nd or 3rd respondent was not in peril of being unseated on an election petition claiming a recount of the votes. That being so I hold that the objection that the petition is not properly constituted by reason of the discharge of the 2nd and 3rd respondent fails.

Is the present case one in which it would be proper for me to order that a recount of the ballot papers be taken ? The only material before me consists of the three affidavits which are almost to the same effect. I have to bear in mind the following points :

(*a*) I am entitled to presume that as between the petitioner and the 1st respondent and the other candidates the votes were correctly counted. The burden was on the petitioner to prove that an error of a magnitude sufficient to turn the scales in his favour might reasonably have occurred.

(*b*) The honesty, care and competence of those responsible for the counting are not challenged.

(*c*) There is no evidence that any of the seven candidates or the fourteen counting agents detected a single case of miscounting or even alleged that there was a miscount.

(*d*) It is not suggested that having regard to the number of ballot papers the returning officer did not have an adequate staff of assistants and clerks or that the counting was required to be done at a rate which multiplied the ordinary chances of error.

(*e*) Although the petitioner was aware of the comparatively narrow majority in favour of the 1st respondent, he did not avail himself of the right of asking for a recount under section 48 (7), from which I am entitled to presume that he was not then dissatisfied with the counting.

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The affidavits say that the conditions under which the counting took place were such that " it was impossible for the candidates or their agents to keep an eye on the count or by any means have an effective check ". It is surprising that no protest was registered at the time and that this allegation should be made as late as six months after the counting. In two paragraphs the petitioner states " to the best of my knowledge and belief " there was a miscount of votes and error in the rapid sorting out of the votes. There is no material before the court for testing the grounds of the petitioner's belief nor is there evidence of the facts which constitute his knowledge nor any evidence of the sources from which he gathered those facts.

In paragraph 10, read with paragraph 9 of the petitioner's affidavit, there is a reference to a discrepancy of 97 votes according to certain figures said to have been announced by the returning officer but no submission on this matter was made by any of the learned counsel who addressed me. At one stage of the argument I had the impression that neither the 1st nor the 4th respondent accepted the correctness of the statements in paragraphs 9 and 10. Even if I accept them as correct, they do not, in the light of the other considerations, afford any ground for believing that the votes cast for the petitioner were not *counted* for him.

Both in his opening address and reply Mr. Izadeen Mohamed referred me to a passage in *Fraser on Parliamentary Elections* (3rd edition, p. 222) to the effect that an application should be supported by affidavit showing the grounds for supposing that there has been a miscount and that where the majority is a very small one the application is, as a rule, allowed almost as of course. Before following this practice I have to caution myself on the difference between the English law and ours on two fundamental points, namely, that under the Order in Council rejected ballot papers cannot be called in question on an election petition and that no discretion is given to a returning officer to refuse a recount if asked for by any candidate.

It is stated in *Halsbury's Laws of England* (3rd edition), Volume 14, page 310,

> " A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer. "

The authority relied on is the case of the *Stephney Division* [1]. As I have said before the provision in section 49 (5) is peculiar to our law and has the effect of reducing a recount ordered by court to a mechanical process. I ought to have good ground for believing that what has already been done under proper supervision did not yield an accurate result. In paragraph 12 of the affidavit the petitioner states,

> " The count of so large a number of votes was a long and wearying process and any attempt at a renewal of the process at that juncture would have been abortive. "

[1] *(1886) 4 O'M. & H. 34.*

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I cannot accept this as an excuse for the petitioner not applying for a recount. Had there been an application for a recount it is more likely that the returning officer, knowing that the majority of the 1st respondent over the petitioner was only 37 votes, would have, in collaboration with the counting agents, taken stringent precautions against errors in the recount. While I do not say that, if a petitioner fails to make an application to the returning officer under the proviso to sub-section 7 of section 48, he would be precluded from petitioning the court for a recount, it would, generally speaking, be undesirable for an election court in its discretion to provide a petitioner with a remedy where he could have insisted on an analogous remedy elsewhere as a matter of right.

Had there been a recount by the returning officer the figures ascertained thereby would have been of invaluable assistance to this court in judging whether a *prima facie* case has been made out for the exercise of what Mr. Izadeen Mohamed always referred to as the discretionary power of the court to order a recount. If that material is not available, the petitioner is alone to blame.

I refuse on the affidavits relied on by the petitioner to order a recount of the ballot papers. In the result the petition fails and is dismissed with the declaration that the 1st respondent has been duly returned. The petitioner will pay to each of the contesting respondents a sum of Rs. 3,000 as costs.

Petition dismissed.

1957 *Present* : **Sinnetamby, J.**

DAHANAYAKE, Appellant, *and* P. B. RATNAYAKE (Inspector of Police), Respondent

S. C. 1155—M. C. Colombo South, 75,484

Autrefois acquit—" *Discharge* "—" *Acquittal* "—*Criminal Procedure Code, ss. 190, 191, 330.*

In case No. 72,835 the accused was charged with certain offences. On the last date of hearing the prosecuting Inspector applied for a postponement and, when it was refused, asked for a warrant on an absent witness. The accused was thereupon " discharged ". He was subsequently charged in the present case in respect of the same offences.

Held, that the order of discharge in case No. 72835 must be regarded as an order made under section 190 of the Criminal Procedure Code and one which amounted to an order of acquittal. The accused was therefore entitled to plead " *autrefois acquit* " in the present case.

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APPEAL from a judgment of the Magistrate's Court, Colombo South.

Neville Wijeratne, for the accused-appellant.

S. Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 20, 1957. SINNETAMBY, J.—

The accused in this case was charged with committing certain offences made punishable under the Motor Traffic Act. When the case was taken up for trial on 13/9/56 the accused-appellant pleaded "autrefois acquit" in as much as he had earlier been charged in respect of the same offences in M. C. Case No. 72835 and discharged. The learned magistrate held that the provisions of section 330 of the Criminal Procedure Code did not apply to the facts of this case and that the plea failed. The accused was tried and convicted and he appeals against the order of the learned magistrate.

The question that arises for consideration is whether on the facts of this case the order of discharge made by the learned magistrate in M. C. Case No. 72,835 is an order under section 190 of the Criminal Procedure Code and therefore amounts to an acquittal although the word used is "discharged". The fact that the magistrate used the word "discharged" is not conclusive of the matter and does not *per se* make it an order under section 191. One has to consider the facts to decide whether the order is made under section 190 in which event the plea of "autrefois acquit" is available irrespective of the word used in terminating the proceedings or whether it comes under section 191 in which event the plea is not available.

A distinction was sought to be drawn by learned Crown Counsel between the present case and the cases of *Don Abraham v. Christoffelsz* [1], *Adrian Dias v. Weerasingham* [2] and *K. Edwin Singho v. P.S. Nanayakkara* [3]. In all these cases on the magistrate refusing a postponement the prosecuting officer stated that he could not go on with the case or made a statement to that effect. In the present case the inspector asked for a date and when it was refused asked for a warrant on an absent witness. Twice previously the case had been postponed because of the absence of this same witness who was a sergeant in the Police Force and the magistrate refused the application, but there is nothing on record to indicate that the prosecuting inspector had stated that he was unable to proceed without the evidence of the absent witness.

In my view it makes no difference whether the record contains an entry to the effect that the prosecution offers no evidence in support of the charge or not. If from the facts it is clear that the prosecution is unable to go on with the case the order terminating the proceedings must be deemed to be an order of acquittal.

[1] *(1953) 55 N. L. R. 92.* [2] *(1953) 55 N. L. R. 135.*
[3] *(1956) 53 C. L. W. 95.*

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If the prosecuting inspector was able to go on I have no doubt he would have expressed his willingness to do so and the magistrate would then have been obliged to hear the evidence : the fact that he even applied for a warrant on the absent witness who was a member of the Police Force shows what importance he placed on this witness's evidence. On the facts it is reasonable to infer that the proceedings on the last date of hearing in M. C. Case No. 72,835 were terminated because the prosecution had no evidence to offer or felt that the evidence available was insufficient to substantiate the charge. The order of discharge must therefore be regarded as an order made under section 190 of the Criminal Procedure Code and one which amounts to an order of acquittal. The plea of " autrefois acquit " should therefore be upheld. I set aside the order of the learned magistrate and acquit the accused.

Appeal allowed.

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1957 *Present :* **Basnayake, C.J., and Pulle, J.**

ABDUL HAFEEL, and another Appellant, *and* MUTTU BATHOOL, Respondent

S. C. 582—D. C. Galle, 5,228/L

Landlord and tenant—Monthly tenancy—Death of tenant—Effect on contract of tenancy—Rent Restriction Act, s. 18.

On the death of a monthly tenant the contract of tenancy terminates at the end of the month in which the tenant dies, and the heirs or executors of the deceased tenant are not entitled to occupy the premises thereafter except upon a fresh contract with the landlord or unless they can avail themselves of section 18 of the Rent Restriction Act.

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for Plaintiff-Appellants.

H. W. Jayewardene, Q.C., with *M. Markhani*, for Defendant-Respondent.

Cur. adv. vult.

April 11, 1957. BASNAYAKE, C.J.—

In this action the plaintiffs who claim to be the co-owners of premises No. 124 in Main Street, Galle, each being entitled to an undivided half share ask for a decree in ejectment and damages against the defendant who is the widow and executrix of the estate of one A. M. A. Cader.

It would appear that Cader was a monthly tenant of premises No. 124 at the time of his death and that he carried on therein a hardware business. Cader died on 6th March 1951 and his widow the defendant has since that date continued to occupy the premises and carry on the same business therein. The plaintiffs assert that the defendant has no right to remain in the premises and is therefore in unlawful occupation of it and seek her removal by process of court. No rent has been accepted by the plaintiffs from the defendant at any time and they have all along refused to recognise her as tenant. The plaintiffs claim from her damages at the rate of Rs. 115/76 per mensem from the date of Cader 's death till she delivers up possession of the premises and they are placed in quiet possession.

The defendant contended at the trial that on Cader 's death his rights and obligations under the contract of tenancy passed by operation of law to her as the executrix of his last will.

The learned trial Judge has upheld that contention. He bases his finding on a statement at page 102 of Lee and Honore's Law of Obligations.

2——J. N. B 65979-1,593 (6/57)

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The appellant canvasses that finding. It is submitted that on the death of a monthly tenant the contract of tenancy comes to an end and the heirs or the executors of the deceased tenant are not entitled to remain in the premises.

The passage in Lee & Honore on which the learned trial Judge has based his judgment is as follows :—

> " 389. Effect of death of parties. In the absence of agreement to the contrary, the rights and duties of the lessor and of the lessee are (normally) transmitted on death to their representatives ; but a lease expressed to be at the will of either party is determined by that party's death. "

The authorities cited in support of this statement are Grotius 3.19.9, Voet 19.2.9 and Ontwerp 2603. Of these authorities I have not been able to get the last named work. Grotius's statement is as follows :—

> " But a person may also let for as long as he pleases, which letting is understood to expire by death, although other lettings, in which the time is fixed, are valid after the death of the lessee, and go over to his heirs. "

Voet's statement runs thus (Gane's translation) :

> " Then again in the second place the contract is either so made that it has an end at a definite time, say in one, two or five years ; or so that its duration is indefinite, " as long " for instance " as the lessor should be willing ". In such a case it has been held that on the analogy of a loan on sufferance it comes to an end both on the death of the lessor and on the announcement of an adverse intention being made by the lessor in his life-time. "

I am unable to find in any of these statements support for the view that on the death of a monthly tenant the tenancy passes automatically to his executor or executrix. Under our law (section 2, Prevention of Frauds Ordinance) a lease of immovable property, other than a lease at will, or for any period not exceeding one month, to be of any force or avail must be in writing and signed by the parties thereto in the presence of a notary and two witnesses and attested by such notary and witnesses. In the instant case it is not claimed by either party that there was an instrument of lease attested in the manner required by section 2 of the Prevention of Frauds Ordinance and it is common ground that the deceased held the premises on a monthly tenancy or in the words of our enactment on a lease for a period not exceeding one month. A lease for a period not exceeding one month commonly known as a monthly tenancy is renewed each month by tacit agreement. Such tacit renewal of leases is known to Roman Dutch Law. Voet states in Book XIX, Tit. 2, S.9 :

> " To make this more perfectly plain you should know that not only express but also tacit leases are approved in law. On those lines if a lessee does not at all hand back the use on the completion of the time which was originally specified for the hiring, but persists in the

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using without objection from the lessor, the lease appears to have been tacitly prolonged or renewed. It is renewed along with any obligation of pledge which the lessee had established over his own property in security of the original lease or rent."

According to the same author the renewal is on the same conditions as those on which the earlier hiring rested. This is how he puts it :

"Surely everyone is understood to have made a new hiring, so far as that could be done, on the same conditions as those on which the earlier hiring rested, when he continued in the hiring after the passage of the scope of time of the original contract."

In a monthly tenancy the lease is tacitly renewed on the first day of each month by the lessor not indicating to the tenant before that day that he wants to terminate the lease and the lessee remaining in the house without notifying the lessor that he proposes to quit. The terms of renewal must be taken to be the same each month unless they are changed by mutual agreement. It might be asserted that if the tenancy terminates at the end of each month there is no need for a month 's notice of termination of tenancy either by the lessor or lessee, and that either party can on the last day of the tenancy inform the other that he will leave at the end of the day. But there is a reason behind the requirement of notice. The reason is that if a tenant is suddenly informed on the last day of a month that he will have to find another house on the next day he cannot do so. So the law requires that reasonable notice should be given of non-renewal of tenancy even if the lease expires at the end of each month. Our practice that the landlord or the tenant may terminate the tenancy or in the language of our common law, the letting or the hiring, as the case may be, in the case of a monthly tenancy upon a month 's notice terminating on the date on which the period of tenancy expires is based on this requirement of the Roman-Dutch Law. Voet states the law thus :

"In like manner the law among us and in very many other countries stands nowadays so, that a hiring of a house or of male or female servants is held to have been prolonged after the end of the original period up to the next date for quitting by the silence of both parties. Definite times for quitting houses and definite terms for services let out by male and female servants are found to be fixed by statute or by long established usages. At the same time, as even topers and barbers know, a need has been laid on for the giving of timely notice by those who at the end of the time of letting do not wish to avail themselves any longer of the use or services, or to render them for the future." (Book XIX, Tit. 2, S. 10, Gane 's translation.)

Van Leeuwen too (Censura Forensis, Book IV, Ch. XXII, S. 14) holds the same view. He says :

"At the expiry of the terms of the lease, the letting and hiring comes to an end also, unless the owner of the estate allows the lessee to remain longer on the farm, in which case the lease itself is to be tacitly continued."

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In the case of monthly tenancy there is no difficulty in determining the period for which the lease is tacitly continued but in the case of other leases the period will not extend beyond the period of reasonable notice required for terminating the lease that has tacitly come into being. On this point there appears to be some conflict of opinion between Van Leeuwen and Grotius and others whose opinions Grotius accepts ; but it is not necessary for the purpose of the present case to go into the matter.

I now come to the question that arises for decision here. Did the tenancy of Cader devolve on his executrix on his death ? I have stated above that a monthly tenancy is a contract of tenancy for a period not exceeding a month as shown in the calendar regardless of the number of days in a month. It expires on the last day of a month and is tacitly renewed by the silence and conduct of parties at the end of a month and the beginning of the next. What then is the position if, as in the instant case, a hirer dies after a month's tacit contract has commenced; but before the end of the month—Cader died on the 6th of March—. As the contract was properly made though tacitly it will be in force for the term for which it was made, viz., the currency of the month and cannot at the end of that month be renewed tacitly if one of the contracting parties is dead. The contract therefore comes to an end at the end of the month in which the hirer dies and his heir or executor has no right to occupy the house thereafter except upon a fresh contract with the lessor or landlord whichever term we may choose to use. This I think is the effect of Van Leeuwen's statement (Censura Forensis, Part I, Book IV, Ch. XXII S. 18 (Barber 's Translation)—

> " At the death of either of the parties the contract of letting or hiring is not terminated, but passes to the heirs both of the lessor and of the lessee until the time fixed arrives. "

The term fixed in a monthly tenancy is the end of the month. Both according to Van Leeuwen (Censura Forensis Book IV, Ch. XXII, S. 1) and Voet (Book XIV, Tit. 2, S.1), the contract of letting and hiring is governed by almost the same rules as purchase and sale. According to these rules upon the death of a party there can be no tacit renewal of a contract and there can be no new contract between the executor or heir and the lessor unless such a contract is concluded between the parties.

Applying this view of the law to the facts of this case it would appear that Cader having died on 6th March 1951 the tacit contract of tenancy which began on 1st March came to an end on 31st March 1951 and as the defendant and the plaintiffs did not enter into a fresh contract of tenancy on 1st April 1951 or at any time thereafter the defendant had no right to occupy the premises and is not entitled to remain therein. The plaintiffs are therefore entitled to succeed in their action.

The defendant was entitled on the death of Cader to take advantage of section 18 of the Rent Restriction Act, but she does not appear to have done so. The time for giving the notice prescribed therein is long past and that section is now of no avail to her.

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The appeal is allowed with costs both here and below. The plaintiffs are entitled to judgment as prayed for except that the date for computing the monthly damages will not be the date of Cader 's death, but 1st April 1951. We direct that decree be entered accordingly.

PULLE, J.—I agree.

Appeal allowed.

1956 *Present* : **Weerasooriya, J., and Sansoni, J.**

KANDASWAMY *et al.*, Petitioners, *and* KANDAVANAM *et al.*, Respondents

S. C. 586—Application for Conditional Leave to appeal to the Privy Council in S.C. 293, D.C. Point Pedro 3,955.

Privy Council—Application for conditional leave to appeal—Notice to opposite party—Power of Proctor to give such notice without client's authority—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 2.

Where a Proctor, whose proxy did not empower him to act for his client for the purpose of takings steps to appeal to the Privy Council, purported, without any other authority from his client, to give notice to the opposite party in terms of Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance—

Held, that the notice was invalid. Nor could such notice be made valid by any subsequent grant of authority after the expiry of the period of fourteen days prescribed under the Rule.

APPLICATION for conditional leave to appeal to the Privy Council.

S. J. V. Chelvanayakam, Q.C., with *A. Nagendra*, for the plaintiffs-petitioners.

C. Thiagalingam, Q.C., with *V. Arulambalam* and *C. Chellappah*, for the 1st and 2nd defendants-respondents.

Cur. adv. vult.

May 30, 1956. WEERASOORIYA, J.—

This is a joint application by the plaintiffs and the 3rd and 4th defendants for conditional leave to appeal to Her Majesty in Council against the judgment of this Court which is reported in 57 New Law Reports, page 241. The facts of the case are fully set out in that judgment.

The respondents to the present application are the 1st and 2nd defendants, and several objections were taken on their behalf by Mr. Thiagalingam against the granting of the application.

One of these objections was that no notice of their intended application for leave to appeal was given by the applicants in terms of Rule 2 of the rules in the Schedule to The Appeals (Privy Council) Ordinance

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(Cap. 85). On the 5th November, 1955, which is within the period of fourteen days allowed for such notice under Rule 2, a registered letter was posted to the 1st and 2nd defendants (who are husband and wife) giving them notice of the intended application. This letter is signed by Proctor Subramaniam as proctor for the plaintiffs and by Proctors Kandiah and Mylvaganam as proctors for the 3rd and 4th defendants. While proxies in favour of these proctors had been granted by the plaintiffs and the 3rd and 4th defendants respectively for the purpose of the action, it was conceded by Mr. Chelvanayakam who appeared for them at the hearing of this application that the authority granted by those proxies did not empower the proctors to act for them for the purpose of the requisite notice under Rule 2. In the original application and supporting affidavit filed by the applicants it was not stated that the proctors, in purporting to give on their behalf the notice in the registered letter referred to, acted on any authority other than the authority derived from the proxies already granted in their favour.

After the 1st and 2nd defendants had filed a statement of objections, which included the particular objection under consideration, a joint counter-affidavit dated the 5th February, 1956, was filed by the applicants in which it is stated that they had " duly authorised " their proctors to send the notice dated the 5th November, 1955. This vague statement leaves it open to conjecture whether the applicants relied on such authority as was conferred in the proxies previously granted by them to the proctors who signed that notice, or whether an express authority to send the notice had been given by them to the proctors. No affidavit has been filed by the proctors themselves as to the nature of the authority under which they purported to act in giving that notice. In the circumstances I hold that the applicants have not made out to the satisfaction of this Court that at the time when the notice dated the 5th November, 1955, was sent the proctors who signed it had any authority to act on behalf of the applicants for the purpose of such notice.

Mr. Chelvanayakam submitted, however, that even if that notice had been given without the authority of the applicants, the subsequent ratification by them of the act of the proctors has had the effect of making it the act of the applicants. The purported ratification is contained in the same affidavit of the applicants dated the 5th February, 1956, which, however, is long after the expiry of the period of fourteen days within which the notice under Rule 2 had to be given.

The doctrine of ratification has been explained by Tindal, C.J., in *Wilson v. Tumman* [1] in the following terms :—

> " That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by his act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. "

[1] *(1843) 6 M & G. 236 at 242.*

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But Bowstead in his Law of Agency [1] states that ratification can only take place in accordance with and subject to certain rules and qualifications, one of which is that where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third person. It has, thus, been held that where a person purporting to act on behalf of a landlord, but without his authority, gives a tenant notice to quit, such notice cannot be made binding on the tenant by the landlord's ratification after the notice had begun to operate—*Mann v. Walters* [2]. So also, where two partners had agreed that on the death of one of them the survivor shall have the option of purchasing the share of the deceased on giving notice to his executors within three months after death and, one of the partners having subsequently died, a solicitor purporting to act on behalf of the surviving partner, but without his authority, gave notice to the executors of the deceased partner, within the prescribed time, of the intention of the surviving partner to exercise the option, it was held that such notice could not be ratified after the expiration of the time so as to bind the executors—*Dibbins v. Dibbins* [3].

It is clear, therefore, that the ratification by the applicants on the 5th February, 1956, of the notice given on the 5th November, 1955, cannot have the effect contended for by Mr. Chelvanayakam. Consequently the applicants must be regarded as having failed to give the requisite notice in terms of Rule 2. The provisions of this rule are peremptory and the Court has no power to extend the time for the giving of such notice unlike where an act is required to be done within a prescribed time under the Appellate Procedure (Privy Council) Order, 1921, which has been made under Sections 3 (*b*) and 4 (1) of the Appeals (Privy Council) Ordinance and which contains express provision (Rule 18) for extending the time allowed by that Order for doing any act notwithstanding that the time has expired. In the result, the present application for conditional leave to appeal cannot be maintained.

There are certain decisions of this Court which have held that an act done as a step in a pending action by a proctor purporting to do it on behalf of a party to the action, who had, however, omitted to grant a proxy authorising such act, may be ratified by the subsequent granting of a proxy even though after the expiry of the time for doing such act. In *Kadirgamadas et al. v. Suppiah et al.* [4] the proctor who had filed the petition of appeal on behalf of some of the appellants had no proxy in his favour at the time he filed the appeal. But it was held, following the decision in *Tillekeratne v. Wijesinghe* [5], that the subsequent filing of a proxy, even after the appealable time had lapsed, cured the irregularity. In the present case no proxy has been granted even subsequently by the applicants in favour of the proctors who sent the notice dated the 5th November, 1955, authorising them to represent the applicants for the purposes of proceedings under the Appeals (Privy Council) Ordinance. Moreover, the decision in each of the two cases referred to went on the basis that, notwithstanding the absence of the proxy, the

[1] (*11th ed*) *36.*
[2] (*1830*) *10 B. & C. 626.*
[3] (*1896*) *2 Ch. 348.*
[4] (*1953*) *56 N. L. R. 172.*
[5] (*1908*) *11 N. L. R. 270.*

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Court was satisfied that the proctor had, at the material time, the authority of the client on whose behalf he purported to act. The subsequent granting of the proxy did not, therefore, strictly amount to a ratification (of an act done without precedent authority) as explained in *Wilson v. Tumman* (*supra*), and these decisions do not appear to be a departure from the rule stated by Bowstead that where it is essential to the validity of an act that it should be done within a certain time the ratification of it must also be within that time. I have already stated my reasons for holding that the notice dated the 5th November, 1955, was not sent with the authority of the applicants and cannot be regarded as a notice given by them.

The conclusion which I have reached makes it unnecessary for me to consider the other objections raised by Mr. Thiagalingam.

The application for conditional leave to appeal is refused with costs.

SANSONI, J.—I agree.

Application refused.

1957 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

S. SUBRAMANIAM, Appellant, *and* K. THANGAVADIVELU *et al.*, Respondents

S. C. (Inty.) 138—D. C. Point Pedro, 5,294

Partition action—Deposit of preliminary survey fees—Power of Court to alter date fixed for such deposit—Partition Act, No. 16 of 1951, ss. 8, 10 (1).

Where, in a partition action, a date is fixed for preliminary survey fees to be deposited by the plaintiff, section 10 (1) of the Partition Act does not preclude the Court, in an appropriate case, from subsequently allowing a longer period for the deposit, provided that the alteration of the date is made prior to the expiration of the time originally fixed.

APPEAL from an order of the District Court, Point Pedro.

C. Chellappah, for the 5th defendant appellant.

S. Sharvananda, for the plaintiff respondent.

Cur. adv. vult.

April 12, 1957. H. N. G. FERNANDO, J.—

This case involves what might be an important question of procedure under the new Partition Act (No. 16 of 1951), if it is decided in favour of the appellant. The plaint was accepted on 13th January, 1956, by the District Judge, who then ordered Rs. 75 for preliminary survey fees to be

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deposited by the plaintiff on 22nd February, 1956. On the latter date, the Judge ordered the fees to be deposited on 29th February, 1956, by which date the fees were actually deposited. Summons then issued on the defendants, and one of them, the present appellant, filed proxy and moved that the action be dismissed on the ground of the failure of the plaintiff to deposit the fees on the date originally fixed, that is on the 22nd February, 1956. This motion was refused by the District Judge and the present appeal is against his order of refusal.

Section 8 of the Act required the Court to fix a date on or before which the preliminary survey fees shall be deposited, and section 10 (1) provides as follows :—

> " 10 (1) Where the plaintiff in a partition action fails to deposit, on or before the date fixed for the purpose, such estimated costs of the preliminary survey as are determined by the court under section 8, the court shall dismiss such action. "

The argument for the appellant is that the provisions of section 10 (1) are peremptory, and that the Court is bound to dismiss the action if the fees are not deposited on or before the date fixed in the original order under section 8. The appellant also points to section 9, in which, *by contrast*, the Court has express power to extend the time for the payment of *balance* survey fees.

I do not disagree with the argument that failure to deposit the preliminary survey fees within the time fixed by the Court by order under section 8 will involve a dismissal of the action ; indeed the Court would be bound to enter an order of dismissal *ex mero motu* in the event of such a failure, because the clear intention is that a partition action cannot be proceeded with unless there is a preliminary survey, the cost of which must in the first instance be defrayed by the plaintiff. But the question is whether the fixation of a date is so " final " an order that the Court thereafter lacks the discretion to extend the time originally allowed.

It is important to note that the order under section 8 (*b*) is one made *ex parte*, and that the defendants will not even be brought into the action by issue of summons until the fees are deposited. The proceedings, therefore, are at a stage during which only the Court and the plaintiff are concerned, *and no other* person. In the present case, the Court had ordered the survey fees to be deposited " for 22nd February ", and it was open to the plaintiff to deposit the fees during office hours on that day. But before the close of office hours, the Court, presumably upon an application made in that behalf, in effect " amended " its original order by specifying 29th February as the date on or before which the fees should be deposited. In principle, the case is no different from one in which the Court alters its original order under section 8 (b) *on the day after it is made*, in order to allow a longer period for the deposit of the fees. Considering that the date is originally fixed in its discretion, and that only the Court and the plaintiff are concerned at this stage of the proceedings, the alteration of the time originally fixed, if that alteration is made before the expiration of that time, is merely tantamount to an original fixation of the later date. The very fact that section 10 (1) penalizes a plaintiff by

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rendering abortive the expenditure incurred by him in having a plaint filed, lends support to the view that the Legislature did not intend in section 8 (*b*) to curtail the discretion of the Court, in appropriate cases, to grant extensions of time prior to the expiration of the time originally allowed. We do not have in this appeal to decide the question whether the Court has a discretion to extend the time for the deposit of the fees *after* the date originally fixed, but the reasons which I have given in this judgment should not be construed to be an answer in the negative to that question.

The appeal is dismissed with costs.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.

1956 *Present :* **Basnayake, C.J., and Pulle, J.**

M. H. MOHAMED, Petitioner, *and* (1) W. GOPALLAWA, (2) DR. N. M. PERERA, Respondents

S. C. 531—IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON WILLIAM GOPALLAWA, COMMISSIONER OF THE COLOMBO MUNICIPAL COUNCIL, UNDER SECTION 42 OF THE COURTS ORDINANCE (CHAP. 6)

Municipal Council—Summoning of meetings which are to be presided over by the Commissioner—Procedure—Municipal Councils Ordinance, No. 29 of 1947, as amended by Act No. 7 of 1954, ss. 19 (2) (a) (b) (c), 20 (2), 21—Mandamus.

Where a second Special Meeting of a Municipal Council is summoned by the Commissioner in terms of sections 19 (2) (*b*) and 20 (2) of the Municipal Councils Ordinance to consider whether or not a resolution which was passed at a previous Special Meeting should be confirmed, there is no obligation in law to set out the specific motion which is to be moved at the second meeting, provided that it is clear from the notice convening the meeting that the members are required to attend a meeting at which the matter for consideration is whether or not the resolution referred to in the notice should be confirmed. If the notice convening the meeting satisfies the requirements of section 20 (2), the Commissioner is, by virtue of section 19 (2) (*c*), under a duty to permit the meeting to transact the business for which it has been convened.

APPLICATION for a writ of *mandamus* on the Commissioner of the Colombo Municipal Council.

H. V. Perera, Q. C. with *H. W. Jayawardene, Q.C., Edmund Cooray* and *Izadeen Mohamed*, for petitioner.

S. Nadesan, Q.C., with *Walter Jayawardena* and *T. Senathirajah*, for first respondent.

Colvin R. de Silva, with *Walter Jayawardena* and *A. B. Perera*, for second respondent.

Cur. adv. vult.

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February 8, 1956. BASNAYAKE, C.J.—

The petitioner is a member of the Municipal Council of Colombo. The first respondent is the Commissioner and the second respondent is the Mayor of that Council. The petitioner asks for a mandate in the nature of a writ of mandamus directing the first respondent—

(*a*) to continue the Special Meeting which commenced at 2.30 p.m. on Monday the 17th of October, 1955, till the business, notice of which he had given, is transacted and concluded ; and

(*b*) for the said purpose to summon all the Councillors to re-assemble on a date and at a time to be fixed by this Court by giving to each Councillor such notice as this Court might direct.

No relief is claimed against the second respondent.

The material facts relating to the application are as follows :—

On 23rd September, 1955, a requisition to convene a Special Meeting of the Municipal Council under section 19 (2) (*a*) of the Muncipal Councils Ordinance, No. 29 of 1947, as amended by Act No. 7 of 1954, (hereinafter referred to as the Ordinance), was made to the first respondent in writing signed by sixteen Councillors. That requisition was as follows :—

" In terms of Section 19 (2) (*a*) of the Municipal Councils Ordinance No. 29 of 1947 as amended by the Municipal Councils (Amendment) Act No. 7 of 1954, We the undersigned sixteen members of the Colombo Municipal Council do hereby request you to convene a special meeting of the Colombo Municipal Council to consider the resolution herein below set out for the removal of Dr. N. M. Perera from the office of Mayor of the said Municipal Council.

The resolution above referred to :—

" This council resolves that Dr. N. M. Perera be removed from the office of Mayor of the Colombo Municipal Council in terms of Section 19 (2) (*a*), 19 (2) (*b*), and Section 15 (2), of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954.

Proposer : Mr. M. H. Mohamed,
Member for Maligawatte ".

On the same date the petitioner addressed a letter to the Municipal Commissioner in the following terms :—

" With reference to the requisition signed by me and fifteen other members of the Council and delivered to you this day requesting you to convene a Special Meeting of the Council to consider a resolution for the removal of Dr. N. M. Perera from the office of Mayor of the Colombo Municipal Council,

I do hereby give you notice that the resolution in the said requisition fully set out which is in the following terms, to wit,

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" This council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of Section 19 (2) (*a*), 19 (2) (*b*), and Section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954,

will be moved by me at the said Special Meeting. "

A Special Meeting was summoned for 1st October, 1955, by the first respondent in pursuance of the requisition, and notice of that meeting, dated the 24th of September, 1955, was sent by him to each of the members in the following terms :

" Whereas a requisition for a Special Meeting of the Council in terms of Section 19 of the Municipal Councils Ordinance No. 29 of 1947, as amended by Municipal Councils (Amendment) Act No. 7 of 1954, has been made to me, I, W. Gopallawa, Municipal Commissioner, Colombo, in terms of the provisions of Section 20 of Ordinance No. 29 of 1947, as amended by the Municipal Councils (Amendment) Act No. 7 of 1954, do hereby summon you to a Special Meeting of the Council to be held at 9.30 a.m. on Saturday the 1st October, 1955, at the Town Hall, Colombo, to consider the following motion :—

Mr. M. H. Mohamed, Member for Maligawatte, to move :—

" This Council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of Section 19 (2) (*a*), 19 (2) (*b*), and Section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954 ".

At the meeting held on 1st October, 1955, the resolution that Dr. N. M. Perera be removed from the office of Mayor of the Colombo Municipal Council was passed by the requisite majority and the first respondent proceeded in terms of section 19 (2) (*b*) to summon a meeting (hereinafter referred to as the second meeting) to consider whether or not that resolution should be confirmed. The notice of that meeting dated the 5th of October, 1955, was as follows :—

" Whereas the Municipal Council of Colombo at its Special Meeting held on 1st October, 1955, in terms of the provisions of Section 19 of Ordinance No. 29 of 1947, as amended by the Municipal Councils (Amendment) Act No. 7 of 1954, has passed the following resolution by not less than one half of the total number of Councillors :—

" This Council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of Section 19 (2) (*a*), 19 (2) (*b*), and Section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954 ".

I, W. Gopallawa, Municipal Commissioner, Colombo, in terms of Section 19 of the Municipal Councils Ordinance No. 29 of 1947, as amended by the Municipal Councils (Amendment) Act No. 7 of 1954,

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do hereby summon you to another Special Meeting of the Council to be held at 2.30 p.m. on Monday the 17th October, 1955, at the Town Hall, Colombo, to consider whether or not that resolution should be confirmed. "

On the date of the second meeting, the first respondent presided as required by section 19 (2) (*c*) of the Ordinance. At the commencement of the meeting he called upon the Secretary to read the notice convening the meeting. After it was read the first respondent addressed the assembled members thus :—

" Gentlemen, now you will consider whether or not that resolution should be confirmed ".

Then a member, Dr. W. D. de Silva, rose to a point of order that the meeting was irregular as only 16 had voted for the resolution for the removal of the Mayor. He contended that unless 17 members voted for the resolution the requirements of section 15 (2) would not be satisfied. The first respondent overruled the point of order.

The petitioner states in his affidavit that immediately after this ruling he rose from his seat to move the confirmation of the resolution passed at the previous Special Meeting " to remove the second respondent from the said office of Mayor ". The second respondent interrupted the petitioner with these words :—

" I do not know why the hon. member for Maligawatte has risen. But I want to ask one or two questions. I presume, Mr. Commissioner, what was just now read out by the Secretary of the Council is the agenda for this day.

Commissioner : That is so.

Dr. N. M. Perera : May I have that recorded, Sir, because that is very important.

Commissioner : Yes.

Dr. N. M. Perera : The second point, Sir, is, may I know whether any notice of a motion has been given ?

Commissioner : No notice has been given. This is the notice.

Dr. N. M. Perera : I would like that also recorded.

I want to rise to a point of order and I would like your patient consideration because, if I may say so without any attempt to prejudice your mind, this is a matter over which I have had occasion to consult legal opinion, and I am submitting my point of order on that basis ".

The second respondent then proceeded to elaborate his point of order and the first respondent ruled as follows :—

" Dr. N. M. Perera rises to a point of order that there is no resolution before the House whether or not the following resolution passed on 1st October 1955, be confirmed :—

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" This Council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of Section 19 (2) (*a*), 19 (2) (*b*), and Section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954 ".

In the absence of any notice of such a resolution it is not open to any Councillor at this meeting to move that the resolution passed at that meeting be confirmed or rejected.

Section 3 (2) of Act 7 of 1954, requires that a resolution for the removal of a Mayor or a Deputy Mayor from office be passed by not less than one-half the total number of Councillors and it be confirmed by *a resolution* similarly passed at another special meeting of the Council convened under paragraph (*b*) of that sub-section. That Section contemplates two resolutions : the first resolution as required by section 19 has been passed ; there is no notice of a similar resolution before the House. In the absence of such a resolution I uphold Dr. Perera's point of order ".

I declare the meeting closed ".

Learned Counsel for the petitioner submitted that once the resolution for the removal of the Mayor was passed the first respondent was bound by law to convene the second meeting within the time prescribed in section 19 (2) (*b*) and cause notice of that meeting and of the business to be transacted thereat to be served in terms of section 20 (2) of the Ordinance. He further submitted that the first respondent having complied with the requirements of both those provisions was under a legal obligation to permit the meeting which he convened to transact its business.

Learned Counsel for the respondents, while conceding that the first respondent had complied with the requirements of sections 19 (2) (*b*) and 20 (2) to the extent only of convening a meeting, contended that the notice does not set out the business to be transacted thereat. Counsel further submitted that the statement in the notice that the meeting was summoned for the purpose of considering whether or not the resolution passed at the earlier meeting should be confirmed was not a notice of the business to be transacted thereat. They argued that the notice served under section 20 (2) should set out the specific motion to be moved at the second meeting and that unless that were done there would be no notice of the business to be transacted at the meeting.

Counsel further contended that, as no notice of the business to be transacted at the meeting had been given, the petitioner was precluded by section 21 of the Ordinance from bringing up any business at that meeting without the permission of the Council. Counsel also argued that to enable the first respondent to specify in the notice the business to be transacted at the second meeting the petitioner should have, in terms of by-law 10 of the Council's by-laws regulating meetings, given, to the Secretary of the Council, notice of the motion he proposed to move. As the petitioner failed to comply with that by-law, the first respondent

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had no alternative but to serve the notice in the form in which it has been given. To this argument Counsel for the petitioner replied that the first respondent's notice specified the business that was to be transacted at the meeting, and that therefore there was no need to ask for the permission of the Council under section 21 of the Ordinance. In support of his argument he referred us to the practice and procedure in regard to the notice of meetings of shareholders of companies and of the Bank of Ceylon.

The only question for decision is whether the notice in the instant case set out the business to be transacted at the second meeting as required by section 20 (2) of the Ordinance.

In our opinion sections 15 (2), 19 (2), and 20 (2) of the Ordinance contain the entire machinery for the summoning of meetings which are to be presided over by the Commissioner.

By-law 10 which governs meetings of the Council convened under sections 19 (1) and 20 (1), and which are presided over by the Mayor, is a by-law made under a repealed Ordinance. It is continued in force by section 318 of the present Ordinance and is not designed for the case of Special Meetings presided over by the Commissioner.

There was therefore no obligation in law on the petitioner to give notice of the motion he proposed to move at the meeting convened under section 19 (2) (*b*) to consider whether the resolution for the removal of the Mayor should be confirmed or not.

It is clear from the notice convening the meeting that the members were required to attend a meeting at which the matter for consideration was whether or not the resolution referred to in the notice should be confirmed. In our opinion the notice of the meeting specifies the business to be transacted thereat and satisfies in every way the requirements of section 20 (2). The business of the second meeting is indicated in section 19 (2) (*b*) and that was communicated to the members in the notice convening the meeting.

If the notice satisfies the requirements of section 20 (2) was the petitioner entitled in law to move at the second meeting a motion to the effect that the resolution passed at the previous meeting for the removal of the Mayor be confirmed ? We think he undoubtedly was.

It is reasonable to infer that when the legislature clothed the Commissioner with the powers vested in him by sections 19 (2) and 20 (2) it impliedly granted him all such powers as are necessary for the proper and effectual execution of the powers expressly granted to him. In the exercise of those powers the Commissioner was free to regulate the meetings convened by him in accordance with the accepted rules of procedure at such meetings.

Learned Counsel for the second respondent also urged that the first respondent had performed the statutory duties imposed on him by sections 19 (2) (*b*) and 20 (2) of the Municipal Councils Ordinance and that a mandamus did not lie. He has undoubtedly discharged his functions under section 19 (2) (*b*) and 20 (2) ; but as presiding officer

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by virtue of section 19 (2) (*c*) he was under a duty to permit the meeting to transact the business for which it was convened. In view of his wrong decision on the point of order that was raised by the second respondent he failed to discharge his duty to give the meeting an opportunity of deciding whether or not the resolution passed by the Municipal Council on 1st October 1955 should be confirmed. The first respondent by an erroneous decision on the point of order raised by the second respondent could not disable himself from performing the duty enjoined by law of transacting the business of the meeting at which he presided.

In our opinion the petitioner is entitled to the mandate he seeks. We accordingly direct the Commissioner to continue the Special Meeting which commenced at 2.30 p.m. on Monday, 17th October 1955, till the business notice of which he has given is transacted and concluded, and for that purpose to summon all Councillors to re-assemble on a date and time to be notified by him by giving the Councillors at least four days, notice before the meeting. We also direct that the date so notified by him for the continuation of the meeting of Monday, 17th October 1955, shall be a date not later than fourteen days from the date on which this order is served on him by the Fiscal.

The petitioner is entitled to the costs of this application as against the first respondent.

PULLE, J.—I agree.

Application allowed.

1957 *Present :* **Sansoni, J.**

D. A. SAMARANAYAKE, Petitioner, *and* V. GRENIER *et al.*, Respondents

S. C. 462—Application for a Writ of Certiorari

Bribery Act No. 11 of 1954—Sections 5 and 10— "Arraignment"—Criminal Procedure Code, s. 219.

The word " arraignment " is not a synonym for " indictment ".

The petitioner who was convicted by a Board of Inquiry appointed under the Bribery Act alleged that the Board of Inquiry acted without jurisdiction in holding its inquiry. The allegation was based on the plea that the Attorney-General had not signed the arraignment as required by section 5 of the Bribery Act. In support of this plea there was produced a document entitled Arraignment before a Board of Inquiry and signed by a Crown Counsel for the Attorney-General. The document was nothing more than the concise statement of the particulars of the charge laid against the accused. In an affidavit of the Crown Counsel who had signed the statement it was declared (1) that the Attorney-General was satisfied on the material available to him that there was a prima facie case of bribery made out against the petitioner, and decided to

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arraign him before a Board of Inquiry on the charges contained in the concise statement, (2) that the statement was signed by Crown Counsel at the instance and on the directions of the Attorney-General.

Held, that the affidavit established that the Attorney-General himself arraigned the petitioner.

APPLICATION for a writ of *certiorari*.

K. Kamalanathan, with *V. K. Palasuntheram*, for the petitioner.

D. St. C. B. Jansze, Q.C., Solicitor-General, with *V. S. A. Pullenayegum*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

February 28, 1957. SANSONI, J.—

The petitioner has applied to this Court for a Writ of Certiorari to have the order of a Board of Inquiry appointed under the Bribery Act No. 11 of 1954 quashed. By that order the Board found the petitioner, who was a Police Constable, guilty of the offence of bribery. The ground of the present application is that the Board of Inquiry acted without jurisdiction in holding its inquiry.

Under section 5 of the Act the Attorney-General has the power, if he is satisfied that there is a prima facie case of bribery and the offender is a public servant, to arraign the offender before a Board of Inquiry. Under section 10 the offender is entitled to be furnished with a concise statement of the particulars of the charge.

The allegation that the Board of Inquiry acted without jurisdiction is based on the petitioner's plea that the Attorney-General has not signed the arraignment, and in support of that plea there has been annexed to the petition a copy of a document entitled Arraignment before a Board of Inquiry. I think this plea arises from a misapprehension as to what an arraignment is. Wharton's Law Lexicon defines the word " arraign " as follows :—" to bring a prisoner to the bar of the Court to answer the matter charged upon him in the indictment. The arraignment of a prisoner consists of three parts, (1) calling him to the bar; and by holding up his hand or otherwise, making it appear that he is the party indicted. Holding up the hand is a mere ceremony, and is frequently dispensed with, it only being necessary for the prisoner to admit that he is the person indicted. (2) reading the indictment to him distinctly in English, that he may fully understand the charge. (3) demanding whether he is guilty or not guilty, and entering his plea, and then demanding how he will be tried, the common answer to which is, " By God and my country ". The Criminal Procedure Code in section 219 refers to the arraignment of an accused in a trial before the Supreme Court and the draftsman of that section seems to have had in mind this definition of the word " arraignment ", for the section reads :—

" When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged ".

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The petitioner's Counsel referred me to Stroud's Judicial Dictionary, but there again the word "arraign" is defined as " to put a thing in order or in its place ; as a prisoner is said to be arraigned when he is indicted and put to his trial ". The procedure is described there also as the appearance of the accused and his pleading to the indictment or other record. I think it is a misuse of language to treat the word " arraignment " as a synonym for " indictment ".

The entire proceeding takes place in three stages. The machinery should, in my view, be set in motion by the Attorney-General himself, but I do not consider it necessary that the Attorney-General should personally appear and take part at each of these three stages.

The document referred to and relied on in the petition as an arraignment, and which has been signed by a Crown Counsel for the Attorney-General, is nothing more than the concise statement of the particulars of the charge mentioned in section 10. That section does not require such a statement to be signed by the Attorney-General. I have been referred to my judgment in *Attorney-General v. William* [1]. In that case my brother de Silva and I held that an indictment signed by a Crown Counsel did not satisfy the requirements of sections 5 (*a*) and 8 which require the Attorney-General himself to indict a person for bribery in the case of a prosecution in any Court. The petitioner's Counsel used this judgment to support his argument that the concise statement of the particulars of the charge should have been signed by the Attorney-General himself. In view of what I conceive to be the true meaning of the word " arraign " which, I repeat, does not mean indict, the petitioner should have established that the Attorney-General did not arraign him before the Board of Inquiry. He cannot establish this in view of the affidavit of the Crown Counsel who signed the statement of the particulars of the charge. It is stated in that affidavit that the Attorney-General was satisfied on the material available to him that there was a prima facie case of bribery made out against the petitioner, and decided to arraign him before a Board of Inquiry on the charges contained in the concise statement, and that statement was signed by Crown Counsel at the instance and on the directions of the Attorney-General. This affidavit establishes that the Attorney-General himself arraigned the petitioner, and this application must therefore fail.

In view of my finding on this point, it is not necessary for me to consider the other objections urged by the Solicitor-General, namely, the delay of two years between the order of the Board and the filing of the application, and the submission by the petitioner to the jurisdiction of the Board.

The application is dismissed with costs.

Application dismissed.

[1] (*1955*) *57 N. L. R. 9.*

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1956 *Present :* **H. N. G. Fernando, J.**

SARIS SILVA, Appellant, *and* L. G. SUMATHIPALA, Respondent

S. C. 156—C. R. Badulla-Haldumulla, 3,382

Rent Restriction Act—"Alternative accommodation"—Burden of proof.

Where a landlord seeks ejectment of his tenant on the ground that the premises let are reasonably required for occupation by him, the tenant need not prove that he tried to look for alternative accommodation for himself if there is already sufficient proof that the landlord has at his disposal suitable premises which he can without difficulty appropriate for his own use.

APPEAL from a judgment of the Court of Requets, Badulla-Haldumulla.

Sir Lalita Rajapakse, Q.C., with *V. C. Gunatilaka*, for the plaintiff-appellant.

C. G. Weeramantry, for the defendant-respondent.

Cur. adv. vult.

October 22, 1956. H. N. G. FERNANDO, J.—

This was an action for ejectment of the defendant from a small boutique in Koslanda on the ground that the boutique is reasonably required for occupation as a place of residence by the plaintiff. The learned Commissioner has dismissed the plaintiff's action on the ground that the notice to quit was insufficient in law. It is conceded by the defendant's counsel that the notice was sufficient and the judgment cannot be supported on that ground. I have however to deal with the facts of the case.

It would appear that of a row of four contiguous boutiques the plaintiff was a tenant of one and the defendant of another, both occupied for the purposes of business. The defendant's boutique was No. 98 (now No. 43) and was used by him as a store and for some few months prior to the date of action also as a garage for his car.

In April 1955 the plaintiff's wife bought the row of four boutiques and within a short time the defendant was given notice to quit No. 98. The plaintiff had apparently been ejected from his former place of residence and he commenced to use one of the remaining boutiques as a kitchen and also as a store ; he and his two sons who assist him in his business sleep either in the boutique he had all the time or in the second one which he appropriated for his own use after the purchase. The plaintiff's claim is that his wife resides partly at Koslanda and partly at Kateluwa where the plaintiff's daughters stay in order to attend school. He alleges that he requires the use of No. 98 mainly because his wife has no place to occupy on her periodical visits to Koslanda.

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It is in evidence that the plaintiff owns three other boutiques which are situated on another road but are yet within thirty feet from No. 98. According to his evidence all the three boutiques were at the time of the trial rented out to three different persons one of whom is a person called Simon. The plaintiff's own witness, the Village Headman, however stated in evidence that the boutique alleged to have been rented out to Simon was vacant.

Upon this evidence the learned Commissioner was strongly of the view that the plaintiff would not require premises in Koslanda for his wife and other children and also that the " plaintiff will not be prejudiced as he still has a room in his own premises thirty feet away ", referring obviously to the boutique stated by the Headman to be vacant. Despite this strong opinion in favour of the defendant however, the Commissioner felt bound, in view of certain authorities to which he had been referred, to hold against the defendant on the ground that there was no evidence that he had tried to look for alternative accommodation. With regard to this matter counsel for the appellant relied on the decision in *50 N. L. R. 43*. It is clear, however, that that decision is one based on the facts and not on a question of law. In brief it is to the effect that once a plaintiff landlord has shown that he reasonably requires premises for his own occupation, the failure of the tenant to search for alternative accommodation will or may negative the plea that the tenant also reasonably requires the premises for himself. That decision, however, does not, nor do I imagine, any of the earlier decisions, establish that in a competition between the landlord and tenant the latter must necessarily prove the lack of alternative accommodation. A landlord who seeks to resume occupation has the burden of proving that he reasonably requires the premises. That burden may be prima facie discharged by evidence of his needs whether for purposes of residence or of business. But so soon as it is shown that the landlord has at his disposal suitable premises which he can without difficulty appropriate for his own use, then, in my opinion, his requirement that the tenant should vacate the premises for his benefit ceases to be reasonable. In the present case the position at the close of the evidence tendered by the plaintiff was that there was available to him thirty feet away from No. 98 a boutique about the same area as No. 98 consisting, as did No. 98, of a verandah and inner room and a kitchen. It was for the plaintiff to show then affirmatively that this alternative accommodation was either not available in fact or else was far less suitable for his purposes than No. 98. Having failed to furnish evidence on either of these matters the plaintiff, in my opinion, failed to discharge the burden of proving that he reasonably required No. 98 for purposes of residence or business.

I was strongly pressed to send the case back for a fresh trial. It is manifest, however, from the evidence and the judgment that the Commissioner was prevented from giving judgment for the defendant on the facts solely because he took an erroneous view as to the duty of the defendant to prove a lack of an alternative accommodation.

For the reasons I have set out I would affirm the decree of dismissal entered by the learned Commissioner and dismiss this appeal with costs.

Appeal dismissed.

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1956 *Present :* **T. S. Fernando, J.**

R. A. DISSANAYAKE, Appellant, *and* D. C. A. SURAWEERA (Police Sergeant), Respondent

S. C., 565—M. C. Colombo, 26,949/A

Excise Ordinance—Section 44—Charge of possessing unlawfully manufactured liquor ("Cider")—Quantum of evidence.

Where a liquid in a pot was found to contain 6·2% of alcohol within a fairly short interval of time after it was discovered—

Held, that it could be reasonably presumed that at the time of the detection itself there could have been no appreciable difference in the percentage of alcohol in the liquid.

Held further, that where the evidence establishes that the liquor is not an approved brand of imported liquor but is tea cider, no reasonable doubt can arise as to whether it is liquor manufactured in Ceylon.

APPEAL from a judgment of the Magistrate's Court, Colombo.

C. de S. Wijeyeratne, for the accused-appellant.

I. F. B. Wickramanayake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 12, 1956. T. S. FERNANDO, J.—

The appellant was convicted on a charge of possession of 2 gallons and 12 drams of unlawfully manufactured liquor called "Cider", punishable under section 44 of the Excise Ordinance. Counsel for the appellant did not canvass the finding of the learned magistrate on the question of possession, but argued that what the appellant was in possession of has not been proved to be a liquor within the meaning of the Excise Ordinance.

The detection was made at about 6.30 p.m. on 15th March 1956 and, according to the evidence, two bottles from the pot which contained nearly fourteen bottles were taken as samples, and to each of these two bottles were added 25 grains of salicylic acid in order to prevent fermentation. The salicylic acid was not available to be added at the place where the detection took place but only after the pot containing the liquor had been brought to the Police Station and its contents measured. The Analyst found the liquid in the bottle he examined to contain 6·2% of alcohol. He was satisfied that there was a sufficient quantity of salicylic acid to arrest further fermentation. There is no evidence as to the interval of time between the detection and the adding of the salicylic acid, and learned counsel argues that there is no proof before the court that the liquid in the pot at the time of detection had 6·2%

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of alcohol. The burden of proving that this was liquor within the meaning of the Excise Ordinance being upon the prosecution, he contends that the prosecution has failed to discharge that burden and that the appellant should therefore have been acquitted. I am unable to agree with this contention. The detection was made in a coconut garden at No. 265, Nawala Road. As soon as the detection had been made and the appellant had been searched at the spot, the appellant and the pot were brought to the Welikade Police Station which is not a great distance away from the place of detection. The prosecution has proved that the liquid discovered in the appellant's possession has been found within a fairly short interval of time to contain 6·2% of alcohol. In this state of affairs it could reasonably be presumed that at the time of detection itself there could have been no appreciable difference in the percentage of alcohol in the liquid in the pot. I cannot also ignore the absence of any effort on the part of the defence to cross-examine the Analyst on the question of the likely percentage of alcohol at the time of detection. In the circumstances established in this case I am of opinion that the prosecution proved that the liquid found in the pot referred to above was liquor within the meaning of the Excise Ordinance.

The prosecution relied in this case on a report from the Government Analyst. The terms of this report are indistinguishable from the terms of the report of the Government Analyst produced in the case of *Ebert Fernado v. Goonewardene* [1] which came up for hearing before me and in which I ruled that the sole evidence of a report of the Government Analyst in these terms is insufficient to discharge the burden of proof that lies upon the prosecution in a case where the charge is one of possession of unlawfully manufactured liquor. In the present case, however, there is other evidence, viz., the evidence of Inspector Dharmaratne and Police Constable Wickramasekere, that the pot contained Tea cider. Tea cider is a liquor for the manufacture of which a licence can be obtained from the Excise Commissioner—vide Excise Notifications Nos. 419 and 420, published in *Gazette* 10,281 of 10.8.1951. Not only has the appellant no licence to manufacture liquor, but the evidence shows that no licence for the manufacture of tea cider has yet been issued to anyone. Neither Dharmaratne nor Wickramasekere was cross-examined on the question of their competence to express an opinion on the question whether the liquid was tea cider, and their evidence has been accepted by the learned magistrate. If this was tea cider, then there is no reason why any reasonable doubt should arise whether this was a liquor manufactured in Ceylon. The Analyst's report negatives this liquor being a liquor manufactured under a licence issued by the Excise Commissioner. The only reasonable conclusion one can therefore reach is that this was unlawfully manufactured liquor.

I dismiss the appeal.

Appeal dismissed.

(*1956*) *58 N. L. R. 22,*

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1957 *Present :* **Sinnetamby, J.**

M. K MARIANTHONY, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

Citizenship Case No. 48—Application Q. 3590

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for registration thereunder—Scope of inquiry—Sections 7 (1) (b), 9 (3) (a).

A Commissioner holding an inquiry under section 9 (3) (*a*) of the Indian and Pakistani Residents (Citizenship) Act has no jurisdiction to inquire into matters outside the scope of that inquiry. He cannot, therefore, reject an application for registration under the Act on the ground that it is not in conformity with the requirements of section 7 (1) (*b*).

APPEAL under the Indian and Pakistani Residents (Citizenship) Act.

S. P. Amerasingham, for the applicant-appellant.

J. W. Subasinghe, Crown Counsel, for the respondent.

March 12, 1957. SINNETAMBY, J.—

In this case the applicant was served with a notice under Section 9 (3) (*a*) requiring him to satisfy the Commissioner in regard to three matters (1) Residence ; (2) that the applicant was of Indian or Pakistani origin ; and (3) that he was permanently settled in Ceylon. When the applicant appeared at the inquiry the Commissioner began to examine him in regard to the application form which the applicant had submitted for registration as a Ceylon citizen. He questioned him as to where the applicant signed and as to what was stated in the affidavit, and in the course of that evidence the applicant made the following statement : " What I said earlier that the forms were signed by me at the Controller's office is correct. What is stated in the affidavit is false. " Acting upon this statement the Deputy Commissioner held that the application was not in proper form and has not been properly sworn to or affirmed before a Justice of the Peace. He accordingly rejected the application as it did not conform with the requirements of Section 7 (1) (*b*).

The first question that arises for consideration is whether when dealing with an inquiry under Section 9 (3) (*a*) it is open to a Deputy Commissioner to go into the question of whether the application is in proper form. It seems to me that he is not entitled to do so. The inquiry contemplated by Section 9 (3) (*a*) is confined to the merits of the application itself and has nothing to do with the form in which the application is made.

When a person comes ready for inquiry into the matters contained in the notice served under Section 9 (3) (*a*), he naturally does not address his mind or his attention to other matters. When therefore he is suddenly

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subjected to a cross-examination on matters in respect of which he has had no time to think he is apt to make statements which may not be strictly accurate. To pounce upon a remark made by a witness under such circumstances in regard to a matter which does not form the subject matter of the inquiry and utilise it to reject his application is neither fair nor consistent with principles of natural justice. In my view it is utterly wrong to do so.

A Commissioner holding an inquiry under Section 9 (3) (*a*) in pursuance of a notice under Section 9 (1) has no jurisdiction to inquire into matters outside the scope of that inquiry and must conform himself to the matters referred to in the notice.

I accordingly set aside the order of the Deputy Commissioner and remit the case back to him for an inquiry into the merits of the application and into matters specified in the notice that was served on him under Section 9 (3) (*a*).

The applicant will be entitled to costs of this appeal fixed at Rs. 105.

Order set aside.

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[In The Court of Criminal Appeal]

1957 *Present :* **Basnayake C.J. (President), Pulle J., and Sinnetamby J.**

REGINA *v.* PERIYASAMY and another

Appeals 86 and 87 of 1956, with Applications 116 and 117

S. C. 4—M. C. Kalutara, 27552

Charge of murder—Verdict of attempt to commit culpable homicide not amounting to murder—Legality—Criminal Procedure Code, ss. 183 (1), 183A—Penal Code, ss. 294, 300, 301, 490.

A person charged with murder can, if the evidence warrants it, be convicted of attempt to commit murder or of attempt to commit culpable homicide not amounting to murder within the meaning of section 300 or section 301 respectively of the Penal Code although he was not charged with such offences.

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *P. B. Tampoe* and *D. Vithanage*, for Accused-Appellants.

V. T. Thamotheram, Senior Crown Counsel, for Attorney-General.

Cur. adv. vult.

March 25, 1957. Basnayake, C.J.—

The accused-appellants Periyasamy son of MuttuWeeran and Singaram son of Muttu Karuppan were indicted on a charge of murder of one Vella Kutti son of Kutti Thevar on 20th November 1955. The first appellant was by a unanimous verdict found guilty of culpable homicide not amounting to murder and sentenced to undergo a term of 10 years' rigorous imprisonment, while the second appellant was found guilty of attempted culpable homicide not amounting to murder by a verdict of 5 to 2 and sentenced to undergo a term of 5 years' rigorous imprisonment.

Shortly the material facts are as follows. The deceased and the first appellant were Indian immigrant labourers resident on Culloden Estate in the Kalutara District. The second appellant was a kangany on the same estate. On the day of the tragedy towards nightfall there was a quarrel in which the participants were Ramalingam, the second appellant, and one Pandian. In the course of it Pandian attacked Ramalingam and injured him. The deceased who lived in a line room nearby was asleep at the time. Being disturbed by the quarrel he came out of his room. Seeing the second appellant, he advised him thus : " We need not fight, you had better get to your room." Then the first

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appellant came on the scene and dealt the deceased a blow on his head with a black rod, saying : " Who are you to question us ? ". As the deceased staggered on receiving the blow the second appellant stabbed the deceased in his abdominal region and held him by his neck and pushed him. The deceased fell in the drain nearby. The appellants then ran away and the deceased was removed to hospital. The deceased's death was caused by the blow given by the first appellant which caused a fracture of his skull and laceration of his brain. The stab injuries were sufficient in the ordinary course of nature to cause death. They damaged the deceased's right kidney and the intestines. The kidney had to be removed and the intestines to be sutured.

The evidence is that the second appellant stabbed with a long-handled tapping knife ; but one witness says that he pushed the deceased with a stick or club and did not use a knife. The District Medical Officer who held the post-mortem examination is of opinion that a short pointed knife with a cutting edge had been used and not a tapping knife which is a bifurcated weapon.

The first appellant did not give evidence but the second did. He denied that he stabbed the deceased or that he even saw him that night. He said it was at the hospital where he had gone to see some persons who were injured that evening that he heard that he had been accused of stabbing the deceased.

The Crown which had opened its case on the footing of a common intention to commit murder on the part of the two appellants submitted, at the end of the trial, that there was no evidence of common intention and invited the jury to consider the act of the first appellant as independent of that of the second. The learned Commissioner directed the Jury that they were free to return a verdict of attempted murder against the second appellant if they accepted the evidence that he stabbed the deceased. He also directed them in view of the medical evidence that death resulted from the head injury and not the injuries caused by the second appellant and that he could not be found guilty of murder, but that it was open to them to return a verdict of attempted murder, attempted culpable homicide not amounting to murder, or voluntarily causing grievous hurt with an instrument for cutting or stabbing.

Learned counsel for the appellants did not question the correctness of the conviction of the first appellant but pressed the appeal of the second on the ground that the verdict was unreasonable.

It was submitted to us as a matter of law that the second appellant having stood his trial on a charge of murder and not on a charge under section 300 of the Penal Code, was entitled to an acquittal and that it was not open to the trial Judge to direct the Jury to find a verdict either under section 300 or section 301 of the Code. Although the marginal note to section 300 reads "Attempt to murder ", it was contended that that section creates an offence defined by its own limits and that it does not penalise the attempt to commit the offence defined in the first four paragraphs of section 294. On this premiss it was argued that section 183A of the Criminal Procedure Code which provides that a person charged with an offence can be convicted of an attempt to commit that

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offence although not charged with such attempt has no application. In regard to section 183A it was further argued that its applicability was restricted to the class of attempts covered by section 490 of the Penal Code and that there was no room to call section 490 in aid where the offence attempted is murder. In regard to the latter submission reliance was placed on the judgment of Straight J. in *Queen-Empress v. Niddah* [1] where he held that section 511 of the Indian Penal Code, which corresponds to section 490 of our Code, does not apply to attempts to commit murder which are fully and exclusively provided for by section 307. The learned Judge declined to follow an earlier judgment of the Bombay High Court in *Regina v. Cassidy* [2] in which a conviction under section 307 was set aside in appeal and a conviction under sections 299 and 300 read with section 511 was substituted therefor.

The precise point raised on this appeal did not fall to be determined in the Indian cases referred to, for in neither of them was the charge one of murder. Having regard to the charge in the indictment and the evidence placed before the jury in support of that charge it was open, in our opinion, to the Judge to direct the jury to find a verdict under section 300 or section 301 if the ingredients constituting either offence were proved.

The prosecution set out to establish as against the second appellant the following facts :—

(1) that he " caused " two injuries of which the one on the head of the deceased inflicted by Periyasamy was the immediate cause of death—section 32 of the Penal Code.

(2) that he had the requisite murderous intention.

Under (1) above the prosecution was able to prove that he caused only one injury, namely the injury to the abdomen which did not however result in death. Under (2) the prosecution was able to prove that the second appellant only had the knowledge that by cutting the deceased he was likely to cause his death. What was eventually proved fell within the larger area of facts which were necessary to establish the charge in the indictment. Had the jury held under (2) that he had the intention to cause grievous hurt a conviction under section 317 would have been beyond question.

Does it make any difference to the propriety of the conviction that they held that the second appellant knew at the time he cut the deceased that his act was likely to result in death ? I see none. Both, in our opinion, are covered by section 183 (1) of the Criminal Procedure Code.

The argument that the constituent elements of the offence made punishable under section 300 must be regarded independently of section 294 cannot be supported because section 300 explicitly refers to "murder" and the only place where one can look for a definition of that word is section 294. For the above reasons we dismiss the appeals of both the appellants but direct that their respective sentences should commence to run from 8th October 1956.

Appeals dismissed.

[1] *14 Allahabad 38.*

[2] *4 Bombay H. C. R. 17.*

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1957 *Present:* **Weerasooriya, J., and Sansoni, J.**

USOOF *et al.*, Petitioners, *and* NADARAJAH CHETTIAR *et al.*, Respondents

S.C. Application 183—Conditional Leave to appeal to the Privy Council in S.C. 189/D.C. Colombo, 24,958

Privy Council—Application for conditional leave to appeal—Must be properly stamped—"Final judgment"—Stamp Ordinance (Cap. 189), s. 35—The Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 1 (a) and 2.

An application for conditional leave to appeal to the Privy Council which is insufficiently stamped will be rejected even if it is filed in time and the deficiency in stamp duty is subsequently made good by the applicant but after the expiry of the period of thirty days prescribed in Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

A judgment of the Supreme Court dismissing an appeal from an order of a District Court refusing to set aside a sale of property seized in execution of a decree is a "final judgment" within the meaning of Rule 1 (*a*) of the Schedule.

APPLICATION for conditional leave to appeal to the Privy Council.

Sir Lalita Rajapakse, Q.C., with *M. Markhani*, for the petitioners.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the respondents.

Cur. adv. vult.

March 22, 1957. WEERASOORIYA, J.—

Two objections were taken by learned counsel for the respondents against this application being granted. One of them was that the judgment sought to be appealed from is not a "final judgment" within the meaning of Rule 1 (*a*) of the rules contained in the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85).

The petitioners seek to appeal from the judgment of this Court dismissing an appeal from the order of the District Court refusing to set aside a sale of a land called Alawwa Estate belonging to the petitioners. The sale took place in execution of a decree which had been entered against them in the case.

The objection raised seems to be covered by the decision in *Subramaniam Chetty v. Soysa* [1] where this Court had reversed in appeal an order of the District Court disallowing an application made by an execution creditor to set aside (on the ground of material irregularity) a sale of certain property seized in execution of a writ in his favour. The matter subsequently came up again in the form of an application for leave to appeal to the Privy Council from the judgment of this Court, and the question arose whether that judgment was a final judgment. The majority of a bench of three Judges held it was. This decision is binding on us. The objection must, therefore, be overruled.

[1] *(1923) 25 N. L. R. 344.*

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The other objection relates to a question of stamp duty. It is common ground that the application for conditional leave was insufficiently stamped when it was filed. The deficiency in stamp duty was subsequently made good by the applicants but after the expiry of the period of thirty days provided in Rule 2 of the Schedule referred to for the making of the application, although the application itself was filed in time. In these circumstances it is contended for the respondents that the application for leave to appeal must be rejected. This matter too appears to be covered by previous authority. It was held by a bench of two Judges in *British Ceylon Corporation Ltd. v. The United Shipping Board* [1] that where a petition of appeal to this Court from the District Court was insufficiently stamped the appeal should be rejected. The judgment in that case followed certain earlier decisions referred to therein, one of which is *Hurst v. Attorney General* [2], also a decision of two Judges, where Ennis J., in delivering the judgment of the Court dismissing an appeal on the ground that the petition of appeal was not correctly stamped, stated : " I would add that section 36 (now section 35) of the Stamp Ordinance prohibits the Court from acting upon the instrument, and there is no proviso or any provision in the Stamp Ordinance allowing the defect to be cured other than possibly section 43 ". These decisions were followed by another bench of two Judges in *James v. Karunaratne* [3].

Section 35 of the Stamp Ordinance (Cap. 189) provides as follows : " No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped ". I respectfully agree with the observations of Ennis, J., in *Hurst v. Attorney General* (*supra*) that the effect of the latter part of this provision is to preclude a Court from acting on a petition of appeal unless it is properly stamped. These observations are equally applicable to the petition for leave to appeal in the present case.

Paragraph (a) of the proviso to section 35 contains provision for an instrument (other than one chargeable with a duty of six cents only or a bill of exchange or promissory note) being admitted in evidence on payment of the duty with which it is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up the duty. Learned counsel for the petitioners did not contend that this provision covered the case but he urged that the objection under consideration should be overruled on the ground that no prejudice has been caused to the respondents, and he referred us to certain observations of Lord Goddard in delivering the judgment of the Judicial Committee of the Privy Council in *Bilindi et al. v. Wellawa Attadassi Thero* [4] that " it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground (of the insufficiency of the stamp) which is from a practical

[1] *(1934) 36 N. L. R. 225.*
[2] *(1917) 4 C. W. R. 265.*
[3] *(1935) 37 N. L. R. 154.*
[4] *(1945) 47 N. L. R. 7.*

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point of view capable of easy remedy without injustice to anyone". It is clear, however, from what precedes those observations that he did not intend to give expression to a finding or an opinion on the question whether the appeal should be rejected or not on such a ground. Moreover, it does not appear that his attention had been drawn to section 35 of the Stamp Ordinance (Cap. 189).

The application for leave to appeal is rejected with costs.

SANSONI, J.—I agree.

Application rejected.

1955 *Present:* **K. D. de Silva, J., and H. N. G. Fernando, J.**

AHAYANI UMMA, Appellant, *and* K. S. KAMALDEEN, Respondent

S. C. 562—D. C. Kandy, 3,899/L

Donation—Clause therein conferring benefit on a third party—Acceptance—Applicability of law relating to a contract creating a stipulation in favour of a third party.

A gift of immovable property by A to B subject to the life interests of A and C is, so far as C is concerned, a contract creating a stipulation in favour of a third party (C). The benefit of the stipulation (life interest) in C's favour may be accepted by C after the death of A.

APPEAL from a judgment of the District Court, Kandy.

H. W. Tambiah, with *H. L. de Silva*, for the defendant appellant.

N. D. M. Samarakoon, for the plaintiff respondent.

Cur. adv. vult.

December 8, 1955. DE SILVA, J.—

K. S. Kamaldeen the plaintiff respondent instituted this action against Ahayani Umma the defendant appellant for a declaration that he is entitled to a life interest in the premises No. 2/9, Slaughter House Road, Kandy, and for the ejectment of the defendant and for damages. The learned Additional District Judge entered judgment in favour of the plaintiff. This appeal is from that judgment.

It was averred in the plaint that Maimoon Umma who was admittedly the sole owner of the premises in question, gifted by deed P1 dated 2nd November, 1950, a half share of the same to one Leithen subject to a life interest in favour of the plaintiff and that she gifted the balance half share by deed P2 of the same date to the defendant also subject to a life interest in favour of the plaintiff. The plaintiff was the 2nd husband

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of Maimoon Umma while the defendant is the daughter of Maimoon Umma by her first husband. The plaintiff alleged that on or about 13th September, 1952, the defendant entered into forcible occupation of the premises and continued to be in wrongful possession of the same. The defendant in her answer denied that the half share conveyed to her on deed P2 was subject to the life interest in favour of the plaintiff. The only witness called at the trial was Mr. Jaimon, Proctor and Notary, who attested the deeds P1 and P2. Although there is no evidence that Maimoon Umma is now dead the trial appears to have proceeded on the footing that she died prior to 13th September, 1952, the date on which the defendant is alleged to have taken wrongful possession of the premises.

The decision of this case depends on the interpretation of deed P2. The relevant part of this deed reads:—" I Maimoon Umma in consideration of natural love and affection which I bear unto . . . Ahiyam Umma . . . . give grant, convey, transfer, set over and assure unto the said donee her heirs executors . . . . by way of gift absolute and irrevocable the houses and premises fully described and set out in the schedule hereto . . . . to have and to hold the said houses and premises hereby gifted and conveyed with the rights and all appurtenances unto the said donee and her aforesaid absolutely forever subject to the condition, mortgage, lease etc. Subject to the further condition that I the donor do hereby reserve my life interest in and to the houses and premises hereby conveyed." By this deed eight properties were gifted and they are described in the schedule. At the end of this schedule referring to properties 6, 7 and 8 it is stated as follows :—" Which said houses and premises marked Nos. 6, 7 and 8 in the above schedule held by me the above donor upon the above said deed No. 5393 dated 11th May, 1889, subject however to a life interest in favour of Cader Saibo Kamaldeen of No. 6, Slaughter House Road, Kandy."

Admittedly the property No. 7 in P2 is identical with premises No. 2/9, the subject matter of this action. It was contended on behalf of the appellant that the reference to the life interest in favour of the plaintiff at the end of the schedule on P2 was a mere recital which is in conflict with the habendum clause in the deed and that it should therefore be ignored. By the habendum clause, it was argued, the property was donated absolutely without subject to any restriction to the defendant. Mr. Jaimon, the Notary who attested the deed stated that he did not insert the reservation of the life interest in favour of the plaintiff in the habendum clause because five of the eight properties dealt with on the deed were not subject to a life interest in favour of the plaintiff. I am unable to agree with the argument that there is a conflict between the operative part of this deed and its recitals. What has been donated to the defendant are the properties described in the schedule. The schedule itself says that the lands Nos. 6, 7 and 8 are subject to the life interest of the plaintiff. Therefore the defendant cannot now claim those lands free of that life interest. It was argued by the Counsel for the appellant that if the deed P2 created a life interest in the lands, 6, 7 and 8 in favour of the plaintiff then it is a donation which is void by reason of non-acceptance by the plaintiff. It is true that although the plaintiff

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has signed P2 as a witness he did not sign it accepting this life interest. I do not think that P2 is a deed of donation in favour of the plaintiff. It only contains a stipulation for the benefit of the plaintiff. Such a stipulation in favour of a third party can be validly created. Pothier states :—" What concerns the interest of a third person may also be ' in modo ' ; that is to say, that although I cannot directly stipulate what concerns the interest of a third person, nevertheless, I may alienate my own property with the charge, that the person to whom I give it shall do something which concerns the interest of a third person. For instance, though I cannot stipulate in my own name directly that you shall make a present to James of Meerman's Thesaurus, I may effectually give you a sum of money or other thing subject to the charge of making such a present."[1] But before the third party could sue upon such a stipulation he should have accepted it. This principle was followed by Garvin S. P. J. in *Jinadasa v. Silva.*[2] The facts in that case were as follows :—P conveyed certain properties to S subject to the agreement that S was to reconvey the property to P or, failing him, to his brother-in-law Jinadasa if called upon to do so by P or Jinadasa at any time within five years from the date of the conveyance on payment of a certain sum of money by P or Jinadasa. P died without exercising his right to obtain a reconveyance. Thereupon Jinadasa sued S to obtain the rights secured to him by the stipulation. Garvin S. P. J. stated in that case, " The question which has been raised and argued before us is this : the stipulation being one which was made in favour of a third party is it actionable by or at the instance of a third party ? That such an agreement may be validly made between the parties to a contract such as this, is, I think, beyond question for the Roman-Dutch-law authorities to which reference has been made in the course of these arguments and which are collected in the case of *McCullogh v. Fernwood Estate Ltd.*[3] are overwhelmingly in favour of the contention that not only is such an agreement valid but that when accepted by a third party whom it is desired to benefit by the stipulation it is actionable by the third party and at its instance." In the instant case the defendant accepted the donation subject to the life interest in favour of the plaintiff in three of the lands gifted. It is implicit in that acceptance an agreement to permit the plaintiff to possess the three lands during his lifetime. The defendant is not entitled to resile from that undertaking. The only question is whether the plaintiff has accepted the stipulation made for his benefit in the deed P2. There is no evidence that during the lifetime of Maimoon Umma the plaintiff accepted this stipulation. The right to possess these premises accrued to him only after the death of the donor as she reserved to herself the life interest. Even in the case of a donation the acceptance can be made after the death of the donor if the fulfilment of the donation is postponed to after the donor's death. (Maasdorp's Institutes of South African Law—4th Edition, Page 109). There is no reason why this principle should not be adopted in the case of stipulations in favour of third parties. The plaintiff has stated in

[1] *Pothier on Obligations Section 71.* [2] *(1932) 34 N. L. R. 344.*

[3] *S. A. L. R. 1920 App. Div. 204.*

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the plaint that he was in possession of the premises in question. That would indicate that he accepted the benefits of the stipulation. Apart from that the fact that he instituted this action to enforce his rights is also indicative of his acceptance.

Accordingly I would dismiss the appeal with costs.

FERNANDO, J.—I agree.

Appeal dismissed.

1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

NORIS APPUHAMY and another, Appellants, *and* UDARIS APPU and others, Respondents

S. C. 887—D. C. Balapitiya, 2,000/L

Appeal—Notice of tendering security—Duty of appellant to have it served at the proper address—Civil Procedure Code, s. 756 (1) and (3).

Merely furnishing to Court, on the day on which a petition of appeal is lodged, the notice of tendering security is not sufficient where there has been in fact a subsequent failure to serve that notice on the respondent.

As it is the duty of the appellant or his Proctor to see that the precept to the Fiscal is correctly drawn up, no relief can be given to the appellant under section 756 (3) of the Civil Procedure Code in respect of the service of the notice of tender of security at a wrong address.

APPEAL from a judgment of the Supreme Court, Balapitiya.

S. W. Jayasuriya, with *Norman Abeysinghe*, for the plaintiffs-appellants.

Frederick W. Obeyesekere, for the defendants-respondents.

April 10, 1957. WEERASOORIYA, J.—

A preliminary objection to this appeal has been taken by Mr. Obeyesekere on the ground that no notice of tender of security as required by section 756 (1) of the Civil Procedure Code was given to some of the respondents who, however, did not appear at the hearing and are not the respondents whom he represents.

As personal service of the notice on the respondents could not be effected the Court on the motion of the proctor for one of the appellants ordered substituted service by affixing the notice to the land called Radatotagoda which is the subject matter of this action. But in the precept to the Fiscal the land was wrongly described as Watawalagoda and the process server's report shows that the notices were in fact affixed to

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that land. For this misdescription the blame must fall on the appellants or their proctor as it was their duty to see that the precept was correctly drawn up. The result is that no notice of tender of security has been given to those respondents on whom substituted service was ordered.

Mr. Obeyesekere submits that the failure to serve the notice is fatal to the appeal and that no relief can be given to the appellants in respect of the failure under section 756 (3).

It is clear that the requirement in section 756 (1) as to the giving of notice to the respondents of the tender of security is a peremptory one. But Mr. Jayasuriya for the appellants relies on the case of *Silva v. Seenathumma* [1] in which Soertsz, J., in delivering the judgment of the Divisional Bench, held that this requirement is satisfied if notice of tender of security is furnished to Court on the day on which the petition of appeal is lodged and Mr. Jayasuriya states that this has been done in the present case.

I do not think, however, that the case cited is authority for the proposition that merely furnishing to Court on the day on which the petition of appeal is lodged notice of tender of security is sufficient where there has been in fact a subsequent failure to serve that notice on the respondent. It is clear from the further observations of Soertsz, J., that he was contemplating a case where the notice of tender of security having been furnished by the appellant at or about the time when the petition of appeal had been filed, the same was duly served on the respondent either within the period of 20 days (which according to Soertsz, J., is the time allowed under the section for the service of it) or even outside that period. In my opinion, therefore, the failure to serve the notice on some of the respondents is fatal to the appeal unless relief can be given to the appellants under section 756 (3). Mr. Jayasuriya submitted, however, that the failure to serve the notices on the respondents (and therefore a failure to give notice to the respondent) amounted to an omission on the part of the appellants in complying with the provisions of section 756 (1) and such omission came within the terms of section 756 (3). But while there is much to be said for that submission it would seem that section 756 (3) was construed otherwise in the decision referred to above where it was held that " where there has been a total failure to comply with one of the terms of section 756 relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure " (at page 245). That decision is binding on us.

I would also add that even if we considered ourselves free to grant the appellants relief under section 756 (3) we do not think that this is a suitable case in which to do so as the failure was occasioned by gross negligence and nothing has been done by the appellants up to date to rectify the lapse although their attention was drawn to it before the record was forwarded to this Court.

The preliminary objection is upheld and the appeal is rejected with costs.

SANSONI, J.—I agree.

Appeal rejected.

[1] (1940) 41 N. L. R. 241.

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1957 *Present :* **H. N. G. Fernando, J.**

V. PANDARAM, Appellant, *and* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS *et al.*, Respondents

S. C. 259—Citizenship Application DD. 2,106

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Sections 6 (2) (i) and 14 (4)—" Suitable employment ".

An applicant can, in the absence of special circumstances which might indicate the contrary, be assumed to have a suitable employment to support himself and his dependants (irrespective of their number) within the meaning of section 6 (2) (*i*) of the Indian and Pakistani Residents (Citizenship) Act if he has an employment which is reasonably likely to be regular and permanent and which is of a common and recognized type.

In the context of the statute, Cages 13 and 14 of the Form of application must be regarded as nothing more than a means of eliciting information as to the employment and income of the applicant and his dependants.

APPEAL under the Indian and Pakistani Residents (Citizenship) Act.

Walter Jayawardena, with *S. P. Amarasingham*, for the applicant-appellant.

H. V. Perera, Q.C., with *N. D. M. Samarakoon* and *N. V. Wirasekera*, for the objector.

V. Tennekoon, Crown Counsel, with *Mervyn Fernando*, Crown Counsel, for the respondent.

Cur adv. vult.

May 28, 1957. H. N. G. FERNANDO, J.—

There arises upon this appeal the necessity to construe yet another provision of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, namely section 6 (2) (i), which requires an applicant to satisfy the Commissioner—

(*a*) that he is possessed of an assured income of a reasonable amount, to support the applicant and his dependants, if any ; or

(*b*) that he has a business or employment or a lawful means of livelihood, to support the applicant and his dependants, if any.

The form in which I have set out the requirements is not exactly that in which it appears in the Statute, but it is clear from the arguments of Counsel that they agree that this form correctly represents the requirements which the Legislature intended to impose. I should add that Crown Counsel who appeared on behalf of the Commissioner quite rightly desired not to be heard, since the decision of the Commissioner was one

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given in a judicial capacity upon objection taken to the registration of the applicant, and that I decided to hear Counsel on behalf of the objector although the latter had not been made a respondent to this appeal.

The Commissioner had decided that, in regard to requirement "(*b*)" the income of an applicant from a business or employment must be sufficient to support himself and his dependants, and that no account can be taken of any wages received by the wife or minor children of the applicant. It was on the other hand contended for the applicant that those wages, because the husband or father of the recipient has a right of control over them, can be taken into account, either as an assured income possessed by the applicant or as a lawful means of livelihood available for utilisation by the applicant, in determining whether the requirement taken as a whole is satisfied. Alternatively, it was contended that, in view of the receipt of wages by the wife and a minor child, the applicant can at the least claim that the wife and child should not be regarded as dependent on him and that accordingly the need to support them should be ignored for the purpose of the determination whether or not the applicant's own wages from employment are sufficient to support himself and his dependants.

The applicant in the present case had to meet a further difficulty. Cage 13 of the Form of application required him to specify the business or employment, if any, if the applicant had a business or employment claimed by him to be sufficient to support himself and his dependants. But the note against this cage is as follows :—

> "Paragraph 13 should only be filled up if the applicant claims that the income from the business or employment is adequate".

The applicant did not specify his employment in Cage 13, but instead specified his own wages and those of his wife and one minor child in Cage 14. The Commissioner has held that the omission of the applicant to fill up Cage 13 (considered in the context of the note to that cage) constitutes an admission that his own wages from employment are insufficient to support himself and his dependants. Having therefore first decided that the applicant's wages alone could be taken into account, the Commissioner did not consider the question of fact whether those wages are or are not adequate to support him and his dependants, because in his view the admission conclusively decided that question against the applicant. Having regard to the provisions of section 14 (4) of the Act, this view of the Commissioner was unwarranted ; the Form is such that an applicant can easily be led (or misled) into thinking that where there are two or more wage-earners in a family, cage 14 is the appropriate one to fill up ; moreover, the Note against Cage 13 does not explicitly state that Cage 13 *must be filled up* if the applicant claims that his wages are adequate, nor does the Note to Cage 14 warn the applicant that it is to be filled up *only if his own wages are* inadequate. In the context of the Act, the two Cages must be regarded as a means of eliciting information as to the employment and income of the applicant and his dependants, and not as a "concealed trap". If, for example, the wages of an applicant

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are in fact manifestly adequate for the support of himself and his dependants, it would surely be contrary to the principles of natural justice to assume inadequacy merely because Cage 14, and not Cage 13, is filled in by the applicant. It will be seen in any event that, in view of the construction which should in my opinion be placed upon the requirement in section 6 (2) (i), this matter of filling up the Cages is merely a " red herring ".

With much respect to the learned Counsel who represented both sides before the Commissioner and in this Court, the view I have formed is different from those for which they respectively contended. It is clear that the condition laid down in section 6 (2) (i) will be fulfilled if an applicant can satisfy either of the requirements (*a*) and (*b*) which I have set out above; but consideration of requirement (*a*) is of much assistance in construing requirement (*b*) which is the one relevant in the present case. I agree with Counsel for the respondent that requirement (*a*) is intended to apply to cases of " investment income " or " unearned income ", and requirement (*b*) to cases where an applicant is engaged in some " activity ".

In the case of an applicant who claims to fulfil requirement (*a*), he must be possessed of *an assured income of a reasonable amount* to support himself and his dependants. According to the dictionary meaning of " assured ", the income must be " secured " or " certain " in the sense that the applicant's right to it is permanent and unconditional and the source of the income must be such that there is certainty, or at least reasonable certainty, that it will yield or produce income. But it is not enough that the applicant has such a right to income from such a source : requirement (*a*) imposes a second condition relating to the *amount* of the income, namely that the amount must be reasonable. The applicant will therefore have to establish that, to support himself and his dependants, he will have an income which is firstly assured and secondly of a reasonable amount ; and the second condition requires the Commissioner to take into consideration the amount of the income and to decide whether or not it is a " reasonable " amount to " support " the applicant and his dependants.

Requirement (*b*) is that an applicant must *have* a *suitable* business or employment or other lawful means of livelihood, to support himself and his dependants. It is significant that the Legislature has not expressly referred in this instance (as it did in requirement (*a*)) to the income derived by the applicant or to the amount of such income, and I cannot agree with Mr. Perera's contention that the omission of such a reference is due to the necessities or intricacies of draftsmanship : if requirement (*b*) was intended to import a condition of the same nature as the second condition included in requirement (*a*), the intention could have been expressed by the insertion of a very few words. To take therefore the case of an applicant who has an employment, the condition is only that *it must be suitable*, having regard to the need to support the applicant and his dependants. There would in my opinion be many cases in which the question of " suitability " is concluded by the very nature of an employment : if for instance, an applicant is employed by the

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Government or a local authority as a Doctor or a clerk, his employment would be *prima facie* " suitable " within the meaning of the requirement, and a further detailed or precise "means test" by reference to wages and the actual number of dependants would not ordinarily be necessary. An employment which is reasonably likely to be regular and permanent, and not casual or intermittent, and which is of a common or recognised type, would *prima facie* be " suitable " to support the applicant and his dependants , if only for the reason that numerous citizens do in fact support their families with the wages derived from such employment. There being no hint in the Statute of an intention to discriminate in favour of applicants in employments which are comparatively more remunerative, an employment cannot be considered " unsuitable " merely because the wages derived therefrom are comparatively low. Indeed Cage 13 of the Form only requires the nature of the employment to be specified ; the Form does not require an applicant to state the amount of the wages, and thus assumes that an employment can be considered suitable *per se*. Particularly then, as in the present case, if the employment is one in a trade for which wages and conditions of service, including the provision of housing and medical facilities, are laid down by law, it must be considered " suitable " within the meaning of the requirement unless for any special reason it appears to be unsuitable. A possible such reason might be that, having regard to the standard of living to which an applicant and his family have been previously accustomed, the wages from the employment in question are likely to be insufficient for the support of the family ; another might be that the employment is unsuitable in the case of the particular applicant for reasons of health, physique or capacity. But where, as in the present case, the applicant has for a long period had the same employment and is of a class of persons ordinarily engaged in such employment, there is nothing which can displace the reasonable assumption that the employment is suitable to support him and his family irrespective of its number of members. To hold otherwise would be to let in the absurdity that Kangany or Rubber Tapper X with a wife and three children might obtain citizenship whereas Kangany or Rubber Tapper Y might be disqualified solely for the reason that the stork had visited his line-room once too often.

I would therefore hold that in the case of an applicant who has an employment which if reasonably likely to be regular and permanent and which is of a common and recognised type, it should be assumed in the absence of special circumstances which might indicate the contrary that the employment is suitable having regard to the need of the applicant to support himself and his dependants and that this assumption should be made all the more readily if the employment is one in respect of which wages and conditions are prescribed by law. In such cases no mathematical computation by reference to the amount of wages and the number of dependants is necessary or permissible.

The appeal is allowed. In view of the fact that the appeal is against a judicial determination by the Commissioner upon an objection and that the objector was not made a party to the petition of appeal, there will be no order as to costs.

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Post Scriptum

For purposes of clarity I should add that the Commissioner should have rejected the objections to the application. The order refusing the application is set aside and an order allowing the application has to be substituted therefor.

Appeal allowed.

1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

K. L. M. PERERA, Appellant, *and* REV. FATHER BATTAGLIA, Respondent

S. C. 77—D. C. Kegalle, 9,054

Appeal—Interlocutory order—Right to question its correctness at stage of appeal against final judgment.

Defamation—Privilege—Should it be specially pleaded ?

In an appeal against a final judgment it is open to the appellant to question the correctness of an interlocutory order even if it had not been the subject of an immediate interlocutory appeal.

The defendant in a libel action is entitled to raise the issue of privilege if he has in effect, though not in express words, set up that plea in his answer.

APPEAL from a judgment of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *A. B. Perera* and *P. Ranasinghe*, for the plaintiff-appellant.

J. A. L. Cooray, for the defendant-respondent.

Cur. adv. vult.

June 7, 1956. T. S. FERNANDO, J.—

This is an appeal against the dismissal by the District Judge of Kegalle of an action which the plaintiff-appellant, the headmaster of a school, instituted against the defendant-respondent, the local manager of the same school, for damages in a sum of Rs. 15,000 alleged to have been suffered by him as a result of a publication by the defendant-respondent of certain statements defamatory of the plaintiff-appellant. These statements which admittedly were made in the Log Book kept in the school are all contained in the entry produced below—

" 8/2/52—Visited the school and held an inquiry about some complaints against the Head Teacher on the part of some of the staff and about a petition against the same Head Teacher on the part of

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the villagers. On account of these complaints and a lack of harmony between the Head Teacher and at least some of the staff ; on account of some irregularities about a child, whose name appears in the Lower Kindergarten Register for the whole of last year, while during the Second and Third Term the child was allowed to study in the Upper Kindergarten, while again the marks of the first term are entered in the L. K., those of the second term in the Upper K. and those of the third term in the Lower Kind. and no promotion was finally granted to the child who was examined at the end of the year at L. K. level, while he studied in Upper K. during the 2nd. and 3rd. terms ; on account also of the fact the H. T. does not reside in the school in the evenings but goes home soon after class, thereby not being in a position to improve the school as he should—in fact the attendance is going down ; (on account also of a serious irregularity in collecting money for the extra repairs to the school, and withholding the money, without even mentioning a word about it to the Manager, on account also of some other complaints about his conduct—as v.f. getting drunk) and also of some occasional lack of respect towards the Manager—he has been advised to ask for a transfer to another school of his choice and finding, or to tender his resignation, also notice is hereby given of discontinuance at the end of the present term. "

On the day fixed for the trial, when issues were being framed, counsel who appeared for the respondent raised an issue as to whether the entry in the Log Book (reproduced above) was made on a privileged occasion. Counsel for the appellant objected to such issue on the ground that privilege was not pleaded in the answer. Respondent's counsel pointed to paragraph 2 of the answer in which it was pleaded that " the defendant admits having made certain entries in the Log Book in the course of his duty as Manager based on facts and in good faith, " and contended that the averments contained in the said paragraph 2 clearly indicated that the plea of privilege was being relied on by the defendant. The learned judge allowed the issue and, at the end of the trial, answered it in favour of the respondent.

Learned counsel appearing before us at the appeal argued that this issue should not have been allowed as privilege had not been pleaded in the answer. Learned counsel for the respondent, while contending that the issue was properly allowed, submitted that if the appellant considered himself aggrieved by the allowance of the issue the proper procedure for him to have followed was to prefer an interlocutory appeal from the order allowing the issue. He referred us to the case, among others, of *Don Andris v. Jameshamy*[1], where Wood Renton J. stated that in ordinary circumstances the disallowance (or allowance) of an issue, the determination of which depends on viva voce evidence, is an order which ought to be made the subject of an immediate interlocutory appeal. While, no doubt, it was open to the appellant to have preferred such an interlocutory appeal before the evidence commenced, I am of opinion that it is competent to him to question the correctness of the

[1] *(1911) 14 N. L. R. 347.*

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order allowing the issue during the course of the appeal against this final judgment. I would refer in this connection to the observations made by the same learned judge, Wood Renton J. in the case of *Abubakker v. Ismail Lebbe et al.*[1], recognising "the clear right of every litigant to invite the Appeal Court to consider on a final appeal any interlocutory decree, even if he did not directly challenge it at the time when it was made."

Counsel for the appellant has referred us (1) to *Nathan's Law of Defamation in South Africa*, (1933 ed), page 306, where it is pointed out that the defendant in a libel action cannot plead the general issue and under it raise the defences of privilege, justification or fair comment—each of which defences must be specially pleaded, and (2) to *Fraser on Libel and Slander*, (7th. ed), page 264, where it is stated that a defendant pleading that the occasion was privileged must give particulars of the facts creating the privilege. In the present instance if the appellant could reasonably have understood paragraph 2 of the answer as raising the defence of privilege, I do not consider that the circumstances of the case called for further particulars ; if however the appellant considered himself prejudiced by the lack of particulars he could no doubt have invoked the relevant provisions of Chapter XVI of our Civil Procedure Code. His principal complaint appears to be that he could not reasonably have entertained the belief that privilege was being raised as one of the defences. He complains also that as a result he had no reason to be prepared with evidence of express malice on the part of the respondent to displace the privilege. It is relevant to point out that no attempt was made by counsel for the appellant at the trial to apply for a postponement of the trial on the ground that he was not prepared with evidence to meet the plea of privilege. As was pointed out by Wendt J. in *Dureya v. Siripina*, [2] if a party objecting satisfies the Court that the issue allowed takes him by surprise, the Court has the fullest power to prevent any prejudice to his rights by granting him an opportunity of meeting the now points raised. I am of opinion that when the respondent pleaded in his answer that " the entries in the Log Book were made in the course of his duty as Manager . . . . " he was in effect, though not in express words, setting up the plea of privilege. Moreover, as was said by Layard C. J. in the case of *Attorney-General v. Smith* [3] in drawing attention to the difference between the English and the Indian systems of pleadings, " our Code does not allow the Court to try the case on the parties' pleadings, but requires specific issues to be framed. By section 146 of our Code, if the parties are agreed, the issues may be stated by them ; if not agreed, then the court must frame them. In this case the defendant's counsel expressed a wish to have a further issue settled. There is no necessity under our law to restrict the issue to the pleadings, as was done in this case ; in fact it appears to me contrary to our law." As the only complaint on account of the allowance of the issue can be one of unpreparedness by the appellant to lead evidence of express malice on the part of the respondent, it is pertinent to recall the answer o the appellant himself, given under cross-examination, that the respondent

[1] *(1908) 11 N. L. R. at 313.* [2] *(1908) 4 A. C. R 125.*

[3] *(1905) 8 N. L. R. 229 at 241.*

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" has no grudge against me personally ". I am therefore of opinion that the contention of learned counsel for the appellant that the latter was prejudiced by the allowance of the issue raising privilege fails.

Learned counsel for the appellant next contended that (*a*) his client has been deprived of a fair trial by the disallowance by the learned judge of certain questions which were put to the respondent while under cross-examination, (*b*) the learned judge appears to have approached a consideration of the issues in the case as if the case was one instituted by the appellant for his wrongful dismissal from service, and (*c*) the learned judge was wrong in considering that the statements in the Log Book were not defamatory per se. While the judgment delivered by the learned judge gives some room for criticism on the lines indicated in the contentions of learned counsel, it seems to me that the questions referred to at (*a*) above were rightly disallowed on the ground that they were irrelevant. At the same time, in regard to the other two points (*b*) and (*c*) raised, I desire to express here the view that the conduct of the appellant which led to the making of the entry in the Log Book was not such as to deserve the opprobrium of a court of law to the extent of describing the appellant, as the learned judge has done, as " a man of scurvy disposition ". The evidence relating to the appellant's connection with the money collected as subscription falls short of establishing misappropriation by the appellant of such money, and the evidence relating to the allegation of drunkenness was of a flimsy and vague nature. While the learned judge was in error in considering that at least two of the statements in the Log Book entry were not defamatory per se, such error does not affect the decision that remains to be reached on this appeal, viz. the correctness of the learned judge's finding on the issue of privilege.

In regard to this remaining question of privilege, the statements which are the foundation of this claim for damages were made, as stated earlier, in the Log Book kept in the school. It is a book kept in the custody of the appellant himself. The nature of the entries that can legitimately be made in the Log Book appears in the evidence of the plaintiff's own witness, the Inspector of Schools. He stated that the Manager is entitled to make observations about all or any one of the members of the staff. The purpose of the Log Book, he admitted, was to record the nature of the work generally done in the school and any complaints regarding any of the members of the staff by the Manager and officers of the Education Department. In the state of this evidence as to (1) the purpose of the maintenance of a Log Book (2) the nature of the statements that can legitimately find a place therein and (3) the persons who are competent to make such statements, it is not possible in my opinion to complain of the conclusion reached by the learned judge on the issue relating to the plea of privilege. As, quite apart from the absence of any evidence of express malice, the position of the appellant himself was that the respondent has no grudge against him personally, this action for damages was correctly dismissed. I would therefore dismiss this appeal with costs.

H. N. G. FERNANDO, J.—I agree.

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Appeal dismissed.

1957

Present : **H. N. G. Fernando, J.**

C. T. RASARATNAM (Inspector of Police), Appellant, *and* K. H. V. PREMATILLEKE, Respondent

S. C. 176—M. C. Colombo, 35,390

Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—"Serving of customers"—Burden of proof—Sections 43 (1), 51, 68 (g).

Where there is proof of delivery, after closing time, of goods purchased before the closing time, in contravention of section 43 (1) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act, the prosecution need not prove that the shop was kept open for the purpose of making the delivery.

Sharufdeen v. Sinnadurai (1955) 57 N. L. R. 214, distinguished.

APPEAL, with the sanction of the Attorney-General, from a judgment of the Magistrate's Court, Colombo.

V. S. A. Pullenayegum, Crown Counsel, for the complainant-appellant.

S. B. Lekamge, for the accused-respondent.

Cur adv. vult.

May 24, 1957. H. N. G. FERNANDO, J.—

This is an appeal with the sanction of the Attorney-General against the acquittal of the accused by the Magistrate of charges of keeping a shop open for the serving of customers in contravention of a closing order made under Act No. 19 of 1954 and of failing to prevent a customer from entering the shop when the shop was required to be closed. The charges were framed under sections 43 (1) and 43 (2) respectively of the Act, contravention of these provisions being punishable under section 51.

The admitted fact is that on a Sunday, being a day on which the shop should have been closed for customers in terms of the closing order, the Inspector of Labour entered the shop and saw a salesman handing the parcel to a woman. The parcel was found to contain coriander, coffee and cinnamon. According to the accused the articles had been sold to the woman on the previous day and on this Sunday she had come for and obtained delivery of the parcel from the salesman. The learned Magistrate thought that this evidence did not establish the charge of a contravention of section 43 (1) of the Act.

The section provides that "no shop shall be or remain open for the serving of customers in contravention of any Closing Order." According to the definition of the expression "serving of customers", that expression includes "the delivery at such shop during any time when such shop is required to be kept closed by any closing order, of goods purchased while such shop is kept open ;"

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Clearly what is contemplated in this paragraph is the very act admitted by the accused in this case, namely the delivery during the " closing periods " of goods purchased during " open periods ", so that the admitted act constitutes the serving of customers within the meaning of the definition.

It is argued, however, for the defence that, upon the evidence, the accused kept the shop open not with the object of serving customers, but because some repairs had to be done to a wall : that since he had no intention when he kept the shop open that customers should be served, he did not contravene section 43 (1). I do not think, however, that the mere fact that the doors of a shop are left open for an innocent reason can assist a proprietor if in fact a customer is " served " within the meaning of the definition. The intention and effect of the section is to prohibit transactions in a shop with customers during a " closing period ". And if a transaction takes place, the shop for that reason is open for the serving of customers and the offence is thereby committed.

In view of an argument adduced to me by Counsel for the accused, I should refer to the following passage in my judgment in *Sharufdeen v. Sinnadurai* [1] : " Applying the decision in the unreported case I would say that it is not necessary for the prosecution to prove an actual delivery after closing time of goods purchased before the closing time. But the prosecution must prove that the shop was kept open for the purpose of making or facilitating such a delivery. That being so it was incumbent to prove in the present case that one purpose at least for which the accused kept his shop open was in order that deliveries may be made of goods purchased earlier. " It is argued from this passage that the present question for determination is whether the shop was kept open with the object of serving customers, but the facts in that case were different from the present facts in that there, there was no proof of a delivery, and in the absence of such proof I held that the prosecution must prove that the shop was kept open for the purpose of making a delivery. The need to prove the purpose with which the shop is kept open would not, however, arise in a case where a customer is in fact served. Section 43 (1) prohibits a shop being kept open for the serving of customers. The typical instance of a contravention would be the actual serving of the customers, proof of which would suffice by itself for conviction. In addition the section would also apply to cases where actual service of customers cannot be proved but where it can nevertheless be established that the shop was kept open for the purpose or with the object of serving customers. My observations in the judgment referred to should not be construed as being applicable in the typical cases.

In the present case the evidence clearly establishes a contravention of section 43 (1), but in the absence of evidence regarding the entry of the woman into the shop I do not propose to consider the second count. The order of acquittal is set aside. I convict the accused on the first count and sentence him to a fine of Rs. 100, in default two weeks rigorous imprisonment.

Acquittal set aside.

[1] *(1955) 57 N. L. R. 214.*

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1957 *Present :* **Basnayake, C.J., and Pulle, J.**

ALICE NONA, Appellant, *and* EWSOHAMY and others, Respondents

S. C. 153—D. C. (Inty.) Gampaha, 3543/P

Appeal—Copy of petition of appeal—Duty of appellant to furnish it in time—Civil Procedure Code, s. 756 (1) and (3).

Failure to furnish a copy of the petition of appeal in terms of section 756 (1) of the Civil Procedure Code at or before the time the security is accepted and deposit made is fatal to the appeal and is not a matter in respect of which relief may be granted under section 756 (3).

APPEAL from an order of the District Court, Gampaha.

H. W. Jayawardene, Q.C., with *P. Ranasinghe*, for 3rd Defendant-Appellant.

H. A. Koattegoda, for 1st and 2nd Plaintiffs-Respondents.

March 22, 1957. BASNAYAKE, C.J.—

Objection is taken to the reception of this appeal on the ground that the appellant has failed to comply with the requirement of section 756 (1) of the the Civil Procedure Code to furnish the District Court with copies of the petition of appeal for service on the respondents along with the notice of appeal. It is not disputed that the appellant failed to comply with the requirement of that section on or before the date on which security was accepted. It was argued that as the copies of the petition of appeal were furnished before the date on which the notice of appeal was made returnable the appellant should not be penalised for his default. The only question for consideration is whether this is a matter in which this Court has the power to grant relief under section 756 (3) of the Civil Procedure Code. Learned counsel for the respondents has drawn our attention to the case of *de Silva v. Seenathummā et al.*[1] in which it has been held by a full Bench of this Court that failure to furnish a copy of the petition of appeal at or before the time the security is accepted and deposit made is fatal and section 756 (3) does not permit relief to be granted by this Court in respect of it. We are bound by that decision and must uphold the preliminary objection taken by the respondents to the hearing of this appeal. We therefore reject the appeal with costs.

PULLE, J.—I agree.

Appeal rejected.

[1] *41 N.L.R. 241.*

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1956 *Present :* **K. D. de Silva, J.**

D. B. S. PERERA, Appellant, *and* D. D. LIYANAGAMA *et al.*, *Respondents*

S. C. 121—C. R. Colombo, 59,331

Landlord and tenant—Partnership—Can it be a tenant?—Trespasser who claims to be tenant—Suit against him by landlord—Jurisdiction of Court of Requests to hear case.

If a landlord is aware, before he lets his premises to a tenant, that a partnership business is to be carried on in the premises by the tenant and certain other persons, no contract of tenancy arises between the landlord and the partners unless it is agreed between the landlord and the partners that the latter are to be the tenants. Although the partners in their individual capacity can enter into a contract of tenancy, a partnership as such cannot do so.

Where an owner of premises sues a trespasser for ejectment and damages and the defendant, without disputing the plaintiff's title to the property, contends that he is the lawful tenant of the plaintiff, the jurisdiction of the Court to try the case does not depend on the value of the premises.

APPEAL from a judgment of the Court of Requests, Colombo.

Vernon Wijetunge, with *D. R. P. Goonetilleke*, for the plaintiff-appellant.

E. A. G. de Silva, for the defendants-respondents.

Cur. adv. vult.

December 20, 1956. DE SILVA, J.—

In this action the plaintiff sought to eject the two defendants from premises No. 1184, Cotta Road, Welikada, and to recover from them damages for wrongful occupation of the same on the ground that they were trespassers. Admittedly, the premises in question belong to the plaintiff. On February 1, 1949, one Charles Liyanagama a brother of the defendants became the monthly tenant of these premises under the plaintiff at a rental of Rs. 23 per month. Charles Liyanagama conducted a provision store and a bakery business in these premises and the adjacent premises bearing No. 2 which too he had taken on rent from the plaintiff. He continued to pay rent to the plaintiff until his death which event took place in March, 1955. After his death the defendants who claimed to be partners of the business carried on by their deceased brother remained in occupation of the premises. They offered to pay rent to the plaintiff which he refused to accept. However, he accepted payment on the basis of damages from them at the rate of Rs. 23 per month up to the end of November, 1955. He instituted this action on October 13, 1956. The defendants in their answer while admitting that their deceased brother Charles Liyanagama was the tenant of the plaintiff averred

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that he had taken the premises in question on rent "for the purpose of the business known as 'Sri Ramya Hotel & Stores' of which the defendants are partners." They also stated that the plaintiff was aware that they were carrying on that business since April, 1953. Their position was that the partnership was the tenant of the premises under the plaintiff. They also contended that the Court had no jurisdiction to entertain this action inasmuch as the subject matter of this action exceeded Rs. 300 in value. It was conceded that the receipts for payment of rent were always issued in the name of Charles Liyanagama. The business carried on in these premises was registered on 6th April, 1953, under the Business Names Registration Ordinance—vide certificate D1. Acccording to this certificate the business was carried on by Charles Liyanagama and his three brothers two of whom are the defendants. Although the business was registered in the year 1953 the plaintiff admitted that a business was carried on in the premises from 1949 and that there was a name-board bearing the words "Sri Ramya Hotel & Stores". He, however, stated that it was only after the institution of this case that he discovered that the business had been registered in 1953. The learned Commissioner held that the defendants had established that this business was carried on in these premises by the four brothers as partners from the year 1949 and that "in the ordinary course of things during this long period of time the landlord should have become aware that the business on these premises was carried on by a partnership, though one partner paid rent as a tenant." He proceeded to state further "in that event he has accepted the relationship that the partnership was the tenant though the rent was paid by one partner." He also expressed a view that if a partner paid rent in his name as a tenant and even if the partnership was not disclosed to the landlord the latter on the death of the tenant cannot treat the surviving partners as trespassers but he must accept them as tenants. I am unable to agree with this view. The tenancy arises from a contractual relationship existing between the landlord and tenant. Even if the landlord is aware before he let his premises to the tenant that a partnership business was to be carried on in the premises by the person taking on the premises on rent and others no contract of tenancy arises between the landlord and the partners unless it was agreed between the landlord and the partners that the latter were to be the tenants. The 1st defendant stated that even during the lifetime of Charles Liyanagama he (1st defendant) paid the rent to the plaintiff and asked for receipts in the name of the partnership but the plaintiff continued to issue receipts in the name of Charles Liyanagama. This is clear proof that the plaintiff was unwilling to accept any persons other than Charles Liyanagama as his tenant. The learned Commissioner was wrong in holding that the partnership was a tenant because a partnership is not a "legal persona". Although the partners in their individual capacity can enter into a contract yet a partnership as such cannot do so. Therefore on the death of Charles Liyanagama the contract of tenancy ceased to exist and the plaintiff is entitled to treat the other partners who remained in occupation of the premises as trespassers. The question of jurisdiction raised by the defendants is not free from some difficulty. The 1st defendant stated that the

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premises in question are worth Rs. 10,000. That evidence stands uncontradicted. It was contended therefore on behalf of the defendants that the Court of Requests had no jurisdiction to entertain this action. On the other hand the plaintiff's title to the property was not disputed. What the defendants contended was that they were the lawful tenants of the plaintiff. The issue that had to be decided therefore was whether or not a contract of tenancy existed between the plaintiff and the defendants. That was a question which a Court of Requests was entitled to adjudicate upon. I would accordingly hold that the Court of Requests had jurisdiction. I would therefore allow the appeal and enter judgment for plaintiff as prayed for with costs provided that the damages would be recoverable only from 1st December, 1955 as the plaintiff has received payment up to the end of November, 1955. The plaintiff would be entitled to the costs of this appeal.

Appeal allowed.

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[In the Privy Council]

1957 *Present :* **Viscount Simonds, Lord Oaksey, Lord Tucker, Lord Somervell of Harrow and Mr. L. M. D. de Silva**

B. MOHAMEDALLY, Appellant, *and* G. E. MISSO and another, Respondents

Privy Council Appeal No. 46 of 1954

S. C. 282—D. C. Colombo, 11,594

Promissory note—Discharge by merger or novation—Quantum of evidence—Bills of Exchange Ordinance (Cap. 68), ss. 36 (1), 59 (1), 62 (1), 63 (1), 90 (1) and (2)—Evidence Ordinance (Cap. 11), ss. 91, 92 (proviso (2)).

The maker of a promissory note subsequently executed a mortgage bond (" No. 44 ") as additional security for the payment of the sum due on the note. The promissory note was attached to the bond and continued to remain in the payee's hands (without any indication of " discharge " or " cancellation " on the face of it) and, on the reverse side of it, the following endorsement was made by the notary who attested the mortgage bond :—" The amount due on the promissory note together with interest thereon from the date hereof has been secured by mortgage bond No. 44 ".

In the present action the plaintiff, to whom the promissory note was indorsed and delivered by the payee after the mortgage bond had been executed, sued both the maker and the payee on the note.

Held, that the promissory note was not discharged by merger or novation upon the execution of the mortgage bond. Therefore, the indorsee of the note was entitled to sue not only the payee but also the maker.

Held further, that section 91 and proviso (2) to section 92 of the Evidence Ordinance precluded parol evidence from being given by the notary to the effect that it was understood by the mortgagor and the mortgagee (neither of whom went into the witness box) that the promissory note was cancelled and discharged by the bond.

APPEAL from a judgment of the Supreme Court reported in *56 N. L. R. 370.*

Sir Frank Soskice, Q.C., with *R. K. Handoo*, for the 1st defendant appellant.

Colvin R. de Silva, with *Ralph Milner* and *L. Kadirgamar*, for the plaintiff respondent.

Cur. adv. vult.

May 7, 1957. [*Delivered by* Lord Tucker]—

The appellant was sued in the District Court of Colombo as maker of a promissory note dated 16th October, 1947, for Rs. 49,393·64 with interest thereon by the first respondent as holder in due course. The second respondent was also sued as indorser of the note. The trial Judge gave judgment against the second respondent and dismissed the claim against

2——J. N. B 66569-1,593 (7/57)

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the appellant. The first respondent appealed against the decision dismissing his claim against the appellant and on 11th February, 1954, the Supreme Court of Ceylon allowed the appeal holding that the first respondent, the holder, was entitled to judgment against the appellant, the maker, as well as against the second respondent, the indorser.

From this decision the appellant now appeals to Her Majesty in Council. The second respondent has taken no part in the appeal and the only question is as to the rights, if any, of the first respondent against the appellant.

The case for the appellant is that the promissory note had been discharged on 15th January, 1948, by a mortgage bond executed by him in favour of the second respondent, the payee of the note, before it was indorsed and delivered to the first respondent.

It will be convenient to refer to the parties hereafter by their names, as follows, the appellant the maker as " Mohamedally ", the first respondent the holder as " Misso ", and the second respondent the payee and indorser as " Pieris ".

There are now only two issues, viz. (1) whether the bond given by Mohamedally to Pieris was an effective discharge of the note as between themselves and (2) if so, whether such discharge precludes Misso the holder for value by subsequent indorsement and delivery from recovering against Mohamedally the maker.

Both questions must be answered in the affirmative for Mohamedally to succeed in this appeal.

Although the issues are now narrowed as indicated above and Mohamedally rests his claim on the validity of the mortgage bond it is to be observed that in his pleadings in the present action, as well as in other proceedings between himself and Pieris, he has alleged that he was " wrongfully and deceitfully induced by Pieris to sign the mortgage bond ", and in fact two actions between these parties were eventually settled on 5th July, 1949, on terms which included the cancellation of this mortgage bond.

It may be convenient at this stage to refer to the relevant sections of the Ceylon Bills of Exchange Ordinance (Ch. 68)—

Section 36 (1) " Where a bill is negotiable in its origin it continues to be negotiable until it has been—

(*a*) restrictively indorsed or

(*b*) discharged by payment or otherwise ".

Section 59 (1) " A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

' Payment in due course ' means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective ".

Section 62 (1) " When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

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The renunciation must be in writing unless the bill is delivered up to the acceptor ".

Section 63 (1) " Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged ".

Section 90 (1) " Subject to the provisions in this Part, and except as by this section provided, the provisions of this Ordinance relating to bills of exchange, apply, with the necessary modifications, to promissory notes ".

(2) " In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order ".

Prior to the execution of the bond on 15th January, 1948, Mohamedally was indebted to Pieris in the sum of Rs. 119,125 on four promissory notes including the note now sued on.

The bond recited that Rs. 25,000 together with interest had been paid to Pieris in part payment of the sum of Rs. 37,500 due on one of these notes dated 5th September, 1947, and that the sum of Rs. 94,125 with interest thereon at ten per cent. per annum from the date of the bond remained due. It then recited that Mohamedally had agreed to secure unto Pieris the said sum of Rs. 94,125 with interest in the manner hereinafter expressed. Mohamedally then bound himself to Pieris in the said sum " being the money borrowed by me on the promissory notes (the dates and amounts of which are then set out) (the receipt whereof I do hereby acknowledge ") to be paid to the obligee (Pieris) his heirs executors administrators or assigns with interest at ten per cent. per annum from the date thereof on demand. For securing the payment of all sums due and payable under the bond he specially mortgaged and hypothecated to the obligee as a first and primary mortgage free from any mortgage charge or other encumbrance the lands and premises described in the first schedule, and as a second mortgage the lands described in the second schedule.

It was then provided as the condition of the bond that on payment of the said sum advanced and in the meantime of interest thereon at ten per cent. per annum payable monthly on or before the 15th day of each and every month and on the obligor carefully keeping and maintaining the mortgaged lands and premises and the buildings thereon the bond should be null and void, with a proviso that in the event of any default in payment of interest or breach of any other covenant or condition all monies due under the bond should be recoverable.

As required by the law of Ceylon a Notary Public added the following attestation :—" I, Sanmugam Coomaraswamy of Colombo in the Island of Ceylon, Notary Public, do hereby certify and attest that no consideration passed in my presence but the same was set off against the amounts due on promissory notes dated 5th September 1947, 26th September 1947, 11th October 1947, and 16th October 1947 in favour of the said obligee and which said promissory notes have been duly identified by me and annexed

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to the original of this instrument and that the duplicate of this instrument bears twelve stamps to the aggregate value of Rs. 837 and the original a stamp of Rs. 1. Which I attest ".

(Signed) S. COOMARASWAMY,
Notary Public.

The following endorsement was also placed on the reverse side of the note now in suit :—

"The amount due on this promissory note together with interest thereon from the date hereof has been secured by mortgage bond No. 44 dated 15th January 1948 attested by me ".

(Signed) S. COOMARASWAMY,
Notary Public.

Three weeks later the bond with the notes attached was handed by the Notary to Pieris and retained by him.

Subsequently the note now sued on was indorsed by Pieris and delivered for valuable consideration to Misso.

The learned District Judge held that the note in suit was discharged upon the execution of the bond with the result that Misso could not recover thereon from Mohamedally, but that by virtue of section 55 (2) (*c*) of the Bills of Exchange Ordinance he could recover against Pieris as his immediate indorsee who was precluded from denying that the note was at the time of indorsement a valid and subsisting note and that he had a good title thereto. He based his decision as to the discharge of the note upon the uncontradicted evidence of the Notary (which will be referred to later) together with the terms of the attestation clause and the indorsement of the note.

In the Supreme Court Mr. Justice Gratiaen, with whose judgment Mr. Justice Gunasekara agreed, held that Misso was entitled to recover against Mohamedally as well as against Pieris. He said " In the present case the language of the indorsement made on the note (and signed by both defendants) by no means makes it manifest that the liability on the note had been extinguished. On the contrary, it is calculated to give the impression that the repayment of the amount due on the note was also secured by the mortgage bond dated 15th January 1948. Besides, at the time when the note was subsequently indorsed to the plaintiff for value it still remained in the payee's hands and bore all the appearances of an undischarged note ".

After referring to *Glasscock v. Balls*[1] and certain Ceylon authorities he continued :—" Be that as it may, it is certainly permissible to regard the fact that a promissory note remained in the payee's hands (without any indication of ' discharge ' or ' cancellation ' on the face of it) as a relevant circumstance to be taken into account in deciding the question of fact whether the liability had been extinguished by novation. Moreover the first defendant (as maker of the note) is in my opinion precluded as against an indorsee for value without notice from alleging that the

[1] *(1889) 24 Q. B. D. 13.*

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execution of the mortgage bond was intended by him to have more serious implications than those which were actually indicated in the indorsement which he signed. The language of his indorsement is quite insufficient to support the plea of discharge by novation, and is especially binding on the maker of a note who allows it thereafter to remain in circulation with all the appearances of a valid promissory note. Besides, to my mind the language of the bond itself is equivocal ".

Their Lordships are in full agreement with these observations in so far as they relate to the issue of discharge. They do not find it necessary in the present case to express any view with regard to the suggested estoppel which had not in fact been pleaded and would only arise if discharge of the note had in fact been established.

The Supreme Court judgment does not, however, contain any reference to the evidence of the Notary Public on which the District Judge had largely based his decision. It is therefore necessary to refer to it. The effect of it can be summarised as follows : After attesting the bond he explained to Mohamedally and Pieris why he had done so. He said it was because no money had passed in his presence and he informed them that the promissory note was cancelled and discharged by the bond. He said he had received instructions from Peiris to prepare the bond and Mohamedally and Pieris attended at his office on several occasions and the bond as finally settled was in accordance with the instructions of both parties.

In re-examination the following questions and answers appear :—

" Q. What did he (i.e. Pieris) tell you about these four notes ?

A. They were to be cancelled immediately the bond was signed.

Q. Did you make that position of Vernon Pieris clear to Mohamedally ?

A. Yes. "

In so far as this evidence relates to the meaning of the bond it was clearly inadmissible (vide section 91 of the Evidence Ordinance). The language of the bond together with that of the notes attached thereto speaks for itself and even if admitted without objection the Court could not properly act on such evidence.

In so far as the questions and answers in re-examination are relied upon as supporting a separate and independent agreement upon a matter on which the bond was silent (see proviso (2) to section 92 of the Evidence Ordinance) they are not evidence against Misso of an oral agreement between Mohamedally and Pieris neither of whom went into the witness box. Furthermore if such an agreement was in fact made it is clear that it was not carried out as the notes were not " cancelled " in the manner provided in section 63 (1) of the Bills of Exchange Ordinance with regard to intentional cancellation.

Their Lordships consider that the bond by itself is equivocal but the indorsement on the note and the fact that the notes were attached to the bond and retained by the mortgagee and payee are conclusive to negative

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the discharge by merger or novation relied upon and show that the bond was taken by way of additional security. This conclusion is in no way vitiated by the evidence of the Notary.

For these reasons their Lordships are of opinion that the appellant fails on the first limb of his case and they will accordingly humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

1955 *Present :* **Pulle, J., and Weerasooriya, J.**

MRS. J. H. RATNAYAKE, Appellant, *and* MRS. P. H. AMARASEKERE *et al.*, Respondents

S. C. 33—D. C. Colombo, 6,314/P

Partition action—Property not forming subject matter of action—Jurisdiction of Court to come to a finding on title thereto—Power of Court to order that any share shall remain unallotted—Partition Act, No. 16 of 1951, ss. 25, 26 (2) (f).

Upon a temporary division of property owned in common by three sisters, each entered into possession of separate properties and possessed them for fifteen years. Thereafter one of them instituted the present action to partition a property which had been allotted to her at the temporary division and which she had possessed upon that basis exclusively.

The appellant, who was one of the defendants, filed answer claiming that the division was a permanent one and also that she had acquired a title by prescription to the properties she had possessed exclusively, and prayed for a dismissal of the plaintiff's action. She participated in the trial and raised issues in support of her contentions. There were also pending actions in other courts filed by the plaintiff against the same defendants to partition some of the very properties which were claimed exclusively by the appellant.

Held, that it was not competent to the appellant in appeal to contend that it was outside the jurisdiction of the trial Court to come to a finding on title to properties not forming the subject matter of the present action inasmuch as she had invited the Court to adjudicate on the issues.

Held further, that, notwithstanding the provisions of section 26 (2) (*f*) of the Partition Act No. 16 of 1951, it was not competent to the Court to leave a third share unallotted pending decisions in the connected cases.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *Kingsley Herat*, for the 2nd defendant-appellant.

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Sir Lalita Rajapakse, Q.C., with *F. R. Dias* and *T. G. Gunasekera*, for the plaintiff-respondent.

H. W. Jayewardene, Q. C., with *C. G. Weeramantry*, for the 1st defendant-respondent.

Cur. adv. vult.

July 5, 1955. PULLE, J.—

This appeal arises out of an action instituted on the 25th July, 1951, under the provisions of the Partition Act, No. 16 of 1951, which came into operation on the 1st June, 1951. The subject matter of the action is a property called "Summer" situated within the Municipal limits of Colombo. The parties to the action, namely, the plaintiff and the two defendants, of whom the 2nd defendant is the appellant, are the daughters of one Hendrick Dabera Appuhamy who died in 1930 leaving a last will by which he devised to them the property in question and several other in equal shares subject to certain conditions.

Although in form the action was one for partition the parties went to trial on issues the answers to which affected, at least incidentally, the title to all other immovable properties devised jointly to the three daughters. Stated very briefly the position taken up by the appellant as against her sisters who have made common cause against her is that the immovable properties jointly devised to them were amicably divided and that in that division the appellant was allotted the properties particularised in the schedule to her amended answer dated 29th June, 1953, and that the plaintiff was allotted, among others, the property which is the subject matter of the action. She also pleaded that she had acquired a prescriptive title to the properties in the schedule referred to and prayed that the action be dismissed. The learned District Judge found against the appellant on all the material issues, save issue No. 7 an answer to which did not arise, and declared the parties entitled to the property in three equal shares subject to the fideicommissum created by the last will. Apart from submissions on certain matters of law, it was strenuously argued in appeal that on the evidence the trial judge was wrong in holding that the appellant had not acquired, by prescription, title to the properties claimed exclusively by her and that in any event it fell outside his jurisdiction to come to a finding on title to properties not forming the subject matter of this action and that that finding should not be allowed to stand. The importance attached by both sides to the finding that the appellant had not made out a prescriptive title to the properties claimed by her to the exclusion of her sisters can well be appreciated because there are now pending actions in other courts filed by the plaintiff in the present case against the same defendants to partition some of those very properties.

Before dealing with the pleas raised by the appellant in her answer it is necessary to set out some facts which are beyond controversy.

When the testator died in 1930 his three daughters were minors and in terms of the will the management of the estate was taken up by the persons named therein, Don Thomas Appuhamy and Philip Perera.

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By 1933 the 1st defendant, the eldest of the daughters, and the plaintiff had attained majority by marriage and the appellant, the youngest of them, was studying in a convent. She attained majority in April, 1937 and married in February, 1938. Early in 1935 the plaintiff filed an application in Testamentary case No. 4960 in which the last will was proved by which she asked, *inter alia*, for the removal from office of Thomas Appuhamy and Philip Perera and for an order directing that the heirs be given possession of their " distributive " shares. The court held by its order dated the 3rd August, 1935, that on the pretext that the appellant was a minor the managers were clinging to the entire estate, that there was no justification for preventing the two major daughters from the actual possession and enjoyment of their 2/3rd share and directed the managers to hand over immediate possession of that share to the two daughters.

On the 4th August, 1935, by the informal writing in Sinhalese marked P 11 the managers purporting to give effect to the order of Court of the previous day handed over to the two daughters the properties described therein as representing a 2/3rd share of the estate. On the same day the plaintiff and the first defendant signed an informal writing P 12 in Sinhalese by which they divided between themselves the properties they received from the Managers. The property which is the subject matter of the action was taken by the plaintiff. Both documents were drawn up by Thomas Appuhamy and one of the witnesses to P 12 was the other manager W. Philip Perera. The concluding paragraph of P 12 reads as follows :—

" We the said two persons undertook to divide and possess the said properties in this manner, until they are later divided among the three persons ".

Now one of the issues tried in the case was whether the order of court dated 3rd August, 1935, made in case No. 4960 operated as *res judicata* in favour of the appellant. The answer was in favour of the plaintiff and the 1st defendant and was not challenged at the argument in appeal. An issue as to misjoinder of parties and causes of action answered in their favour was not pressed in appeal.

To continue the narrative. The objections raised by the plaintiff to the accounts rendered by the managers in case No. 4960 were referred on the 9th October, 1935, to arbitration and an award P 14 was made on the 21st April, 1937, the last paragraph of which reads :

" In the course of the proceedings and on the 19th December, 1936, a certain agreement was noted between the parties regarding the immovable property belonging to the estate, namely, that the present arrangement regarding possession was to continue until the 6th respondent becomes a major in or about April, 1937, and thereafter it shall be open to the heirs to take steps for a partition, proper division or any other adjustment ."

After the appellant became a major in April, 1937, and towards December of the same year the three sisters attempted to reach a final settlement regarding the division of the immovable properties and to embody

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that settlement in a decree of court in case No. 4960 The document P 17 shows the items of immovable properties taken over from the inventory in case No. 4960 with their respective values. Excluding item No. 16 which was a property devised solely to the 1st defendant, the value of the properties which fell to the appellant at the division in August, 1935, was Rs. 146,595 while the other two sisters got properties valued at Rs. 157,385. The desire on the part of the latter for a fairer division was only natural.

Probably in December, 1937, an informal writing (Vide P 20 and P 20A) purporting to be a scheme of distribution was drawn up in triplicate and signed by the three sisters. Each was witnessed by the husband of the plaintiff and Thomas Appuhamy, the manager of the appellant's share under the 1935 division. The appellant repudiated this settlement shortly afterwards and her claim now is that since then she had acquired by prescriptive possession title to all the properties retained by the managers on her behalf under the 1935 division. Before dealing with the oral evidence on this point and the finding of the trial Judge I would refer to some minutes in case No. 4960. The first dated the 16th December, 1937, reads :—

" The parties have arrived at a tentative settlement with regard to the distribution of the immovable properties. The 6th respondent, however, desires to have a further opportunity of considering it before finally agreeing to it. This matter also may be brought up on 20th January to see whether it is possible for the parties to come to a final adjustment of all the matters connected with the estate ." (Vide 2D 3).

The 6th respondent referred to is the appellant. On the 20th January, 1938, no settlement had been reached and the record reads—P 15 :

" Call the case on 17th March, 1938, to see whether the parties can come to a settlement with regard to the properties to be taken separately by each of them ."

On the 17th March, 1938, it was recorded—P 16—that no settlement was reached. Towards the end of 1937 the appellant was engaged to be married to one Mr. J. M. B. Ratnayake whose brother, Mr. J. H. L. Ratnayake, a Proctor, was acting for the appellant in connexion with the scheme of distribution recorded in P 20. The estate of the testator was being administered by the Secretary of the District Court and Proctor Ratnayake sought access to the deeds relating to the properties. It appears to be probable that particulars were being sought early in 1938 from the deeds and from the proceedings in case No. 4960 to prepare conveyances vesting title according to the scheme of distribution P 20.

It is common ground that after the settlement recorded in P 20 fell through each of the three sisters continued as before to possess the properties as fell to them under the tentative division of August, 1935, and appropriated the income without accounting to the other two. One of the properties retained on behalf of the appellant in 1935 was Kanuwana Estate of the extent of 70 acres. She and her husband effected improvements. In D. C. Negombo case No. 16262 the plaintiff in the

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present case sought on 20th July, 1951, to partition Kanuwana Estate on the basis of a 1/3rd share to each of the sisters. The appellant has answered on the same lines as in this case but has claimed, in the alternative, that if a decree for partition is entered she be granted compensation for improvements in a sum of Rs. 150,000. The hearing of the cases in Negombo and in other courts awaits the determination of the case under appeal. Before dealing with the evidence on which the appellant bases her title by prescriptive possession I would refer to the documents P 21 and P 22. The former dated 4th February, 1944, is addressed by the 1st defendant, the eldest sister, to the Secretary of the District Court asking him to hand over to her Proctors the title deeds and other documents to enable them to file a partition action. The letter dated 14th February, 1944, is by the Proctors to the Secretary. It enclosed P 21 and stated that they had been instructed to file action " for the partition of the several lands belonging to the estate ."

Now the burden of proving title by prescriptive possession lay on the appellant and it would, therefore, be convenient to examine first her own evidence and that of her witnesses. She stated that there was displeasure over her marriage because she refused to marry the brother of the 1st defendant's husband. Ultimately neither of the sisters attended her wedding. She admitted having signed the writings P 20 and P 20A. The reason for doing so was that she was to be married in February and her sisters came with their husbands and worried her to sign. She repudiated the agreement shortly after her marriage on the occasion that her sisters divided the movable properties among themselves. The reason given for the repudiation was that Thomas Appuhamy, who, incidentally, witnessed the agreement, and the appellant's mother told her that she had done an extremely foolish act. She described her discussion of the settlement with her sisters in these words :

" On that day there was a discussion in regard to the immovable property. I told my sisters that as this settlement was rejected by court and as everybody told me it was unfair I said I was willing to continue with the division of 1935 because I was made aware by everybody that as I was the minor in 1935 I was the only one who could have disagreed with it, but I told them I was accepting it and from that date I accepted it. That old division stood ."

Referring to an attempted settlement in 1943 she said,

" I told them (the sisters) I had already settled, my husband had spent so much of his money on all these improvements, by that time he had done all the improvements, so I said—what settlement after I had spent so much time—and I did not agree because it was not possible at that time."

It would not be correct to say that there was any " rejection " of the settlement by court. The agreement being informal the appellant was free to resile from it and either bargain for another division or seek the appropriate legal remedy to obtain her share. The allegation that

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pressure was brought to bear on the appellant by her sisters to agree to the division recorded in P 20 has been discounted by the trial Judge for the reasons which are fully set out by him and which I need not repeat. If there was any ouster it could not have been prior to 1943.

The appellant called her husband Mr. J. M. B. Ratnayake as a witness. who deposed, principally, to the improvements made to three of the large estates retained by the Managers on her behalf at the 1935 division. There is one item of evidence in his cross-examination which is not adverted to in the judgment but which was the subject of comment by learned Counsel who appeared for the elder sisters. It is the letter P 29 dated 9th September, 1939, written by Mr. Ratnayake to the plaintiff's husband in reply to one sent by the latter. In it he says,

"There is no objection whatever for me to have these things settled. I have been asking you several times whenever I met you to come to a settlement. It will be quite suitable to me any day that will be convenient to you and Mr. Rodrigo. Only let it be in Colombo or Jaela ."

Mr. Rodrigo is the husband of the 1st defendant. It was put to Mr. Ratnayake that the proposal to have things settled had reference only to the making of a fresh attempt to come to an amicable division of the immovable properties but he denied it and ended by saying that he did not know what the settlement was about. During the re-examination certain journal entries in case No. 4960 were marked by way of suggesting that the matters therein referred to might have been the subject which Mr. Ratnayake intended to discuss. Of these entries, of which copies were not in the typed proceedings, the nearest in date to the letter P 29 of the 9th September, 1939, is the entry 2 D 15 dated the 24th November, 1939, which refers to the motion 2 D 14 of the 15th November, 1939. By this motion the appellant asked to be paid a sum of Rs. 95 which had been transmitted to case No. 4960 from the Court of Requests of Gampaha and it was paid to her on the 24th November. There is nothing to indicate any dispute over this small sum of money, when one has regard to the value of the estate and its income producing capacity, and it is most unlikely that the husbands of the respective sisters would have had any desire to discuss, what is plain from the testamentary case record, a matter which could not raise any serious controversy. The other entries do not afford any evidence of any serious disagreement. In my view the letter P 29 tends to support the evidence of the 1st defendant that after the appellant became a major attempts at reaching a settlement with the appellant were unsuccessful. The letter also renders improbable the version of the appellant that when she repudiated the arrangement recorded in P 20 she regarded the 1935 division as final and that she was not amenable to a negotiated settlement. Indeed when one examines the values of the properties—vide P 17—and their allocation in the 1935 division it would have been surprising had the appellant's sisters and their husbands remained inert without even inviting the appellant to consider fresh modes of settlement on an equitable basis. The steps taken in 1944 to institute a partition action appear to mark, perhaps, the stage when the two sisters had lost

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all hope of dividing the inheritance otherwise than by process of court. The trial Judge has accepted the reason given by the 1st defendant to explain the delay in filing action.

The appellant argues that there was an ouster of the two sisters from the properties now claimed exclusively by her because on the occasion she repudiated the 1937 arrangement she told them that she stood by the 1935 division. The trial Judge held that there was no evidence of ouster and that the possession by the appellant was under a temporary arrangement and that the bare fact that more than ten years had elapsed before the partition actions were instituted did not invest that arrangement with the character of a permanent settlement. He also held that the making of improvements was an act consistent with co-ownership. Paying due heed to the relationship between the parties and the events which took place between 1935 and the institution of the actions I am not convinced that the Judge came to a wrong finding on the issue of prescriptive possession. In my opinion the repudiation by the appellant of the 1937 division resulted in no more than that the parties stood and continued to stand in relation to the division of the estate exactly as they were in 1935.

The point was pressed in appeal that the question, whether the appellant had acquired title by prescription to the properties which she claimed to the exclusion of her sisters, was wholly irrelevant to any issue properly arising in an action to partition a property not included among those which she claimed. Undoubtedly the question would have been directly in issue, for example, in the Negombo case. In this connexion there are two circumstances which have to be kept in mind. The appellant both in her answer and in her petition of appeal asked that the plaintiff's action be dismissed. To obtain a dismissal of the action it was necessary for her to establish a tripartite division of a final character, under which division the plaintiff bacame the exclusive owner of the property in suit and that, as a necessary corollary, the appellant became the owner of the properties entered in the schedule to her answer. It is difficult to explain the appeallant's participation in the trial on any other basis. Else how can it be that the eminent counsel who appeared for the appellant at the trial raised issue after issue directed to the question whether there was a concluded settlement in regard to the division of the estate and also invited the court to answer an issue of prescription ? The terms of the judgment appealed from indicate to my mind that the case was conducted on the footing, and was so understood by the equally eminent counsel who appeared for the plaintiff, that if the appellant failed on both the issues of family arrangement and prescription, the inevitable result was a declaration that the parties were entitled each to a third share of the property in suit. Further, I accept the argument on behalf of the two sisters based on *Thevaganasekaram v. Kuppammal et al.*[1] that it is not competent to the appellant to take up the position in appeal that the Court should not have adjudicated on the issues on which she expressly invited it to give its findings.

[1] *(1934) 36 N. L. R. 337.*

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It is conceded that the plaintiff who claimed to be the owner of only a third share was entitled to maintain the action under the Partition Act and that a dismissal of the action was not warranted even though the appellant succeeded on the contest raised by her, provided the court ultimately held the property was held in common by the plaintiff and the 1st defendant. It was argued, on the assumption that the appellant could not have a third share thrust on her against her will, that a way out of the difficulty was to leave unallotted the third share which the plaintiff assigned to the appellant.

Express provision is made in section 26 (2) (*f*) of the Partition Act to enable the court to order that any share shall remain unallotted. I am unable to hold that the legislature contemplated that in the circumstances such as those proved in the present case, the court shall have left a third share unallotted pending decisions in the connected cases. Under section 25 it was the duty of the court to examine the title of each party. It might, perhaps, have been more desirable if the case under appeal had been laid by pending the decision of the Negombo case but it is not at all unlikely that the parties and their legal advisers thought that Colombo was a more suitable forum from the point of view of convenience than Negombo or other outstation. The convenience of the forum is pretty evident. Admittedly on the death of the testator a third share in the properties jointly devised passed to each of the daughters. The court was invited to hold by the youngest daughter that her share in the property in suit was extinguished at a point of time somewhere about 1947 or 1948. The court held against her on this point and it had now no alternative but to declare that each of the sisters was entitled to a third share.

I see no reason for interfering with the decree under appeal and I would dismiss it with costs.

WEERASOORIYA, J.—I agree.

Appeal dismissed.

1957 *Present :* **Basnayake, C.J., and Pulle, J.**

M. RAZIK, Appellant, *and* H. ESUFALLY, Respondent

S. C. 351—D. C. Colombo, 30380/M

Rent Restriction Act—Section 13—Arrears of rent—Tender of rent—Elements necessary to constitute tender—Overholding lessee—Liability to pay rent.

Tender of money does not mean mere expression of readiness to pay the money. To constitute tender the readiness to pay must be accompanied

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by production of the money that is offered in satisfaction of the debt. Therefore, mere willingness by a tenant to pay the rent due to his landlord does not discharge his obligation to pay the rent.

Under the Rent Restriction Act an overholding tenant under a notarial lease is liable to be ejected if he fails to pay rent for one month after it has become due.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *M. Rafeek*, for Defendant-Appellant.

Walter Jayawardena, with *F. X. J. Rasanayagam*, for Plaintiff-Respondent.

Cur. adv. vult.

March 29, 1957. BASNAYAKE, C.J.—

The plaintiff seeks to have the defendant ejected from premises No. 44 (4-9) situate in Wolfendhal Street, Colombo, and also to recover damages amounting to Rs. 7,000 with further damages at Rs. 291/67 per mensem from 1st October 1953 till the plaintiff is placed in possession.

The material facts are as follows :—

Abdul Kaiyam was the tenant of the premises in question. On his death in 1949 the plaintiff asked his widow to vacate the premises ; but the defendant, her brother, appealed to him to permit the business to be carried on at least until the termination of the testamentary proceedings in respect of Abdul Kaiyam's estate. Thereupon the plaintiff leased the premises to the defendant by indenture dated 5th April 1950 for a period of 18 months. The lease was to terminate on 30th September 1951 and the annual rent of Rs. 3,500 was payable in quarterly instalments of Rs. 875 on the 15th day of the months of May, August, and November 1950, and February 1951. One of the conditions of the lease was that the lessee should yield up and deliver to the lessor or his agent vacant possession of the premises at the expiration of the period of eighteen months. On 29th June 1951 the plaintiff through his lawyers notified the defendant in writing that at the end of the term of the lease he should quit and deliver vacant possession of the premises. The defendant did not either send a reply to this notice or vacate the premises on 30th September 1951. Thereafter a second notice was sent to him on 8th October 1951. On that day the defendant saw the plaintiff and asked that he be allowed to continue as tenant. The plaintiff did not consent as the matter had been placed in the hands of his lawyers. On 6th November 1953 this action was instituted and the defendant's answer was filed on 28th June 1954. No rent had been paid between 30th September 1951 and the date of filing answer. It is on the ground that the defendant has been in arrears for one month after the rent has become due that the

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plaintiff seeks to get over the bar to an action in ejectment created by section 13 of the Rent Restriction Act. The defendant claims that he offered the rent to the plaintiff and that the plaintiff said that he was not worried about the money.

The learned District Judge has rejected the defendant's evidence that he offered to pay the rent and that the plaintiff declined to take it. He accepts the plaintiff's evidence that at no stage did the defendant tender to him the rent due or even make an offer of payment. We see no reason to disturb those findings of fact. The plaintiff's evidence is quite clear on the point. He says :—

> " On 8th October defendant approached me with a suggestion that he should be allowed to continue as tenant. I said the matter was in the hands of the lawyers and that he should make arrangements with the lawyers. Since then he has not seen me. My lawyers are Messrs. F. J. & G. de Saram. To my knowledge defendant did not approach my lawyers. Defendant did not at any time give me rent. Until I came to court no money was paid to me."

The defendant's position is summed up in the following question and answer in his examination in chief :—

> " Q. Your case was that you were willing to pay but plaintiff wanted the premises back ?
>
> A. Yes. "

Mere willingness to pay the rent does not discharge the obligation to pay the rent. At no time did the defendant on his own showing pay the rent. The farthest he went was to take his cheque book with him and say he was " prepared to pay ".

It was argued that the defendant's action amounted to tender of the rent. Tender does not mean mere expression of readiness to pay. To constitute tender the readiness to pay must be accompanied by production of the money that is offered in satisfaction of the debt (Harris on Law of Tender, p. 11). In this sense the rent was never tendered by the defendant.

As the plaintiff notified the defendant three months before the expiry of the lease that he should hand over the premises at the end of September 1951 it cannot be said that there has been a tacit renewal of the lease. The contractual tenancy having expired at the end of September 1951, the defendant was able to remain in the premises merely because section 13 barred an action in ejectment except on one of the grounds provided therein. The defendant is then a tenant remaining in possession of the leased premises without the lessor's consent. Under the common law such a person is deemed to hold the premises on the same terms as under the lease except that he is not entitled to go on for the term of the original lease or any shorter period and is bound to pay a proportionate rent for the period of his unauthorised occupation (Van Leeuwen Censura Forensis, Pt. I, Bk IV, Ch. XXII, Sec. 15—Barber). But the Rent Restriction Act

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bars an action for the ejectment of such a person except in circumstances prescribed by the Act. Such a person can be ejected if he fails to pay the rent for one month after it has become due. The defendant not having paid any rent for two years cannot escape the consequences of such non-payment. The lessee's obligations under our law in regard to rent is to pay the rent at the proper place and time (Van Leeuwen's Censura Forensis, Part I, Book IV, Ch. XXII, s. 13). It is not sufficient to express a willingness to pay the rent. The rent must be actually paid.

If he does not pay the rent and falls into arrears it is no defence to an action in ejectment to say that because of the landlord's attitude he did not pay the rent.

The appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

[ASSIZE COURT]

1956 *Present :* **Gunasekara, J.**

THE QUEEN *v.* S. H. CICILIN

S. C. 1 (Southern Circuit, 2nd Criminal Sessions)—M. C. Balapitiya, 14,832

Confession—Criminal Procedure Code—Section 134 (3)—" Voluntarily "—Evidence Ordinance, s. 24.

A confession is made " voluntarily " within the meaning of section 134 (3) of the Criminal Procedure Code if it is made in circumstances that do not render it inadmissible by reason of the provisions of section 24 of the Evidence Ordinance.

ORDER made in the course of a trial before the Supreme Court.

E. H. C. Jayatilaka, Crown Counsel, for the Crown.

Siva Rajaratnam, with *Douglas Wijeratne*, for the accused.

Cur. adv. vult.

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September 26, 1956. GUNASEKARA, J.—

The accused woman is being tried on a charge of having committed the murder of a woman named Sirimal Nona on the 26th February last at Hirikumbura-Meegaspitiya in the judicial division of Balapitiya. The learned counsel for the defence objected to the admission of the document P16, which is a record of a proceeding under section 134 of the Criminal Procedure Code, in which the accused made a confession to the Magistrate of Balapitiya. I overruled the objection and said that I would give my reasons later.

The section provides in subsection (1) that any magistrate may record any statement made to him at any time before the commencement of an inquiry or trial, and in subsection (3) that no magistrate shall record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. The ground of the objection was that the magistrate did not probe sufficiently the accused's motive for making the confession before he concluded that it was made voluntarily. It was contended that if the magistrate in his questioning of the accused had investigated her motive in the light of the facts that were already before him it might well have turned out that her confession was not voluntarily made.

These facts, so far as they had been elicited in evidence at the time of my order, were as follows. The homicide was reported to the magistrate by the Uragaha police on the 26th February, and he visited the scene at 3.15 p.m. on the same day. The deceased's body lay in a pool of blood on the floor of her house with a cut wound on the nape of the neck. The magistrate recorded the available evidence and directed that the case should be called before him on the next day. On the same afternoon the police took into their custody the accused's father Kaluneris and her husband Addin (or Edwin) as persons suspected of the murder. They were produced before the magistrate on the 27th and remanded to the custody of the fiscal until the 6th March. On the 27th the police also produced before the magistrate what they alleged was a bloodstained shirt that had been found in Addin's house, a specimen of the deceased's blood and scrapings from the floor of the room in which her body was found. These things were ordered to be sent to the Government Analyst for a report, by the 19th March, as to whether the shirt was stained with blood of the same group as the deceased's and whether it was also stained with a substance of the same kind as a substance alleged to be present in the scrapings. In the early hours of the morning of the next day the accused was arrested in her parents' house at Hirikumbura and taken to her own house and thence to the Uragaha police station, a few miles away. Later, at 9.30 a.m. she was produced before the magistrate at the court-house in Balapitiya by an assistant superintendent of police, who told the magistrate that she wished to make a confession.

It was as a result of information given to the police by a brother of Kaluneris, a man named Charlis, that the accused was arrested. It appears that on the night of the 27th February, at some time after 8.30 p.m., Charlis interviewed her at the house of her parents, where she was staying after her husband's arrest, and then went to the Uragaha police

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station with a brother of hers and made a statement to the effect that she had confessed to him that the deceased had been killed by her. Charlis's statement was recorded by a sub-inspector of police, Ibrahim, at 11.40 p.m. The sub-inspector then went to the accused's parents' house at Hirikumbura, which he reached at 1.45 a.m., and arrested her there. It appears from evidence given by Mr. Ibrahim before me, in the absence of the jury, that before he took her into custody he questioned her and she made a long and circumstantial statement to him in which she confessed that she had killed the deceased.

According to Charlis's evidence the accused made a confession to him in reply to a question as to whether she knew anything about Sirimal Nona's death. He denied that he had said anything to her with the object of inducing her to confess. But according to Ibrahim, in the statement that Charlis made to him at the police station Charlis said that he had asked the accused " to speak the truth if she had committed the murder ", and had said that if she spoke the truth he would " save her from that ". Charlis denied that he had said such a thing in his statement to the police. I accept Ibrahim's evidence on this point, but there is no evidence of the truth of what Charlis stated to him. There is no evidence that Charlis asked the accused to speak the truth if she had committed the murder or that he said he would save her if she spoke the truth.

It was suggested to Charlis in cross-examination that he had advised the accused " that she should confess to this murder ", and had told her that if she did so her father and her husband would be released, instead of being hanged for murder, and she, being a woman, would be sentenced to a year's imprisonment, and also that he himself and Kaluneris and Addin would " save her ". These suggestions were denied by Charlis and there is no evidence that contradicts his denial. The burden is on the prosecution, however, to show that the making of a confession that it seeks to prove has not been caused by such an inducement, threat or promise as is referred to in section 24 of the Evidence Ordinance, and I am not satisfied with Charlis's denial. It seems to me that it is not unlikely that Charlis did seek to induce the accused to make a confession by pointing out to her the advantages of such a course and by telling her that he and her father and her husband would " save her ". But Charlis was not " a person in authority " within the meaning of section 24 of the Evidence Ordinance. Therefore an inducement or promise proceeding from him cannot render the confession obnoxious to this section unless it proceeded from him " in the presence of a person in authority and with his sanction ".

The suggestions to which I have referred were made in the cross-examination of Charlis on his evidence about the confession alleged to have been made to him on the night of the 27th February, and they relate to what passed between him and the accused before the latter was interviewed by sub-inspector Ibrahim. There is no evidence that he offered any inducement or made any threat or promise to the accused in the presence of any person in authority. It was not even suggested in cross-examination that any such thing happened ; although both he and Ibrahim admitted

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that he was present when the accused's statement was taken by Ibrahim, and he further admitted that he had gone to the magistrate's court later that morning with the accused in the police van that took her there. According to the evidence of the sub-inspector, from the time when he met the accused at 1.45 a.m. on the 26th February until he produced her before the magistrate at about 9.30 a.m. she was within his view practically all the time, and no one offered her any inducement or threat or promise. In the absence of any evidence or even a suggestion to the contrary I see no reason to doubt the truth of what Ibrahim has said on this point. On the material before me I am of opinion that the making of the confession was not caused by such an inducement, threat or promise as would render it inadmissible in terms of section 24 of the Evidence Ordinance.

Mr. Rajaratnam contended that an adequate probing of the accused's motive for making the confession might well have revealed that what moved her to confess was a belief that if she did so her father and her husband would be released and she herself would be dealt with leniently. I agree with this contention, but I do not agree that a confession so motivated would not be one made "voluntarily" within the meaning of section 134 of the Criminal Procedure Code. The learned counsel was not able to refer me to any authority on the question of the meaning of the term as used in this section. In my opinion a confession is made "voluntarily" if it is made in circumstances that do not render it inadmissible by reason of the provisions of section 24 of the Evidence Ordinance, which enacts a principle of the English law that a confession is admissible in evidence only if it is made voluntarily. In the only case that was cited to me, *R. v. Ranhamy*[1], there appears to be nothing that conflicts with this view. It was held upon the facts of that case that a magistrate who purported to record a confession under section 134 of the Criminal Procedure Code "should have probed with the greatest care into the motives which led the accused to make this statement"; apparently for the reason that there was a possibility that the hope of a conditional pardon had been held out to him by the police to induce him to make a confession. A confession which might well have been procured by such an inducement would have been inadmissible by reason of the provisions of section 24 of the Evidence Ordinance. It does not appear from the report of the case whether any evidence was led at the trial to exclude that possibility. In the present case, as I have already said, I am of opinion that the confession is not obnoxious to section 24 of the Evidence Ordinance.

For these reasons I admitted the document P16 in evidence.

Objection overruled

[1] (1937) 2 C. L. J. R. 104.

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1956 *Present :* **Basnayake, C.J., and K. D. de Silva, J.**

RATNASINGHAM and another, Appellants, *and*
CATHERASWAMY, Respondent

S. C. 472—D. C. Colombo, 479/Z

Rent Restriction Act, No. 29 of 1948—Sub-letting—Sale of premises—Right of purchaser to evict tenant and sub-tenant—Sections 9 (1) and (2), 27.

Where the tenant of any premises sub-lets them in contravention of section 9 (1) of the Rent Restriction Act and the premises are thereafter sold by the landlord to a third party, the purchaser is entitled to maintain an action under section 9 (2) for the ejectment of the tenant and the sub-tenant.

APPEAL from a judgment of the District Court, Colombo.

C. Renganathan, for Defendants-Appellants.

H. W. Jayewardene, Q.C., with *E. R. S. R. Coomaraswamy* and *P. Ranasinghe*, for Plaintiff-Respondent.

December 19, 1956. BASNAYAKE, C.J.—

This is an action instituted by the plaintiff, one Catheraswamy, the purchaser of premises No. 11, Fernando Road, Wellawatte, from one Edwin Silva on 7th June, 1954. The learned trial Judge has held, and it is not disputed in appeal, that the 1st defendant who was the tenant under Edwin Silva sub-let the premises to the 2nd defendant when Edwin Silva was his landlord. He has also held that the rights of Edwin Silva were transferred to the present plaintiff by virtue of the sale of the premises to him.

Learned counsel for the appellants contends that an action under Section 9 (2) of the Rent Restriction Act No. 29 of 1948 is available only to a landlord who is the landlord at the time of the breach of the provisions of Section 9 (1) of the Rent Restriction Act. He submits that the present plaintiff was not the landlord of the premises in question at the time the 1st defendant sub-let them, and that he is not entitled to maintain this action. We are unable to uphold this contention. Section 9 (1) provides that " the tenant of any premises to which this Act applies shall not, without the prior consent in writing of the landlord, sub-let the premises or any part thereof to any other person ". In this case it is not disputed that the 1st defendant did not obtain the consent of Edwin Silva prior to sub-letting the premises. The question then is as to the meaning of the word " landlord " in Section 9 (2) of the Rent Restriction Act.

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That Sub-section reads as follows :—

" Where any premises or any part thereof is sub-let in contravention of the provisions of Sub-section (1), the landlord shall, notwithstanding the provisions of Section 13, be entitled in an action instituted in a Court of competent jurisdiction to a decree for the ejectment from the premises of his tenant and of the person or each of the persons to whom the premises or any part thereof has been so sub-let. "

Learned counsel for the appellant contends that the word " landlord " in the context means the landlord of the premises at the time the premises were sub-let. Learned counsel's interpretation requires the interpolation of words into the section. Such an interpolation would be a violation of the canons of interpretation of statutes. The expression " landlord " is defined in Section 27 of the Rent Restriction Act, and in relation to any premises it means the person for the time being entitled to receive the rent of such premises and includes any tenant who lets the premises or any part thereof to any sub-tenant. There is nothing in the context of Section 9 (1) which excludes the application of that definition to that Section. The word " landlord " in the context of Section 9 (2) therefore means the person for the time being entitled to receive the rent, who, in the instant case, is the plaintiff. He is therefore entitled to maintain this action. The learned trial Judge is right in his finding and we dismiss the appeal with costs.

DE SILVA, J.—I agree.

Appeal dismissed.

1956 *Present :* **K. D. de Silva, J., and Sinnetamby, J.**

M. SUBBIAH, Appellant, *and* THE TOWN COUNCIL, POINT PEDRO, Respondent

S. C. 276—D. C. Colombo, 33,917/M

Town Council—Sued for breach of contract—Notice of action not necessary—Town Councils Ordinance, No. 3 of 1949, s. 231 (1).

The notice contemplated in section 231 of the Town Councils Ordinance, which provides that no action shall be instituted against a Town Council for anything done or intended to be done under the powers of that Ordinance until the expiration of one month after written notice is given to the Council stating with reasonable certainty the cause of action etc., is required to be given only in cases where the cause of action is based on tort and not on contract.

APPEAL from a judgment of the District Court, Colombo.

V. A. Kandiah, for the plaintiff-appellant.

H. Wanigatunga, for the defendant-respondent.

Cur. adv. vult.

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December 20, 1956. DE SILVA, J.—

The plaintiff appellant instituted this action against the Town Council, Point Pedro, the defendant, to recover a sum of Rs. 347/50 on account of goods sold and delivered. The defendant filed answer denying the purchase of the goods and also pleading that this action was not maintainable as the notice required in terms of the provisions of section 231 (1) of the Town Councils Ordinance No. 3 of 1946 was not given. The learned District Judge tried the two issues relating to this plea as preliminary issues and having answered them in favour of the defendant dismissed the plaintiff's action with costs. This appeal is from that order.

Section 231 (1) of Ordinance No. 3 of 1946 provides that no action shall be instituted against a Town Council for anything done or intended to be done under the powers of that Ordinance until the expiration of one month after written notice is given to the Council stating with reasonable certainty the cause of action etc. It is contended on behalf of the plaintiff that the notice contemplated in section 231 (1) is required to be given only in cases where the cause of action is based on tort and not on contract or quasi-contract. Section 177 of the Municipal Councils Ordinance No. 17 of 1865 which is substantially the same as section 231 (1) of Ordinance No. 3 of 1946 came up for consideration in *John Walker & Co. v. The Municipal Council of Kandy* [1]. In that case the plaintiff sought to recover a sum of money from the defendant Council on account of work done and goods supplied. The defendant pleaded that the action was not maintainable as the notice required by section 177 of Ordinance No. 17 of 1865 had not been given. In rejecting this plea Clarence J. stated :—

> " This clause seems to me to contemplate actions to recover damage for torts or to restrain the commission of torts. I do not think it was meant to impose a three months ' time of prescription on a mere claim for goods sold or work done. "

The same Judge adhered to this view in the subsequent case *Jayasundera v. The Municipal Council of Galle* [2].

In *Siripala v. U. D. C., Kalutara* [3] Wijeyewardene J. had occasion to consider the interpretation of section 230 of the Local Government Ordinance No. 11 of 1920. That section is identical with section 231 of Ordinance No. 3 of 1946. In that case the plaintiff sought to recover a sum of money which he had paid for the purchase of land belonging to the Urban Council sold by auction but which sale the Council refused to confirm. The Council pleaded that the action was not maintainable as no notice had been given in terms of section 230 of Ordinance No. 11 of 1920. In construing that section Wijeyewardene J. after referring to the earlier cases observed :—

> " Apart from authority, the language of section 230 of the Local Government Ordinance leaves no doubt in my mind that the section is not applicable to actions against an Urban District Council for the enforcement of contractual or quasi-contractual obligations. "

[1] *(1881) 4 S. C. C. 140.* [2] *(1883) 5 S. C. C. 174.*

[3] *(1939) 41 N. L. R. 161.*

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I would respectfully agree with that view. Section 231 of Ordinance No. 3 of 1946 is applicable, in my opinion, to actions for the enforcement of obligations arising *ex delicto* and not to actions such as this. The judgment of Wijeyewardene J. in *41 N. L. R. 161* was cited by the plaintiff's Counsel in the Court below but the learned District Judge refused to follow it on the ground that the passage quoted above from that judgment was obiter. I am unable to understand how the District Judge could have held it to be obiter. The point was specifically raised in the case and it became absolutely necessary to decide whether or not the provisions of section 230 were applicable to actions based on contract or quasi-contract. After considering the earlier authorities and the language of the section this Court held that the section in question was not applicable to such actions. The original Courts should not lightly dismiss the views of this Court as being obiter.

The learned District Judge should have answered the preliminary issue No. 4 in the affirmative. Accordingly I would set aside the order appealed from and send the case back for trial on the remaining issues. The defendant will pay the costs of this appeal to the plaintiff.

SINNETAMBY, J.—I agree.

Appeal allowed.

1957 *Present :* **H. N. G. Fernando, J.**

D. SUPPIAH, Appellant, *and* K. KANDIAH, Respondent

S. C. 265—C. R. Hatton, 8,134

Rent Restriction Act, No. 29 of 1948—Section 13 (a)—" Arrears of rent ".

Where it has been the practice for the landlord to accept rent not in the month for which rent is payable but once in several months, the question whether the tenant is in arrears of rent within the meaning of section 13 (*a*) of the Rent Restriction Act must be considered in terms of that practice.

APPEAL from a judgment of the Court of Requests, Hatton.

N. Samarakoon, with *J. C. Thurairatnam*, for the defendant-appellant.

Siva Rajaratnam, for the plaintiff-respondent.

March 27, 1957. H. N. G. FERNANDO, J.—

The defendant has been the tenant of the plaintiff since 1944 on a monthly tenancy. The only question which arises is whether the defendant was in arrears of rent for the month of January, 1956, by reason of his failure to pay that rent within one month after it became due. According to the plaintiff the rent for January, 1956, became due on the 15th

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January. The defence position was that it had been the practice for the plaintiff to accept rents not in the month for which rent was payable but once in three or four months. The learned Commissioner has found from the evidence of books kept by the plaintiff himself that rent was not paid on the due dates but after the rent had accumulated for about two or three months. The books show that up to the end of the year, 1955, this practice had obtained and even from the plaintiff's evidence it seems fairly clear that it had never been the practice for rent to be paid in any month for that month. Before the plaintiff can establish that the rent was in arrears he had to establish when it became due, and in the face of the documentary evidence it is in my view impossible for the plaintiff to contend that there had been any agreement to pay the rent from month to month. He attempted to allege that shortly before the alleged default now in question, he had requested the defendant to pay the rent before the 15th of the month but the vagueness and uncertainty of his evidence on this point is no doubt the reason why the Judge does not hold that such a request had been made.

The Commissioner seems to have thought that the only question was whether the indulgence granted by the plaintiff entitles the defendant to claim that indulgence as of right. It seems to me, however, that the real question is whether the practice does not show that there was an implied agreement to pay and accept rents about once in two or three months. In my opinion such a practice was established and the tender of payment in March, 1956, of the rents for January and February was in accordance with this practice. The defendant was therefore not in arrears of rent at the time of the notice.

For these reasons I set aside the decree appealed from and dismiss the plaintiff's action with costs in both courts.

Appeal allowed.

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[In the Privy Council]

1957 *Present :* **Viscount Simonds, Lord Oaksey, Lord Tucker, Lord Somervell of Harrow and Mr. L. M. D. de Silva**

NAGAMMAI ACHI and another, Appellants, *and* A. R. L. LAKSHAMANAN CHETTIAR, Respondent

Privy Council Appeal No. 27 of 1953

S. C. 234—D. C., Galle, X 56

Fraud—Burden of proof—Misdirection—Concealed fraud—Can agent's knowledge be imputed to the principal ?—Prescription.

The equitable principle of concealed fraud is part of the law of Ceylon. It is not necessary to establish some independent act of concealment in cases where the tort is itself done furtively so that its commission will be concealed.

The plaintiff was a money lender resident in India and having a branch of his business in Ceylon. The branch was managed by the defendant, who held a power of attorney from the plaintiff. Two persons, A and B, were debtors of the Ceylon business—the former under a decree which the defendant had obtained against him, and the latter upon a promissory note given by him to the defendant. On January 25, 1933, the defendant assigned the decree and negotiated the promissory note to one Alagappa without receiving any payment for either transfer. Three days later, on January 28, 1933, he left the services of the plaintiff, and one Sinniah was appointed as his substitute. Between 1933 and 1938 Alagappa recovered sums on the decree and the promissory note, but no part of these sums reached the plaintiff or his agent Sinniah. The plaintiff had not heard of these transactions and the recovery of the monies until 1942. He then claimed these monies in the present case on the ground that the assignments were fraudulent and made in order that Alagappa might recover the monies for the defendant in fraud of the plaintiff. The defendant's main answer was that he received express instructions from the plaintiff to assign the decree and endorse and deliver the promissory note to Alagappa. He further pleaded that the causes of action were prescribed. In answer to this plea the plaintiff alleged that the prescriptive period did not begin to run until 1942 as there had been " concealed fraud ".

Held, that the burden of establishing fraud on the evidence as a whole rested plainly on the plaintiff. But once the Court was satisfied that the plaintiff had not given express instructions to assign the decree and negotiate the promissory note, it was for the defendant to establish such express instructions if, otherwise, the only conclusion possible on the evidence on the fraud issue would be adverse to the defendant ; in this limited sense, therefore, there was no misdirection when the trial Court held that the burden rested on the defendant to prove that he assigned the decree and negotiated the promissory note to Alagappa at the instance of the plaintiff.

Held further, that the defence under the Prescription Ordinance failed because on the facts, in particular the entries or absence of entries in the books, there was ample evidence on which the Court could find " concealed fraud ". The fact that Sinniah, who succeeded the defendant as attorney of the plaintiff, was probably aware of the assignment could not necessarily import knowledge to the plaintiff in the absence of very precise findings of fact and, especially, as no point based on Sinniah's alleged knowledge was taken in the defendant's case.

2—J. N. B 66846—1,593 (7/57)

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APPEAL from a judgment of the Supreme Court reported in *50 N. L. R. 337.*

Stephen Chapman, Q.C., with *John Stephenson*, for the plaintiffs appellants.

J. Chinna Durai, for the defendant respondent.

Cur. adv. vult.

May 16, 1957. [*Delivered by* LORD SOMERVELL OF HARROW]—

This is an appeal from a judgment of the Supreme Court of Ceylon setting aside a judgment of the District Court of Galle whereby the respondent (defendant) was ordered to pay to the plaintiff, since deceased, certain sums with interest. By Order in Council dated 17th March, 1955, the present appellants were substituted for the deceased plaintiff. In this judgment the original plaintiff will be referred to as the deceased appellant.

The deceased appellant was a money lender resident in India and having a branch of his business in Ceylon. That branch was managed up to 28th January, 1933, by the respondent, who held a Power of Attorney from the deceased appellant.

One Samaranayake was a debtor of the Ceylon business. He died and in 1929 the respondent obtained a decree in the District Court of Galle against his executor for Rs. 8,618·20 with interest and costs.

I. M. S. Alles was another debtor of the Ceylon business. On 1st January, 1931, the respondent obtained from him a promissory note for Rs. 7,000 with interest at 12 per cent.

The decree was obtained by and the note made payable to A. T. K. P. L. M. Letchumanan Chettiyar. The initials are those of the deceased appellant's firm or business and the name, though differently spelt, is that of the respondent. It was not suggested that there was anything irregular in the use by the respondent of his own name.

On the 25th January, 1933, the respondent by an instrument in writing assigned the decree to one Alagappa. The assignment recited that Rs. 2,695 of the judgment debt had been already paid by the judgment debtor. This was true and that sum had been accounted for by the respondent to the deceased appellant. It also recited that the respondent had received Rs. 3,000 as consideration for the assignment. According to the respondent this was not true. He said that he received no payment.

On or about the same date the respondent endorsed and delivered the note to Alagappa, also, according to his evidence, without any payment. The respondent left Colombo on or about 28th January, 1933, Sinniah being appointed as his substitute.

Between 1933 and 1938 Alagappa recovered Rs. 5,706·81 on the decree. Alles had died and on 3rd October, 1934, his executor paid Rs. 8,500. No part of these sums reached the deceased appellant or his then agent in Ceylon.

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The deceased appellant's case was that the assignments were fraudulent and made in order that Alagappa might recover the monies for the respondent in fraud of the deceased. The respondent's main answer was that he received express instructions in writing from the deceased appellant to assign the decree and endorse and deliver the note to Alagappa.

The deceased appellant gave evidence accepted by the learned trial judge that he had not heard of these transactions and the recovery of the monies until 1942. The plaint was issued in July of that year.

Before the District Court the respondent challenged the jurisdiction of the Court. That failed and is not pursued before the Board.

The first question, apart from jurisdiction, was whether fraud was established. The learned trial Judge held that it was. The respondent then pleaded a discharge in writing dated 28th April, 1934, when books and accounts were handed over. That defence was not relied on before the Board. The respondent further pleaded that the causes of action were prescribed under the Prescription Ordinance (Legislative Enactments of Ceylon, Vol. II, c. 55). In answer to this plea the deceased appellant alleged that the period in the Ordinance did not begin to run until 1942 as there had been "concealed fraud", or alternatively because the respondent was a Trustee within the Trusts Ordinance (Legislative Enactments of Ceylon, Vol. II, c. 72) which by section 111 makes the Prescription Ordinance inapplicable in certain cases of which, it was said, this was one.

The Supreme Court set aside the order of the District Court on the ground that the learned Judge had misdirected himself.

There was no dispute as to many of the relevant facts. The following is a summary of the learned trial Judge's findings.

The debt from Alles was a good debt. Owing to his death it was expected in 1932 that it would take a year or two years to collect. The slump had affected Ceylon and a number of debts were in effect irrecoverable. The deceased appellant instructed the respondent to write off bad or irrecoverable debts. On or about 5th December, 1932, the debt due from Alles was written off as if it had been an irrecoverable debt and ceased to appear in the books. The Samaranayake debt was also, as the respondent admitted, a good debt. That debt also disappeared from the ledger balances sent to the deceased appellant at or about the end of December, 1931.

But for the subsequent assignment of the decree and delivery of the note, the documents, that is the decree and the note, would have remained in the files of the branch.

As has been stated the respondent alleged that the deceased appellant had given him express written instructions to write off the debts, to assign the decree and endorse and deliver the note. The deceased appellant denied that he had given any such instructions.

The learned Judge in a careful judgment considered the probabilities as well, no doubt, as the impression made on him by the witnesses. He refers to a letter, the terms of which he thought supported the deceased appellant. The respondent himself had said that the deceased appellant

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personally did not know his clients in Ceylon which would make it unlikely for him to refer to two particular debtors. He considered at some length the position of Alagappa, who was related both to the deceased appellant and the respondent. On the one hand he found that the deceased had asked Alagappa to exercise some degree of supervision over his affairs in Ceylon. He also had in mind that Alagappa already owed the deceased appellant a large sum of money and it was therefore unlikely that he would be chosen by the deceased appellant as an assignee for no consideration. He also considered the respondent's failure to call Alagappa, who had according to the respondent's evidence, himself brought one of the letters of special instructions.

Their Lordships have thought it right to refer in a little detail to the consideration given to the matter by the learned Judge in view of the ground on which the Supreme Court set aside his judgment and then held on the evidence that fraud was not established.

The Supreme Court held that the learned trial Judge had placed the burden of proof in regard to fraud on the defendant. This was based on the following sentence in the judgment :—

> " It is admitted that the defendant assigned the Samaranayake decree and assigned Alles note to Alagappah Chetty. That being so the burden rests on him to prove that he did so at the instance of the plaintiff. "

Read in its context in a judgment in which the evidence and probabilities are carefully weighed the effect of the sentence is not in their Lordships' opinion as stated in the Supreme Court. The learned Judge was not speaking of the burden of establishing fraud on the evidence as a whole which plainly rests on the plaintiff. He was dealing with one issue of fact in the light of admitted facts and documents. Apart from the defence of express instructions the learned Judge may well have held that only one conclusion was possible on the fraud issue. The deceased appellant had denied express instructions and in those circumstances it was for the respondent to establish express instructions unless the verdict was to go against him. When the word onus is used in this sense it may well be desirable to make this clear. It is a dangerous word. Their Lordships are, however, satisfied that the learned Judge's conclusion that no express instructions had been given was based on a consideration of the evidence as a whole and not on any misapplication of the law as to onus of proof on an issue of fraud.

There being therefore no misdirection the issue was clearly one of fact for the trial Judge who saw the witnesses. The various points which in the opinion of the Supreme Court raised a doubt were points which were open to be taken before the learned trial Judge and most if not all of them are expressly referred to by him. There was ample evidence on which the learned trial Judge could come to the conclusion as he did that the respondent fraudulently converted to his own use the note and the decree.

Turning to the defence based on the Prescription Ordinance, the learned trial Judge held that there was " concealed fraud " down to 1942 applying the principle originally established in the Courts of Equity in this country

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but applicable in all Courts since the Judicature Act (*Gibbs v. Guild*)[1]. The application of the principle as part of the law of Ceylon was in accordance with precedent. In *Dodwell & Co. Ltd. v. John* [2], the question was whether the time for prescription could be extended by " concealed fraud " as against a defendant who had got no benefit from the fraud. There was a difference of opinion on this point in Ceylon but all the Judges proceeded on the basis that the principle of concealed fraud was part of the law of Ceylon. The case came before this Board, *Dodwell & Co. Ltd. v. John* [3]. The issue was considered in the light of English equitable principles and of the views held by Roman lawyers " on whose system the law of Ceylon is founded " (p. 574). Lord Haldane who delivered the judgment of the Board treated the English equitable principles as applicable but thought it relevant to refer to the Roman law.

In *Punchi Hamine v. Ukku Menika* [4], the judgment in *Dodwell & Co. Ltd. v. John* was treated as deciding that the equitable principles were applicable in Ceylon. In *Dodwell & Co. Ltd. v. John* [5], Pereira, J., said, " This Court has often pointed out that our Courts (in Ceylon) are Courts of Law and Equity, and it would be quite in order to give here the same relief as is given in England in cases of fraud ". As the basis of Ceylon law is Roman Dutch law the generality of the first part of this sentence may require qualification. That can be dealt with if and when it arises but there are no grounds for doubting the application by the Courts of Ceylon of the equitable principle of concealed fraud in the present case. Counsel did not suggest otherwise.

The next question is whether the learned trial Judge was right in finding that there was here a concealed fraud. In *Balli Coal Mining Coy. v. Osborne* [6], this Board rejected the argument that it was necessary to establish some independent act of concealment in cases where the tort was itself done furtively so that its commission would be concealed. " Two men acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot free at the end of a limited period rather than the other (*loc. cit.* p. 364). " On the facts here, in particular the entries or absence of entries in the books there was ample evidence on which the learned Judge could find " concealed fraud. "

Sinniah, who succeeded the respondent as manager, gave evidence. He said he was not aware of the assignment. The learned Judge doubted this; he thought he was aware of the assignment. He added, " But that does not import knowledge to the plaintiff. "

It is possible that, in a case of concealed fraud, facts might come to the knowledge of an agent not himself a party to the fraud; that these facts might be such that the agent's knowledge would be imputed in law to the principal; and that the principal who in fact knew nothing might find himself precluded from relying on the " concealment " as preventing

[1] (*1882*) *9 Q. B. D. 59.*
[2] (*1915*) *18 N. L. R. 133.*
[3] (*1918*) *A. C. 563.*
[4] (*1926*) *28 N. L. R. 97.*
[5] (*1915*) *18 N. L. R. 133 at p. 141.*
[6] [*1899*] *A. C. 351.*

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the prescription period running. Such a case would want very precise findings of fact and it is sufficient to say here that no point based on Sinniah's alleged knowledge is taken in the respondent's case.

There was no suggestion that the deceased appellant was guilty of laches in not discovering the fraud before 1942. The defence under the Prescription Ordinance therefore fails.

This makes it unnecessary to consider the appellant's alternative submission under the Trusts Ordinance.

Although the proceeds were not traced to the respondent there was no dispute as to the quantum of the learned trial Judge's judgment on the basis that he was right as their Lordships have held on the various issues.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed and the judgment of the District Court restored. The respondent must pay the appellants' costs of this hearing and of the appeal to the Supreme Court.

Appeal allowed.

1957 *Present :* **Weerasooriya, J., and Sinnetamby, J.**

VELLAITHAMBY, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 11—D. C. Batticaloa, 1,090/L

Irrigation Ordinance (Cap. 312)—Certificate of sale in favour of Crown—Nature of Crown's title—Sections 2 (1) (4), 66 (2), 68—Registration of Documents Ordinance (Cap. 101), s. 7 (1).

Where land sold under the Irrigation Ordinance for non-payment of irrigation rates due in respect of it is purchased by the Crown and a certificate is thereafter issued vesting title in the Crown, all previous titles to the land must, by virtue of sections 2 and 66 (2) of the Ordinance, be regarded as wholly extinguished, or suspended, by operation of law, and a new title is created in the Crown which is good against all persons. Accordingly, a subsequent transferee from the original owner of the land cannot claim title to it by priority of registration as against the Crown.

APPEAL from a judgment of the District Court, Batticaloa.

Walter Jayawardene, with *A. S. Vanigasooriyar*, for the plaintiff-appellant.

V. Tennekoon, Crown Counsel, with *M. Fernando*, Crown Counsel, for the defendant-respondent.

Cur. adv. vult.

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February 22, 1957. WEERASOORIYA, J.—

On the 18th June, 1945, two allotments of land called Akkarai Vyal were sold under the provisions of the Irrigation Ordinance (Cap. 312) for non-payment of irrigation rates due in respect of them and were purchased by the Crown, and on the 19th March, 1946, there were issued the two certificates of sale D2 and D3 vesting title to them in the Crown. Section 66 (2) of the Ordinance provides that on such a sale taking place a certificate substantially in the form given in Schedule II of the Ordinance shall be issued. The certificates D2 and D3 are substantially in that form, and it is clear from the provisions of section 66 (2), read with the terms of the relevant form of certificate, that on the issue of the certificates the said two allotments vested absolutely in the Crown free from all encumbrances. Although the certificates D2 and D3 were subsequently registered, purportedly under the provisions of the Registration of Documents Ordinance (Cap. 101), it was granted by learned Crown Counsel that the registration was not in accordance with the provisions of section 15 (1) (*a*) of that Ordinance and that they must, therefore, be deemed not to have been duly registered.

Notwithstanding the sale, the original owners purported to transfer the two lands for consideration by deed P1 of the 26th December, 1945, and the subsequent devolution of the title so disposed of appears from the deeds P2 to P6, under the last of which the plaintiff-appellant claims to have acquired title. All these deeds have been duly registered. P3 to P6 were executed subsequent to the issue of the certificates D2 and D3.

The case for the appellant is that the deeds in his chain of title prevail against the unregistered certificates D2 and D3 by virtue of section 7 (1) of the Registration of Documents Ordinance and it is on that basis that he filed this action against the Crown for declaration of title to the two lands and consequential relief. The learned District Judge dismissed the action with costs, and the present appeal has been filed against that order.

One of the questions canvassed at the trial and in appeal was whether the Crown is bound by the provisions of the Registration of Documents Ordinance. But this question, which does not appear to be covered by any previous authority, need not be considered as the appellants's claim must fail on another point of fundamental importance the decision of which, in my opinion, and also as conceded by learned counsel for the appellant, is fatal to the appeal.

To deal with that point immediately, it is clear that the provisions of section 7 (1) of the Registration of Documents Ordinance would not come into operation unless the appellant shows that the deeds in his chain of title, as well as the two certificates of sale, are from the same source, vide the case of *James v. Carolis* [1]. The effect of a certificate of sale vesting title absolutely and free from encumbrances was considered in *Nugawela v. The Municipal Council, Kandy* [2]. The question that arose there was whether a land sold for non-payment of municipal rates and purchased by the Kandy Municipal Council had vested in the Council

[1] (*1914*) *17 N. L. R. 76 at 81.*

[2] (*1938*) *40 N. L. R. 166.*

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by virtue of a certificate of sale issued under the relevant provisions of law, free from any obligation to perform or commute certain services which governed the tenure of the land prior to the sale, and that question was answered in the affirmative by a bench of two Judges who, in doing so, dissented from an earlier decision of this Court (also of two Judges) in *Sivacolundu v. Noormaliya*[1]. For the purpose of the present case, however, it is not necessary to attempt to resolve the conflict between these two decisions as on a consideration of the relevant provisions of the Irrigation Ordinance (Cap. 312) it is possible to reach the conclusion that by virtue of the certificates D2 and D3 there came into existence an entirely new title in the Crown to the lands in suit which was not dependent on any transmissible interest which the proprietor of the land or other person had in them immediately prior to the sale.

Sub-section (1) of section 2 of that Ordinance (which has since been replaced by the Irrigation Ordinance, No. 32 of 1946) provides that an irrigation rate under the Ordinance with reference to any land to which it relates is a charge in favour of the Crown, and under sub-section (4) such charge "shall be binding on the land and every part thereof, and such land and every part thereof, and the proprietors of such land and every part thereof, shall be liable for the payment of the same, into whosoever hands the ownership, possession, tenancy or occupancy of such land or any part thereof under any circumstances may at any time pass, until the said charge shall be extinguished, and such charge shall have priority over all mortgages, hypothecations, encumbrances, and charges whatsoever, whether antecedent in date or otherwise, affecting the land". Section 62 provides for the seizure and sale of any land for default in the payment of rates due in respect of it. Sub-section (1) of section 66 deals with a sale to a purchaser other than the Crown and it provides that on the issue of a certificate of sale in the prescribed form the land shall vest in the purchaser free from all encumbrances whatsoever. Sub-section (2) of section 66 deals with a purchase on behalf of the Crown and in such a case, in terms of the prescribed certificate of sale, on the issue thereof the land would vest absolutely in the Crown free from all encumbrances. Section 67 deals with the cancellation of a sale of land purchased by the Crown on payment (at any time before re-sale to a third party) by or on behalf of the proprietor of the amount due in respect of the land, and it provides that on an endorsement being made by the Government Agent on a certified copy of the certificate which issued under section 66 (2) and on the registration of such endorsement in the office of the Registrar of Lands the land shall re-vest in the proprietor as though such sale had never been made. Section 68 provides for a re-sale of the land to a third party by a similar endorsement and it is important to note that on such an endorsement being registered in the office of the Registrar of Lands what is declared to vest in the purchaser is the right, title and interest which would have been acquired by him if he had purchased the land at the original sale. These provisions indicate that in the case of a sale of the land in the first instance to a purchaser other than the Crown only the right, title and interest to and in the land

[1] *(1921) 22 N. L. R. 427.*

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(free of all encumbrances) are transmitted, whereas in the case of a sale to the Crown the land itself vests in the Crown absolutely and free of all encumbrances.

In my opinion, as long as the title to the lands in suit remains vested in the Crown all previous titles must be regarded as wholly extinguished, or suspended, by operation of law, and a new title created in the Crown which is good against all persons. The position appears to be no different from a decree for partition of land which, it was held in *Bernard v. Fernando* [1], creates a new title in the parties and which, though unregistered, prevailed over a subsequent registered conveyance by which one of the co-owners sold his undivided interests in the land prior to partition.

The appeal is, therefore, dismissed with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.

1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

S. SALISHAMY, Appellant, *and* W. SALISHAMY *et al.*, Respondents

S. C. 115—D. C. Kalutara, 27,830

Estoppel—Sale of mortgaged property—Bids made by mortgagee—Mortgagee's right to enforce bond subsequently—Partition Ordinance, s. 12—Evidence Ordinance, s. 115.

Where a mortgaged land was put up for sale under a partition decree and the mortgagee, who was not a party to the action, made bids at the sale—

Held, that the making of bids by the mortgagee did not constitute an unequivocal representation by him that the land was not subject to a mortgage. The mortgagee, therefore, was not estopped by section 115 of the Evidence Ordinance from enforcing his mortgage bond subsequently.

APPEAL from a judgment of the District Court, Kalutara.

E. Gooneratne, for the plaintiff-appellant.

B. S. Dias, for the defendants-respondents.

Cur. adv. vult.

[1] *(1913) 16 N. L. R. 438.*

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June 18, 1956. H. N. G. FERNANDO, J.—

The plaintiff-appellant was the mortgagee of two lands under a Bond dated April 23rd, 1945, which according to the plaint was duly registered. In April, 1950, he instituted this action for the recovery of the principal and interest due on the bond as well as for a hypothecary decree in respect of the two lands, joining as parties the two mortgagors, and also (for reasons which will presently appear) two other persons as the 3rd and the 4th defendants. The mortgagors did not contest the action and a money decree was entered against them. This appeal is only against the refusal of the District Judge to grant a hypothecary decree.

The first of the two mortgaged lands was the subject of a partition action D. C. Kalutara No. 26367 instituted by one of the mortgagors after the execution of the mortgage bond. The present plaintiff was not made a party to that action and did not intervene. Decree was entered for the sale of the land, and, in pursuance of a commission issued by the Court on 20th July, 1948, the land was sold by the Commissioner on 23rd October in that year by public auction and purchased by the present 3rd defendant, who obtained a certificate of sale on 21st March, 1949. The 3rd defendant is joined in the hypothecary action in view of his purchase of the land.

At the trial (in the words of the learned District Judge) " the mortgage was admitted " ; and since no issue was raised as to the validity of the mortgage or the amount due thereunder or its due registration in order to bind subsequent incumbrancers, it must be presumed that the admission covered all these matters. The only issue tried was the one suggested on behalf of the 3rd defendant :—" Is the plaintiff estopped from enforcing his mortgage bond No. 32932 dated 23rd April, 1945 by the sale of Welawatte land No. 1 in the schedule to the amended plaint ? ".

It was clearly established by the evidence that the plaintiff was present at the sale and that he made the third bid (Rs. 450) at the auction. The 3rd defendant commenced to bid thereafter and ultimately became the purchaser at Rs. 770. Despite the evidence of the plaintiff and of the auctioneer that the plaintiff had informed persons present at the sale that the land was subject to the plaintiff's mortgage, the learned Judge has preferred to believe the evidence of the 3rd defendant to the effect, *firstly* that the mortgage was never mentioned, and *secondly* that the 3rd defendant would not have purchased the land if he had known of the plaintiff's mortgage. I should add that the plaintiff is the brother-in-law of the original mortgagor. Upon these facts, the learned Judge formed the conclusion that " any reasonable person would take such conduct (of the plaintiff) to mean that the plaintiff had no interest in the land " and held against the plaintiff on the issue of estoppel.

The question whether (to employ the language of section 115 of the Evidence Ordinance) " a person has by his declaration, act or omission intentionally caused or permitted another to believe a thing to be true and to act upon such belief ", can rarely receive a summary answer such

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as appears to have been given in this case ; and the fine, though valid, distinctions which have been drawn in the decided cases show that difficult problems arise upon pleas of estoppel. For example *Theadoris de Silva v. Kalu Appu et al.*[1] which decided that a person who was the highest bidder at a Fiscal's sale, though he did not comply with the terms for completing his purchase, was not estopped from asserting his title against the person who was ultimately declared the purchaser at the sale, cannot be readily reconciled with *Tissahamy v. Perera*[2] where the plaintiff was held estopped from asserting title to a land on the ground that he had been a bidder at a Fiscal's sale of the same land.

The provisions of section 115 of the Evidence Ordinance are in effect a codification of the English Law on the subject which is stated in general form as follows :—" Where one person (' the representor ') has made a representation to another person (' the representee ') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto ". (Spencer Bower on Estoppel by Representation p. 10). In the first place it has to be established that the act or omission relied upon was intentional, and it has been held in one of the leading cases (*Freeman v. Cook*)[3], per Baron Parke, that " if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation will be equally precluded from contesting its truth ; and conduct by negligence, where there is a duty cast upon a person, by custom of trade or otherwise, to disclose the truth, may often have the like effect ". The learned District Judge in this case has not found, and indeed upon the evidence could scarcely have found that the plaintiff actually intended the defendant to think that there was no mortgage in existence so that the ingredient of intention would not be established unless it can be said that the plaintiff's conduct would necessarily lead a reasonable man to conclude that a mortgage was not subsisting.

In regard to the fact that the plaintiff was a bidder at the Fiscal's sale, what has now to be established in order to estop him from asserting his mortgage is that the making of bids by a mortgagee at a sale of the mortgaged lands constitutes an unequivocal representation that the land is not subject to a mortgage. Ceylon cases such as those of *Caruppen Chetty v. Wijesinghe*[4] and *Tissahamy v. Perera* (supra) are not directly in point, because there the rule of estoppel was applied against persons who

[1] *(1910) 2 Matara Cases 183.*
[2] *(1942) 43 N. L. R. 405.*
[3] *(1848) 2 Exch. 654.*
[4] *(1910) 14 N. L. R. 152.*

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asserted title and not merely encumbrances against purchasers at Fiscal's sales. But even where a claim of title was subsequently set up the mere fact that bids were made was not thought conclusive in *Theadoris de Silva v. Kalu Appu* (supra). There, upon the facts it was held that the bids were made merely in order to buy up the land and avoid future litigation and that the ultimate purchaser at the Fiscal's sale was not proved to have been induced to purchase by reason of the bids made by the person who subsequently set up title.

More directly in point is the case of *Tikiri v. Belinda* [1] where the plaintiff was present at an execution sale held under his own writ of a 4/6th share of the land and himself made bids. Upon these facts he was held to be estopped from setting up a prior registered usufructuary mortgage of the entire land in his favour. A special feature of that case referred to by de Sampayo J. was that " the plaintiff was himself a writ holder and was present at the sale in that capacity and as a bidder ", and it was held (apparently for the reason that he was a writ holder) that a duty lay on him to speak and to disclose the mortgage. On those grounds de Sampayo J. distinguished the case from that of *Caruppen Chetty v. Wijesinghe* (supra) which he had earlier decided himself. In the decision last mentioned the same learned Judge observed that " in the case of a mortgagee or lessee the duty to notify his right is less apparent seeing that notwithstanding the mortgage or lease the land may still be sold ". While therefore a person who himself has *title* may well have a duty either to warn or else not to mislead others to whom the land is being offered for sale, such a duty does not so clearly arise in the case of a person the existence of whose interests would not prevent the passage of title to another. In the present case the land was put up for sale under a partition decree and all the parties must be presumed to have been aware of the provisions of section 12 of the Partition Ordinance which expressly preserves the rights of a mortgagee of land which is the subject of the partition or sale. In view of the provisions of that section and of the fact that acquisition by mortgagees of lands subject to their own mortgages is not unusual (merger being a recognised legal form of the extinction of mortgages), it cannot in my opinion be said that the conduct of the plaintiff in bidding at the sale amounted to an unequivocal representation that there was no existing mortgage. If, as I think, the act of bidding does not work an estoppel, still less can the failure of the plaintiff to disclose his mortgage prevent him from now asserting his interest. But it would perhaps be useful to add a few observations on this matter as well.

Silence or inaction can only count as a representation if there is a legal duty (not merely moral or social) owed to a party to make the disclosure, the omission of which is relied on to create the estoppel, (Spencer Bower p. 65 sec. 75). Baron Parke in *Freeman v. Cooke* (supra) observed that the omission to disclose will only estop a person if " there is a duty cast on him by custom of trade or otherwise, to disclose the truth ". Many of the cases show that the rule of estoppel by silence or acquiescence is usually applicable when there is some dealing or trans-

[1] *(1916) 19 N. L. R. 284.*

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action between the parties or where "a person stands by" and permits another to incur expenditure the benefit of which he subsequently seeks to keep for himself. Apart from such cases a person who has a title, right or claim, has a duty to disclose it to another who conducts himself with reference to the property in a manner inconsistent with that title, right or claim. But where a land which is already subject to a mortgage is being sold to some third party, the acquisition of title by the third party is not inconsistent with the interests of the mortgagee and therefore does not involve any such violation of the mortgagee's rights as would render any disclosure necessary.

For these reasons the provisions of section 115 of the Evidence Ordinance are not in my opinion applicable in the circumstances of this case. The ordinary principle that the plaintiff's prior registered mortgage prevails over the subsequent Fiscal's conveyance must therefore be applied.

To turn now to the plaintiff's claim for a hypothecary decree in respect of the second land. According to the pleadings the 1st defendant who was the original mortgagee sold the second land to the 4th defendant. But it was also stated in the plaint that according to the Interlocutory decree entered in Case No. 26520 D.C. Kalutara, the interests of the 1st defendant in the second land are now described in the manner set out in the second schedule to the plaint. The learned Judge found however that the description in the plaint of the second land was confusing; and a hypothecary decree over the second land was denied to the plaintiff by the Judge on the ground that there was no evidence before him of the conversion of the second land described in the mortgage bond into the land as described in the Interlocutory decree in Case No. 26520. But it is by no means clear that any of the defendants contested the right of the plaintiff to the hypothecary decree. The 1st and 2nd defendants filed no answer and were not represented at the trial. The 4th defendant also filed no answer but he was represented, and the proceedings of 9th November, 1954, would seem to indicate that the mortgage was admitted by the parties who were represented at the trial and that the only issue actually raised was the one with which I have already dealt.

The question whether the second land was correctly described in the plaint or not, appears to have been raised for the first time by the learned District Judge in his judgment. In these circumstances I think the dismissal of the plaintiff's action in respect of the second land without his being given any opportunity either to identify the land in respect of which he claimed a decree or to lead evidence in support of his claim was quite unjustified.

In the result the plaintiff's appeal must succeed in regard to both lands. Hypothecary decree must be entered in his favour in respect of the land described in schedule No. 1 in the amended schedule to the plaint which is attached to the amended plaint marked "C". As to the second land which is described in schedule No 2 in the amended schedule to the plaint, the case is remitted to the District Court with a direction that the plaintiff be given an opportunity to identify the land so described with the land

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No. 2 described in the schedule to the mortgage bond P1, including an opportunity to lead any further evidence considered necessary. If he so identifies the land to the satisfaction of the District Judge, a hypothecary decree should be entered in the plaintiff's favour in respect of the second land as well. That part of the decree of the District Court which dismisses the plaintiff's action against the 3rd and 4th defendants is set aside. The 3rd defendant will pay to the plaintiff the costs of the proceedings in the District Court and of this appeal.

T. S. FERNANDO, J.—I agree.

Judgment set aside.

1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

SINNEPILLAIPODY, Appellant, *and* MUHAMADUTHAMBY *et al.*, Respondents

S. C. 602—D. C. Batticaloa, 534/L

Fideicommissum *by last will—No personal benefit conferred on* fiduciarius—*Validity—Trusts Ordinance* (*Cap. 72*), *s. 3* (*a*).

There can be a *fideicommissum* without any conferment of rights on the *fiduciarius* to enjoy the fruits and profits of the fideicommissary property.

A testatrix left a will dated 21st May 1902 appointing A—, one of her brothers, as " executor " to look after her five lands and " to collect the income derived from them and to hand them over " to her child, who was 5 days old when the will was made. The will proceeded :—" And so my brother A— shall accept these properties and the child from this day until she becomes a major, and in the meantime to take the income and to spend same for the use of the said child according to his own wish reasonably, and to preserve the balance income and the properties and when the child becomes major to give these as dowry to the child and the bridegroom . . . . And if the child happens to die before this, the said A— shall give away these properties to my brothers or their heirs ". The testatrix died in 1902 and her child died in 1904.

Held, that the will created a valid *fideicommissum*. According to the will, the executor was the *fiduciarius*, and the *fideicommissarius* was the daughter of the testatrix ; in the event of the daughter's death before she attained majority, the brothers of the testatrix became *fideicommissarii*.

APPEAL from a judgment of the District Court, Batticaloa.

H. V. Perera, Q.C., with *C. Ranganathan* and *M. Shanmugalingam*, for the defendant-appellant.

E. B. Wikramanayake, Q.C., with *E. A. G. de Silva* and *M. Rafeek*, for the plaintiffs-respondents.

Cur. adv. vult.

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April 4, 1957. WEERASOORIYA, J.—

I have had the advantage of seeing the judgment prepared by my brother Sansoni and I am in complete agreement with it. The facts and the material parts of the will are set out in that judgment.

In my opinion it is not possible to construe the will as creating a trust, as we were requested to do by Mr. Perera. I have come to this conclusion because, while it is true that the executor, who is the immediate devisee, is not given the beneficial enjoyment of the property, neither is it given to the successive groups of beneficiaries as represented by the child and her husband, and (in the event of the child dying before her marriage) the brothers of the testator. On this point it is clear that, except in so far as it is provided that a portion of the income may be expended for the use only of the child (and that too in the discretion of the executor and not as a matter of right in the child) the beneficial enjoyment of the properties is postponed to the point of time when the properties themselves will vest in the beneficiaries. There is, therefore, absent in this settlement a concurrent ownership of the legal title in the executor and of the beneficial interest in the other persons, or in those persons jointly with the executor, which according to the definition in Section 3 (*a*) of the Trusts Ordinance (Cap. 72) is of the essence of a trust.

If a trust is excluded, the question is what was the intention of the testator as far as can be gathered from the (implied) prohibition against alienation and the express designation of the persons to whom the properties should go on the happening of the events contemplated. As pointed out in *Wijetunga v. Wijetunga*, [1] an important test to be applied in considering whether a will or other instrument creates a fideicommissum is whether any provision or stipulation expressed in it can be regarded as having been inserted for any purpose other than that of "inducing" a fideicommissum. In the view I have already taken this question must be answered in the negative in respect of the provisions to which I have just referred.

The further question, then, is whether we should hold that the intention of the testator to create a fideicommissum is frustrated because no personal benefit has been conferred on the executor as the fiduciary. A somewhat similar question arose in *De Saram v. Kadijar* [2] which came up before a bench of five Judges. In that case the will contained a provision that the fiduciaries should accumulate the balance of the income and profits from the properties devised (after defraying expenses for the subsistence and maintenance of their families) in a fund for the benefit of the fideicommissaries. It was contended that the fact that the fiduciaries did not have the whole of the beneficial interest stood in the way of the construction of the instrument as creating a fideicommissum. In dealing with this contention Hearne, J., observed that if the intention of the testator was to create a fideicommissum the only way of dealing with a clause which deprives the fiduciary heirs of their beneficial interest, and to that extent inconsistent with the Roman Dutch

[1] *(1912) 15 N. L. R. 493.*

[2] *(1944) 45 N. L. R. 265.*

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law conception of the position and rights of a fiduciary, would be to ignore it. Wijeyewardene, J., was of the same view and, alternatively, but without examining the matter in detail as has been done by my brother Sansoni, he stated that he did not see why such a provision alone should be a ground for holding that no fideicommissum was created. Keuneman, J., was of the opinion that the provision referred to should be construed as merely expressing the wish of the testator regarding the use of the income and profits which was not legally binding on the fiduciaries.

In the appeal subsequently taken in the same case before the Judicial Committee of the Privy Council from the decision of this Court, their Lordships expressed the opinion [1] that the provision as regards the use of the income and profits should be interpreted as being only of a precatory nature and not legally binding on the fiduciaries.

While the present case is somewhat different in that no part of the beneficial interest falls to the fiduciary, I think that the same construction can be applied to the provision in the will dealing with the income and profits.

For these and the other reasons stated in the judgment of my brother the appeal should be dismissed with costs.

SANSONI, J.—

This appeal concerns the interpretation of the last will, dated 21st May, 1902, of a woman named Pathumma. Having described five lands to which she was entitled she went on to say in it :—" As I am at present seriously ill and am at the point of death and as I am having the five properties mentioned and a daughter 5 days old I do hereby appoint as executor to this last will Moheideenbawa Ahamadulevvepody, who is my brother and who looked after me when my mother died when I was very young, and who rendered every assistance to me to purchase the fourth property, and who gave me dowry out of his own earnings, to look after this baby and adopt her, and also to look after the said properties and to collect the income derived from them and to hand them over to this child ". Pausing there, it seems clear that the testator did not by these words give the dominium of the lands to the executor.

The will then proceeds :—" And so my brother the said Ahamadulevvepody shall accept these properties and the child from this day until she becomes a major, and in the meantime to give the produce of the second and third properties for this year only to my husband M.A. Ahamadulevvepody for the purpose of the debt incurred by us, and to take the rest of the income and to spend same for the use of the said child according to his own wish reasonably, and to preserve the balance income and the properties and when the child becomes a major to give these as dowry to the child and the bridegroom ". This clause emphasises the limited powers which the executor was given in respect of these lands. He is

[1] *(1946) 47 N L. R. 171 at 176.*

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to accept them in the same way as a donee accepts a donation; but as regards the income from them, he is enjoined to collect it and to accumulate it for the benefit of the child and her bridegroom when she married.

The only other provision in the will to which I need refer is that which follows the clause last quoted. It runs: "And if the child happens to die before this, the said Ahamadulevvepody shall give away these properties to my brothers or their heirs". No separate reference is made here to the income, but presumably it was intended to follow the lands, for the executor is not even in this eventuality given any share of it.

Pathumma died in 1902 and her child died in 1904. Pathumma was survived by her four brothers, Mohideenbawa Ahamadulevvepody (the executor) who died in 1928, Mohamadu Thamby, Meeralebbepody and Adamlebbepody. Meeralebbepody died in 1924 leaving two children, who are the plaintiffs in this action, while Adamlebbepody is the defendant.

The plaintiffs in their plaint pleaded that Pathumma devised the five lands to her only child with a condition that if the child died before she became a major the lands were to devolve on Pathumma's four brothers. The plaintiffs sued for a declaration of title to 1/4th share of three of the lands on this basis. They pleaded that the defendant was in wrongful possession of the three lands, and asked that he be ejected from them.

It is not clear what position the defendant adopted at the trial in regard to the interpretation of the will, but in his answer he denied almost every averment in the plaint. Since this is an action rei vindicatio the plaintiffs were bound to establish their title to the $\frac{1}{4}$th share claimed by them. Issues (1) and (2) framed at the trial raised the questions whether the will created a fideicommissum in favour of the four brothers, and, if so, whether the plaintiffs are entitled to 1/4th share of the lands.

The District Judge in a judgment which is not very helpful held that the will did create a fideicommissum. He gave the plaintiffs the relief they claimed, except in regard to ejectment as he found that the defendant is a co-owner.

The defendant has appealed, and Mr. Perera for him submitted that the will did not create a fideicommissum, but a trust, the trustee being the executor who was directed to hold the lands devised for a limited purpose and to use the income from them in a particular way. He submitted that the child cannot, in any view of the matter, be considered a fiduciary, nor could even the executor, since the latter never had a beneficial interest in the property devised, while in a fideicommissum there is a succession of full ownership passing from the fiduciary to the fideicommissary.

Mr. Wickremanayake for the plaintiffs respondents conceded that the child was not a fiduciary. He contended, however, that the last will created a fideicommissum, the executor being the fiduciary, and the

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fideicommissary being the daughter; in the event of the daughter's death before she attained majority, Pathumma's four brothers would be fideicommissaries. He emphasised that the intention of the testator was the paramount consideration, and that her intention was to create a fideicommissum. He relied strongly on the South African case of *Kemp's Estate v. Mc. Donald's Trustee* [1].

Now that was a case where a testator bequeathed property to trustees to be held by them in trust for his three sons and their issue. The sons were to get their share of the income for life. The grand-sons who attained majority were to get their shares absolutely, while the grand-daughters were to get their share of the income for life, and after their death their children who attained majority were to get their shares absolutely.

Solomon, J. A., said that it was quite possible to discover the intention of the testator without translating the English legal terms of the will into the corresponding expressions of South African Law. He added :— " Were it necessary to do this I think that we should have to speak of the trustees as fiduciary heirs or legatees and of Susannah (a grand-daughter) as a fideicommissary legatee. In doing so, however, we should be using the terms fiduciary and fideicommissary in a wider sense than they have hitherto been employed in any of our reported cases. For in these cases a fiduciary heir or legatee has invariably meant a person who himself had a beneficial interest, usually a life interest, in the property bequeathed to him while the fideicommissary has been one in whom the dominium of the property has *ipso facto* vested on the death of the fiduciary, or on the happening of any other event which terminates the rights of the fiduciary. In the present case, however, the trustees have no beneficial interests in the store dealt with in clause 10 of the will, nor could the dominium ever have passed to Susannah. On principle, however, there seems to be no reason why a fiduciary should necessarily have any beneficial interest in the property bequeathed to him, nor does there appear to be any reason why he should not be directed to convert the property into money before handing it over to the fideicommissary. So that it would be possible, in my opinion, to say that the trustees under the will are fiduciary heirs in whom the store vested on the death of testator, and that they are burdened with a fideicommissum to pay the rents and profits as directed in the will, and after the death of the wife of the testator to convert the store into money and dispose of it to the persons indicated by the testator ".

Maasdorp, J.A., said : " The mere circumstance that the testator did not intend to confer any personal benefit upon the trustees does not prevent their being treated legally and technically as fiduciary heirs ".

Innes, C.J., referring to the trustees in the will, said that they were vested with the legal ownership but that the testator never intended that they should have any beneficial interest—" they were instituted not to enjoy but administer the property ". He then went on to say :— " A testamentary trust is in the phraseology of our law a fideicommissum

[1] (*1915*) *A. D. 491.*

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and a testamentary trustee may be regarded as covered by the term fiduciary. In modern practice 'fiduciary' is most frequently used to denote an heir or legatee who holds the bequeathed property as owner and for his own benefit subject to its passing to fideicommissaries upon the happening of a certain condition. But it does not follow that the element of personal benefit on the part of the first holder is essential to the condition of a fideicommissum or the character of a fiduciary. It was an element which (as distinct from the statutory right of deduction) was frequently absent in the testamentary trusts of Civil Law. And seeing the wide and comprehensive conception of such trusts entertained by the lawyers of Holland, one would expect Dutch practice to be even more elastic in this regard".

With regard to this last statement of the learned Chief Justice, Mr. Frere-Smith in his "Manual of South African Trust Law", at p. 49, says :— "Diligent search has failed to disclose the uncited authority in support of the Chief Justice's statement in *Kemp's case* (at p. 499), that the lawyers of Holland recognised a fiduciary administrator bare of personal benefits". He adds :—"The possibility of a fiduciary burdened with administrative duties, without having any rights of enjoyment for himself, seems to have sprung from obiter dicta of de Villiers C. J., (afterwards Lord Villiers) in *Strydom v. Strydom's Trustee* (1894) 11 S. C. 425, which were based upon a mistranslation of D. 36. 2.26.1 (recording what is called Papinian's case). The interpretative error is attributed to Voet. Reference to the passage in the Digest shows that Papinian, who was one of the greatest of Roman lawyers, if not the greatest, was dealing directly with vesting, not administration".

Professor Nadaraja in his book "The Roman Dutch Law of Fideicommissum" at pages 233—238 deals with the fideicommissum purum and the much more familiar fideicommissum conditionale. I do not think it is necessary to go further into the character of the fideicommissum purum as no question of vesting arises on this appeal. But the terms of the will under consideration seem to me to create a fideicommissum conditionale, an example of which is given by Innes C. J. in his judgment. If there is a bequest "to A for the use and benefit of B, if and in case the latter attained majority, in which case he is to receive interest until the age of 25 and thereafter the capital ; and in the event of B's death during minority the capital to another son C, such a fideicommissum would not be pure but conditional".

In Appendix (2) of Mr. Frere-Smith's book, the author reproduces an opinion of Professor Fischer of Leyden University on the question: Can the opinion that a trust in modern Roman-Dutch Law is to be regarded as a fideicommissum be supported by what we know about the law and practice in respect to fideicommissa in the 18th century Law of Holland ? Professor Fischer first deals with the fideicommissum purum and says that he has not found any proof of the use of that fideicommissum in the practice of that time and adds : "I think Nadaraja is quite right, when he writes in his Roman-Dutch Law of Fideicommissa 'It seems better to let that form of fideicommissum lie, buried and

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forgotten as a historical curiosity relevant only as having played an important part in the origin of fideicommissa and not to seek to revive it by identifying the trust with it' ".

But Professor Fischer also deals with " the fideicommissum prescribing that the fiduciary shall restore to the fideicommissary not only the fideicommissary property itself but also all its fruits and profits ". Regarding this type of fideicommissum he says :—" This form of fideicommissum is not quite the same as the fideicommissum purum. A fideicommissum with a provision to restore all the fruits and profits to the fideicommissary, and thus without any benefits for the fiduciary, is mentioned in Digesta, 36.1 19 (18) and recognised as part of the Roman-Dutch Law by Van Zutphen S. v. Fideicommis, nr. 16, and by Voet Ad Pandectas, 36.1.49. Voet adds that such a provision may be implied, e.g., when the fideicommissum is created only to save a minor heir or legatee from tricks of his intestate successors or from the administration of an unacceptable guardian. It seems, however, that these fideicommissa were very uncommon in Holland, not only because Voet does not refer to other authorities than Roman legal texts, but chiefly because in the sources of the legal practice of Holland such fideicommissa cannot be found. In the abovementioned Observationes tumultuariae of Van Bynkershoek I have not encountered one case of a fideicommissum where the fiduciary was not entitled to take for himself the fruits and profits of the fideicommissary property during the time he was in possession of it. In 1806 Van der Linden wrote in his Rechtsgeleerd, Practicaal, en Koopmanshandbock :—' Further it is an incident of a fideicommissum that so long as the fiduciary is entitled to hold the property he can take the fruits '. If there had been an exception from this rule in general use in Holland, Van der Linden would have said so. In conclusion, the view that in Holland, especially during the eighteenth century, a fiduciary became an owner of fideicommissary property for one or more fideicommissaries—not exceptionally under special arrangements to avoid an unacceptable guardian's administration, but generally—cannot, as far as I see, be supported by the sources of the eighteenth century law of Holland ".

Mr. Perera pressed on us the submission that the judges in the South African case were faced with the difficulty arising from the fact that the English Law of Trusts found no place in the law of South Africa, and that their decision sought to give effect to the testator's intention by fitting the provisions of the will into the framework of a fideicommissum. There is much to be said for this view, but although that case seems to have decided for the first time that there can be a fideicommissum without any rights of enjoyment, the opinion quoted supports the decision. We have not been referred to any local case in which this particular question has been considered. I see no reason why, having regard to the terms of the will under consideration, we should not hold that it contains a valid fideicommissum. I would therefore dismiss this appeal with costs.

Appeal dismissed.

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1957 *Present :* **Basnayake, C.J., and Pulle, J.**

DE SOYSA, Appellant, *and* FONSEKA, Respondent

S. C. 33—D. C. Colombo, 6,070/L

Servitude—Prescriptive user by licensee—Quantum of evidence necessary.

When a user of immovable property commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for Plaintiff-Appellant.

N. Nadarasa, with *S. Sharvananda*, for Defendant-Respondent.

Cur. adv. vult.

March 21, 1957. BASNAYAKE, C.J.—

The plaintiff-appellant and the defendant-respondent are the owners of adjoining premises No. 33 Park Avenue and No. 18 Gunasekera Lane. The plaintiff's father was the owner of both properties till 1919 in which year he gifted No. 33 to the plaintiff and No. 18 to her brother Dr. L. C. Gunasekera. By virtue of a reservation in the plaintiff's deed of gift the father took the rents and profits of No. 33 as he was entitled to until her marriage in 1933.

In that year the plaintiff's brother Herod Gunasekera began to look after her premises and collect her rents. Shortly after the execution of the deed of gift in his favour Dr. L. C. Gunasekera left for England to prosecute his medical studies. During his absence abroad his father managed No. 18 and collected its rents. He returned in 1927 or 1928. On his return from England he began to collect the rent of his house himself.

In 1924 the tenant of No. 33 was a Municipal Engineer who wanted a garage for his car. The plaintiff's father who was then managing both No. 18 and No. 33 built a garage for him in No. 18. The reason for building the garage in No. 18 and not in No. 33 would appear to be that at that time No. 18 had access to the main road while No. 33 had not. It would also appear that the tenants of No. 18 at all material times were medical students who did not need a garage.

In 1945 Dr. Gunasekera sold his house to the defendant. Disputes arose thereafter as to the right of the tenant in No. 33 to use the garage in No. 18 and the roadway to it. These disputes led to proceedings in the Magistrate's Court and finally to the present action.

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The learned trial Judge has found that—

(*a*) there has been no adverse possession of the garage and the roadway, and

(*b*) even if adverse possession had commenced in 1933 the evidence does not establish an uninterrupted user of ten years thereafter.

I see no reason to interfere with that finding of fact.

Servitudes are onerous and the law does not favour them and it is incumbent on a person who claims a servitude to establish his claim by clear and satisfactory evidence of the strongest kind. There is no evidence that the user which commenced with the leave and licence of the owner of No. 18 was at any time converted to an adverse user. When a user commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour. There is no such evidence in the instant case.

It would appear that the plaintiff's brother Dr. L. C. Gunasekera was present at the trial of this action, but he was not called by the plaintiff to testify to the fact that the user of the roadway and garage was not with his permission. He was a material witness for the plaintiff as he alone was in a position to testify to that fact. The burden of proof being on the plaintiff, the presumption is that Dr. Gunasekera's evidence would, if produced, have been unfavourable to her.

For the above reasons the appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

1957 *Present:* **Sinnetamby, J.**

S. MUTTIAH, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 53—Citizenship Case No. R/O. 4,509

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Notice under sections 9 (1) and 20—Procedure for service.

Where a notice issued under section 9 (1) of the Indian and Pakistan Residents (Citizenship) Act is returned unserved and the Commissioner subsequently becomes aware, within three months from the date of the notice, that the applicant has changed his address, the applicant should be informed of the fact that notice under section 9 (1) had been sent to him and had been returned unserved.

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APPEAL under the Indian and Pakistani Residents (Citizenship) Act.

S. P. Amarasingham, for the applicant-appellant.

V. G. B. Perera, Crown Counsel, for the respondent.

April 2, 1957. SINNETAMBY, J.—

In this case the applicant in the application form had given his address as Gonakelle Bazaar, Kandapola. Subsequently, he wrote a letter to the Deputy Commissioner on the 4th May, 1953, asking the Deputy Commissioner to note his change of address as 3, High Forest, Maturata. This was duly noted on the application form.

After the Investigating Officer's report, the Deputy Commissioner issued a notice under Section 9 (1) informing the applicant that he had failed to prove that he was resident in Ceylon for certain periods and that he had failed to establish certain other requirements. This notice which was dated 28th May, 1956, was addressed to High Forest, Maturata. It was posted on the 30th May and returned on the 14th June, according to the date stamp.

Under Section 9 (2), where no cause is shown to the contrary within a period of three months, the Deputy Commissioner is obliged to reject the application. Three months from the date of notice would be the 28th August, but no action was taken on that day. Prior to that, however, on the 4th July, the applicant submitted to the same Deputy Commissioner quoting the same number under which his application is registered, viz., R/O. 4,509, an application of an identity certificate to enable him to proceed to India. This application is in the file and was accompanied by a letter dated 2nd July signed by the applicant. This letter too has the application No. R/O. 4,509 quoted.

It would appear that on receipt of this application, the Deputy Commissioner would have received some kind of intimation that the address in Ceylon of the applicant was on that day, once again, Gonakelle Bazaar, Kandapola. That is the address given in the appropriate cage.

On the 26th September, the applicant submitted another letter which bears a date stamp 27th February as being the date it was received in the Deputy Commissioner's office, making a further request for his travel documents. In that letter, he states that in July 1956 he came personally with his wife to his office and filled up the form and identity certificates giving his permanent address as Gonakelle Bazaar, Kandapola. It would appear, according to that letter, that on the 24th September, he had called for these identity certificates, when he was informed that the identity certificates could not have been issued as he had not replied to the notice under Section 9 (1) sent to High Forest. By that date, the three months had elapsed but on the date on which

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the application for identity certificates, which appears at page 63 of the file, was filed, the original address mentioned was within the three months.

Section 20 requires that notice should be served personally : that is the kind of service which the section contemplates ; but it provides also for a case in which it is not possible to serve notice personally, by enacting that a notice shall be deemed to have been served if it is sent by registered post to the last known place of abode.

Notice was sent under Section 9 (1) in this case to the last known place of abode at the time it was issued. The main object of Section 20 being to effect personal service, it seems to me that once it was discovered that the appellant had changed his address, he should have been informed of the fact that notice under Section 9 (1) had been sent to him, and had been returned unserved on the 19th June. That notice unserved was in the file when the applicant made his application for the identity certificates on the 4th July, 1956.

The object of serving the notice, as stated in Section 9 (1), is to give to the applicant an opportunity of showing cause to the contrary. If, therefore, it was known that at or about the time of the issue of the notice the applicant had changed his address and the notice had not been served and was returned unserved, it could, had appropriate steps been taken, have been communicated to him within the three months. Natural justice demands that the applicant should receive the notice ; otherwise he is denied the opportunity of showing cause, which is the main object of issuing the notice under Section 9 (1).

In this case, one cannot blame the Deputy Commissioner for not issuing the notice to Gonakelle Bazaar, in view of the letter notifying the change of address dated 4th May, but having regard to all the circumstances in this case, I think it is a case in which the applicant should be given an opportunity of showing cause to the contrary.

I set aside the order made by the Deputy Commissioner under Section 9 (2) and remit the case back to him so that he may issue fresh notice under Section 9 (1) and take thereafter appropriate steps as prescribed by law. This notice should be served on the applicant to the address he originally gave, viz., Gonakelle Bazaar. In all these circumstances, I do not propose to make any order as to costs.

Order set aside.

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1957 *Present :* **Basnayake C.J., Gunasekara J., Pulle J., de Silva J., and Sansoni J.**

JOSEPH PERERA, Appellant, *and* LEWIS ABEYSEKERA, Respondent

S. C. 140—D. C. Chilaw, 13,210

Contract—Informal agreement to sell immovable property—Time limit fixed for execution of deed of sale—Deposit of part of purchase price—Forfeiture clause—Failure of purchaser to pay balance sum within stipulated period—Right to claim refund of deposit—Unjust enrichment—Money had and received—Prevention of Frauds Ordinance, s. 2.

Where, under a non-notarial agreement to sell immovable property, a sum of money is paid in advance by the purchaser, but the sale subsequently falls through, the subsidiary agreement as to the destination of the money paid in advance is severable from the agreement for the sale of the immovable property and is valid.

By a non-notarial agreement the defendant agreed to convey to the plaintiff certain immovable property for Rs. 45,000. The plaintiff paid Rs. 5,000 in advance and it was stipulated in the agreement that, upon payment of the balance sum of Rs. 40,000, the conveyance was to be executed on or before November 8, 1949, i.e., within fifteen days from the date of the agreement. It was also agreed that should the plaintiff not pay the balance consideration within the fixed period, he was to forfeit the deposit of Rs. 5,000 and that should the defendant fail to fulfil his part of the agreement he should pay Rs. 10,000 as compensation to the plaintiff.

The balance sum of Rs. 40,000 was not paid by the plaintiff within the period of 15 days specified in the agreement. In the present action instituted by the plaintiff for the refund of the deposit of Rs. 5,000, the trial Judge found that the failure was due to the fact that essential steps relating to the investigation of the title to the property could not be completed within those 15 days because the defendant could not make available to the plaintiff the title deeds relating to the property ; the defendant therefore agreed to an extension of time, but subsequently on November 18, 1949, he repudiated the contract.

It was also decided by the trial Judge that it was not intended by the parties that time should be of the essence of the contract and that, in law therefore, the condition for the forfeiture of the deposit of Rs. 5,000 meant only that the purchase should be completed on or before November 8, 1949, or within a reasonable time thereafter.

Held, per GUNASEKARA, J., PULLE, J., and SANSONI, J. (BASNAYAKE, C.J., and DE SILVA, J., dissenting), that the plaintiff was entitled to the return of his deposit of Rs. 5,000. Although the informal agreement relating to the sale of immovable property was void by virtue of the provisions of section 2 of the Prevention of Frauds Ordinance, the subsidiary agreement, in the same contract, as to the destination of the deposit of Rs. 5,000 was severable and effect could be given to its terms according to law.

APPEAL from a judgment of the District Court, Chilaw. This appeal was referred under section 51 (1) of the Courts Ordinance to a Bench of five Judges.

H. V. Perera, Q.C., with *K. C. de Silva* and *J. A. D. de Silva*, for Defendant-Appellant.

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N. K. Choksy, Q.C., with *E. G. Wikramanayake, Q.C.*, *E. R. S. R Coomaraswamy*, *B. A. R. Candappa* and *N. K. Rodrigo*, for Plaintiff-Respondent.

Cur. adv. vult.

April 12, 1957. BASNAYAKE, C.J.—

In this action the plaintiff sued the defendant on three causes of action. For a first cause of action he alleged—

(*a*) that by agreement dated 24th October 1949 the defendant agreed to convey to him within 15 days of the execution of the agreement, for a sum of Rs. 45,000, a land about ten acres in extent, together with the buildings, furniture and the fibre mill thereon,

(*b*) that he paid to the defendant out of the consideration of Rs. 45,000 a sum of Rs. 5,000 as a payment in advance,

(*c*) that the failure to effect the conveyance in terms of the agreement was due to the default of the defendant.

For a second cause of action the plaintiff claimed a sum of Rs. 3,500 being the value of fibre wrongfully appropriated by the defendant and a sum of Rs. 806·54 as damages. He alleged—

(*a*) that the defendant, in terms of the agreement, on or about 24th October 1949, placed the plaintiff in possession of a fibre mill and gave him the right to work it and dispose of the fibre manufactured by him,

(*b*) that between the 25th October 1949 and the 18th November 1949 he brought 261,700 coconut husks for the manufacture of fibre and manufactured mattress fibre and bristle fibre, and

(*c*) that on 18th November 1949 the defendant took forcible possession of 250 cwt of mattress fibre manufactured by the plaintiff valued at Rs. 3,500.

As an alternative cause of action the plaintiff pleaded that even if it be held that the agreement was void in so far as it related to immovable property, he was entitled to recover the sum of Rs. 5,000 paid to the defendant on 24th October, 1949.

He prayed—

(*a*) on the first cause of action or on the alternative cause of action for judgment in a sum of Rs. 5,000 with legal interest thereon,

(*b*) for an order directing the defendant to deliver to the plaintiff 250 cwt of mattress fibre or in default to pay the sum of Rs. 3,500 with legal interest thereon,

(*c*) for judgment in a sum of Rs. 806·54, and

(*d*) for costs.

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The defendant denied that the failure to effect the conveyance within the time stipulated in the agreement was due to his default. While admitting that he placed the plaintiff in possession of the land and the fibre mill thereon, the defendant denied that he took forcible possession of 250 cwt of fibre valued at Rs. 3,500. He valued the coconut husks brought by the plaintiff at Rs. 960·71. He prayed that the plaintiff's action be dismissed with costs.

The agreement referred to in the pleadings is not attested in the manner required by section 2 of the Prevention of Frauds Ordinance and is signed only by the defendant. It reads as follows :—

"This 24th day of October 1949.

I, the undersigned K. Edward Joseph Perera of Wennappuwa in Chilaw District have valued the land called Molawatta in extent about ten (10) acres situated at Wattakaliya within the town of Chilaw and the Blackstone Oil Engine bearing No. 161781 of 50 Horse Power and all other accessories of the Fibre Mill, all other buildings and all materials appertaining thereto and standing thereon for a sum of Rupees Forty-five Thousand (Rs. 45,000) of present lawful money of Ceylon, having agreed to transfer the same unto Mr. D. L. Abeyasekara of Andiambalama in Negombo and have received on this date a sum of Rupees Five Thousand (Rs. 5,000) in cash from the said Mr. Abeyasekera as an advance.

Wherefore the balance sum of Rupees Forty Thousand (Rs. 40,000) shall be paid within 15 days from this date and shall execute a deed of conveyance at the expense of the purchaser.

And that until the deed of conveyance is executed and the rights are assigned, I have hereby assigned all the right, title and interest of working the Mill and of disposing the goods manufactured unto the purchaser hereof from this date under a person authorised by me.

And that if the balance amount is not paid and the deed of conveyance is not executed within 15 days from this date and that the same could not be performed the sum of Rupees Five Thousand (Rs. 5,000) paid by the said Mr. D. L. Abeyasekera as advance and the authority assigned as aforesaid shall hereby be forfeited and null and void and that if I the vendor Mr. K. E. J. Perera neglected to execute the said deed and deliver the same, I have hereby agreed to pay a sum of Rupees Ten Thousand as compensation."

As in my view the translation filed of record is unsatisfactory, I set out below the document in its original form :—

වෂී 1949ක්වූ ඔක්තෝම්බර මස 24 වෙනි
දිනදීය.

මෙහි පහත අත්සන්කර දෙන හලාවත දිස්ත්‍රික්වේ වෙන්නප්පුවේ පදිංචි කේ. ඇඩ්වර්ඩ් ජෝශප් ප්‍රේරා වන මට අයිති හලාවත ටවුම්එකතුළ වට්ටක්කල්ලි-යේ පිහිටි අක්කර දහයක් පමණ විශාල මෝලවත්ත යන ඉඩම සහ එහිතුළ පිහිට නොම්මර 161781 දරණ අශ්වබල 50 ක බලැක්ස්ටෝන් ඔයිල් ඇන්ජින් එක සහ කොහුමෝල්ලේ සියලුම ගොඩනැගිලින් එහිතුල තිබෙන මීට අයිති සියලුම

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බඩුබාහිරාදියත් දැනට ලංකාවේ වලංගුවෙන මුදලෙන් රුපියල් හතලිස් පන්දාහකට රු, 45000/- මිළ නියම කර මීගමු ආඩිඅම්බලමේ පදිංචි ඩී ඇල් අබේසේකර මහතාට විකිණීමට කැමතිවී එම අබේසේකර මහතාගෙන් ඇඩ්වාන්ස් වශයෙන් අදදින රුපියල් පන්දහක් රු, 5000/-මුදලෙන් භාර ගන්ට යෙදුනෙමි. එසේ හෙයින් ඉතුරු මුදල වන රුපියල් හතලිස් දාහ රු, 40000/- අද පටන් දවස් 15 ක් ඇතුලතදී ගෙවා සින්නක්කර ඔප්පුවක් ගැනුම්කාර මහතාගේ වියදමෙන් සාදාගත යුතුයි.

තවද අදපටන් සින්නක්කර ඔප්පුව සාදු අයිතිවාසිකම් පවරාගන්නාතුරු මෙම ගැනුම්කාර පක්ෂයට මෝලේ වැඩ කෙරවීම් ආදියත් සාදන බඩු විකුණාගැනීමටත් සියලුම බලය මගේ බාරකාරයෙක් යටතේ මෙයින් පවරාදී වැඩපල බාරදෙන්ට යෙදුනෙමි. තවද අද පටන් දවස් 15 ක් ඇතුලත ඉතුරු මුදල ගෙවා සින්නක්කර ඔප්පුව සාදු නොගතහොත් එකී දිනට එය ඉස්ට කරන්ට නොහැකි උනොහොත් මෙම ඩී ඇල් අබේසේකර මහතා විසින් ඇඩ්වාන්ස් වශයෙන් ගෙවන්ට යෙදුන රුපියල් පන්දහ රු, 5000/- සහ එම පවරාදුන් බලතලත් මෙයින් අවලංගුවී යන බවත් විකුනුම්කාර පක්ෂය වන කේ ඊ ජේ ප්‍රේරා මහතා එකී දිනට එම ඔප්පු සාදදී බාරදීමට පැහැර හැරියොත් වන්දි වශයෙන් රුපියල් දහදහක් වන්දි ගෙවන බවටත් මෙයින් පොරොන්දු වුනිමි.

සාක්ෂි 1 :—

2 :—

It is common ground that the balance of Rs. 40,000 was not paid within 15 days as stipulated in the agreement. It was also not disputed at the trial and the hearing of this appeal that the last day for the payment of the balance sum by the plaintiff and for the execution of the deed of conveyance was 8th November 1949. The plaintiff's notary, Proctor D. E. J. Peiris, states in his evidence that his client came to him on 27th or 28th October 1949 and informed him of the agreement and requested him to write to the defendant for the title deeds. In pursuance of that request he wrote a letter to a person whose name and address was furnished by the plaintiff, viz., W. E. I. Fernando, which is not the defendant's name. The letter was returned by the Post Office with the endorsement " Addressee not known ". When the plaintiff came to see him a second time about the 3rd of November bringing with him the agreement pleaded by him, Proctor Peiris informed him that he had not got the deeds. The plaintiff then undertook to get them. He came a third time a few days later and informed him that the deeds were with Dr. Pinto to whom the property was mortgaged for Rs. 10,000 and that they could be examined at the office of Proctor W. R. Ranasinghe at Chilaw. On 7th November Proctor Peiris went to Proctor Ranasinghe's office with the plaintiff. There he discovered that the deeds were not with Proctor Ranasinghe but were in fact with Dr. Pinto. Proctor Ranasinghe, however, gave him the reference to the folios in which the deed was registered to enable him to search the registers kept under the Registration of Documents Ordinance and at the same time asked Proctor Peiris to write to him calling for the deeds to enable Proctor Ranasinghe to obtain them from Dr. Pinto. Proctor Peiris searched the encumbrances and returned to Negombo and on 8th November wrote to Proctor Ranasinghe requesting him to send the deeds. The deeds were received on 15th November with a covering letter dated 12th November.

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The learned trial Judge has accepted the evidence of Proctor Peiris. I am unable to reconcile his finding that it was the defendant and not the plaintiff who defaulted in carrying out the agreement with the evidence of Proctor Peiris. To my mind on his evidence there can be no doubt that it was the plaintiff and not the defendant who defaulted. The plaintiff who gave evidence offered no valid explanation as to why he at first gave the wrong name to Proctor Peiris. On this point his evidence is at variance with Proctor Peiris's and must therefore be rejected. He denies he gave any name to his proctor. He says he gave the defendant's address and did not give his name, as it was in the agreement. But Proctor Peiris states that the agreement was brought by the plaintiff only on the second visit, the visit after the one in which he gave the wrong name. Neither the plaintiff nor his notary gives any satisfactory explanation as to why the conveyance was not prepared on the 7th or 8th November after Proctor Peiris had examined the land registers. Nor is there any explanation as to why the balance money at least was not paid on or before 8th November as required by the agreement. For, if the balance money had been paid within the stipulated time, the signing of the conveyance would have been a mere formality, especially as the plaintiff was in possession of the land.

The learned trial Judge's finding that it was the defendant and not the plaintiff who defaulted is not supported by the evidence and cannot therefore be sustained.

I shall next consider whether on this view of the facts the plaintiff would in law be entitled to claim a refund of the Rs. 5,000 paid by him even if the agreement had been notarially attested. The agreement, though a home made one written by the defendant's baas in Sinhalese, is a carefully worded instrument. It states that the sum of Rs. 5,000 is received as an advance being part of the purchase price of Rs. 45,000. It also provides that the balance of Rs. 40,000 shall be paid within 15 days of the date of its execution and that a conveyance shall be executed at the expense of the purchaser. It also makes provision for placing the plaintiff in possession of the mill pending the execution of the conveyance. It goes on further to provide that if the balance is not paid within 15 days of its execution the sum of Rs. 5,000 paid as advance shall be forfeited and all the rights given under the agreement shall be null and void and that if the vendor fails to fulfil his part of the agreement he should pay Rs. 10,000 as compensation.

The deposit of money which goes to form part of the purchase price if the sale goes through and is liable to forfeiture if it does not, was a common feature of contracts under Roman and Roman-Dutch Law. The deposit came to be called arrha in Roman Law and this expression was used by the Roman-Dutch writers as well. Isidore whom Voet quotes thinks the word was derived from *a re*—the thing on account of which it is delivered. Gane the translator of Voet calls this derivation fanciful and he traces it to the Greek ἀρραβών which is said to have a Hebrew origin and means "earnest" or "security". In English law arrha is known as earnest. In *Summer and Leivesley v. John Brown & Co.*[1] it is defined as "something given for the purpose of binding a

[1] *25 T. L. R. 745.*

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contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, it was deducted from the price. If the contract went off through the giver's fault, the thing given in earnest was forfeited." Voet, Grotius, Van Leeuwen, Pothier, and Domat all agree that arrha is liable to forfeiture where the purchaser seeks to withdraw from the purchase. It will be helpful if I were to set out below relevant extracts from the discussions of this topic by the learned writers I have referred to above.

Voet—Book XVIII, Title I, Section 25 (Gane's translation)

But the jurists look at it in a slightly different way. In the first place it can consist either of a money payment or of other things. If it is in money, nothing forbids its remaining in the hands of the receiver after it has been given by the purchaser to the seller, and having to be reckoned as part of the price. But if it consists of other things, it is clear from the passage cited below that after completion of the contract of purchase and sale what had been given by way of earnest can be reclaimed by the giver in an action on the purchase or in a personal action for the recovery of what has been paid without cause. Then again in the second place, earnest was indeed often given in order to mark the completion of a contract of purchase which had further to be put into effect from both sides, so that thus the covenant as to the price could be more plainly proved. Yet it also was given sometimes as a token of an unfinished purchase to be later completed in writing or otherwise according to the will of the parties.

In the latter case there can be a retiring from the unfinished purchase subject to the loss of the earnests which one has given, or, if one has received them, subject to the restoration of their doubled value. But in the former case all change of mind has been shut out in accord with what has been said in our foregoing remarks although one is ready to lose the earnests given, or to pay back double the value of those received.

Voet—Book XVIII, Title 3, Section

Assuredly it is matter of reason that if an earnest has been given, or anything else has been disbursed by the buyer on account of the purchase, such as on a drinking-party on the preparation of a document of purchase, on the commission of a broker and on whatever else may be like such things, they are lost to the buyer and ought not to be restored to him. It came about through the buyer that he did not comply with the term annexed, and he ought not to be allowed to break faith with impunity.

As to its being stated in the passage cited below that there had been a special agreement that on the price not being paid " the buyer would lose the earnest and the thing be unbought ", you would not correctly infer from that a need of an agreement for the loss of the earnest. It is no novelty for such matters often to be put also into agreements

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superfluously and for the purpose of removing doubt, though even without agreement they would flow from the very provision of the common law.

Voet—Book XVIII, Title 3, Section 4

This commissory term becomes effective in the ordinary course by the very passage of the time specified ; and there is no need of a demand by the seller to put the buyer in default, since the day makes full demand in place of the human being.

Voet—Book XVIII, Title 3, Section 5

Nevertheless the effect of such an agreement falls away whenever the non-payment of the price on its day has been due not to the buyer but to the seller.

Grotius—Book III, Ch. XIV, Sec. XXVII

Introduction to Dutch Jurisprudence (Herbert's Translation)

" An agreement without writing can be entered into not only between parties present, but also by letters, messengers, or agents ; and the purchase is considered as completed as soon as the price has been reciprocally agreed on. As long as the purchase is not fulfilled on either the one or the other side, the one or the other may retire therefrom without any loss, except that the purchaser loses his earnest or deposit, if any has been given ; this earnest is called by us God's money, because it seldom amounts to much more than is generally given on account of the poor or the church ; but if the seller has renounced the bargain, he must restore the earnest (should he have received any) twofold. "

Grotius—Book III, Ch. XIV, Sec. XXXII

" It is also frequently stipulated, that, unless the purchase money be paid on the day fixed, the subject shall be considered as unbought (lex commissoria), in which case also the purchase is actually effected ; but, in case of non-payment, the seller has the choice either to allow the purchase to stand, or take back to himself the thing that is sold, retaining the earnest and whatever more was paid on the purchase. "

Van Leeuwen—Pt. I, Book IV, Ch. XX, Sec. III (Barber & Mac-Fadyen)

" The conditional agreement by which it is agreed that, unless the price be paid within a certain time, the thing should be unbought, and this is also attached solely in the interest of the vendor, and therefore he has the choice either to demand the price or to make use of the conditional stipulation. But if he has once chosen he cannot afterwards change and if he has demanded the price or interest he seems to have renounced the ' lex commissoria '. "

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Pothier—Contract of Sale, Sec. 474

"We add sometimes to the commissory pact, this clause, that the seller, who has received a part of the price, may, in case of a dissolution of the contract, for default of payment within the time limited, retain, by way of damages and interests, this part of the price, taking back the thing sold. This clause is lawful, provided the sum is not too considerable, and does not exceed the highest sum, in which the damages and interests, resulting from the non-execution of the contract, may be estimated."

Domat—Pt. I, Book I, Title II, Sec. IV

Section 330.—

"The earnest penny is, as it were, a pledge which the buyer gives to the seller in money, or some other things; whether it be to signify more certainly that the sale is perfected; or to be in place of payment of a part of the price; or to regulate the damages to be recovered of the party who shall fail to perform the articles of the sale. Thus the earnest given in the sale has the effect which the parties have agreed it should have."

V

Section 331.—

"If there be no express agreement which regulates the effect which the earnest shall have, against the party who shall fail in performing the contract of sale; if it is the buyer, he shall lose his earnest; and if it is the seller, he shall give back the earnest, with as much more."

. . . . . .

In the instant case we have a written agreement which expressly stipulates the forfeiture of the deposit in the event of the purchaser's default. It is a contract of sale to which the Lex Commissoria applies. Except Pothier all the other writers are agreed that the full amount deposited may be forfeited in the event of default. Pothier alone states that the courts have power to mitigate the forfeiture. His view cannot be preferred to that of the writers on Roman-Dutch Law by whose opinion we must be guided. I hold therefore that even if this agreement had been notarially attested and therefore of force or avail in law the plaintiff would not be entitled to claim refund of his deposit of Rs. 5,000. The plaintiff cannot have greater rights under an agreement which is not notarially attested. His claim for a refund must therefore fail. There is considerable support for this view from the judgments of the South African Courts which like us are governed in matters of contract by the principles of Roman-Dutch Law.

The application of the Lex Commissoria (Commissory pact as Gane calls it) has been discussed in a number of cases where attempt has been unsuccessfully made to establish that such a forfeiture is a penalty coming

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within the principle stated by Lord Tomlin in the *Pearl Assurance* case [1]. I shall now proceed to refer to the better known cases. I am citing at length because my citations are from reports which are not available in most of our libraries. In *Cloete v. Union Corporation Ltd.* [2] Tindall J. states :—

"The Roman-Dutch authorities are clear that *arrha* is forfeited to the seller if the contract is cancelled owing to the buyer's default, and no Roman-Dutch authority has been quoted which shows that that is not the case where the *arrha* is a sum of money which is to be applied in part payment of the price. In regard to *Pothier's* statement in section 474 I know of no Roman-Dutch authority which is to the same effect. It is doubtful whether *Groenewegen* in his note to *Grotius* (3.14.32) had in mind the case of a special stipulation. It is not possible to read such a qualification into *Voet's* statement in 18.3.3. *Voet* was, however, well aware that the Roman-Dutch law mitigated the rigour of the Roman Law in regard to penal stipulations ; he deals with the subject in 45.1.12 and 13. But it must be observed that *Voet* does mention a certain mitigation of the forfeiture ; he states that if the seller keeps the portion of the price paid, the buyer must be allowed to retain the fruits. This alleviation of the buyer's position, though it is inconsistent with the view that the seller's right must be tested by the actual damages suffered, certainly does involve a discretion in the judge to mitigate the rigour of the forfeiture to some extent, namely, by allowing the buyer keep the fruits."

This question of the power of the Court to mitigate the forfeiture of *arrha* was again raised in the cases of *Arlow Properties (Pty) Ltd. v. Bailey* [3] and *Mine Workers' Union v. Prinsloo Greyling* [4]. In the former case the Court felt itself bound to follow *Cloete's* case ; but in the latter case the whole question was reagitated by counsel and dealt with in the judgments. Dealing with the argument that the provision for forfeiture should be treated as if it were a penalty Greenberg J.A. states at page 851 :—

"The main contention advanced on behalf of the appellant was that the provision for forfeiture is indistinguishable from and is in fact a penalty and that there is no reason why, unlike other penal provisions, it should be enforced. But although it was recognised in Roman Dutch Law that penalties were not enforceable (*Voet*, 45.1.12, 13), the validity of a provision for forfeiture contained in a *lex commissoria* was not questioned and the proper conclusion seems to me to be that a pact of this kind was considered valid, notwithstanding its penal nature."

This view of the law has been approved by a Bench of five Judges of the Appellate Division in the case of *Tobacco Manufacturers Committee v. Jacob Green & Sons* [5]. Schreiner J. A. states at page 488 :—

"Where there is provision for the payment of a sum, specified or ascertainable and, if ascertainable, by calculation or assessment,

[1] *1934 A. C. 570.*
[2] *(1929) T. P. D. 508 at 516–519.*
[3] *(1937) W. L. D. 116.*
[4] *1948 (3) S. A. L. R. 831.*
[5] *1953 (3) S. A. L. R. 480.*

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upon a breach of a contract the question whether the sum is a penalty or liquidated damages must ordinarily arise. There may, no doubt, be exceptions, real or apparent, to this generalisation. For instance, forfeitures under a *lex commissoria*, though they may be highly penal in their operation, fall outside the field. (*The Mine Workers' Union v. Prinsloo and Greyling*[1]) "

The same question was again raised before five Judges of the Appellate Division in the case of *Baines Motors v. Piek*[2]. That case holds that a forfeiture clause accompanying a *lex commissoria* in a contract of sale and pertinent to that contract is enforceable according to its tenor, unless it is designed to enforce a principal obligation which is forbidden by the law or is conducive to immorality, and that the principles laid down in the *Pearl Assurance* case[3] in regard to a penalty in a contract of sale have no application to a forfeiture clause annexed to a commissory pact merely because it is penal in nature. Schreiner J.A. and Van Den Heever J.A. examine in detail the legal aspects of the question. Schreiner J.A. states at page 540 :

" In particular, if what the seller selects amounts to no more than recovery of the vehicle sold and retention of what the buyer has paid in respect of the purchase price, this is simply a *lex commissoria* which can be enforced even if it operates penally. That the actual claim of the seller is wholly within the field of the *lex commissoria* is not open to question, and it follows that, if that claim can be made despite the fact that it rests upon provisions of the contract which form part of a penal totality, the mere fact that there is such a penal element cannot be set up by the buyer and the exceptions to the plea and the counterclaim should have been upheld. "

He referred to the *Mineworkers* and the *Tobacco Manufacturers'* cases (*supra*) as supporting his view.

Van Den Heever J.A. in a forceful judgment upholding the claim to forfeiture based on the *lex commissoria* states at page 546 :

" I have come to the conclusion, therefore, that a forfeiture clause accompanying a *lex commissoria* in a contract of sale and pertinent to that contract is enforceable according to its tenor, unless it is designed to enforce a principal obligation which is forbidden by the law or is conducive to immorality. "

In view of the fact that the question of forfeiture of deposits is a subject dealt with both by the institutional writers and the South African Courts, it is not necessary to make more than passing reference to the English Law on the subject. It would appear from the case of *Hinton v. Sparkes*[4] that the forfeiture of a deposit operated to the full extent of the

[1] *1948 (3) S. A. 831 (A. D.)*
[2] *1955 (1) S. A. L. R. 534.*
[3] *1934 A. C. 570.*
[4] *L. R. C. P. Vol. III, Page 161 (1867–68).*

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amount in deposit and in that case the Court refused to reduce the amount of forfeiture. Bovill C.J. stated at page 165 :

> " The intention of the parties, as I collect it from the agreement, is, that this is to be taken as the ordinary case of payment of a deposit, which is to be forfeited on the purchaser's failure to complete the contract. That being so, it follows that the defendant has no answer to the action. This view is entirely in accordance with the decision of the Court of Queen's Bench in *Ockenden v. Henly* [1]. The numerous cases referred to as to the distinction between penalty and liquidated damages have in my judgment no application to a contract in the form of that now in question. "

As the main controversy in this appeal centred round the plaintiff's claim for a refund of the deposit of Rs. 5,000 the decision I have reached concludes the matter but the question on which this appeal has been referred to a bench of five Judges is whether the case of *Nagur Pitchi v. Usoof* [2] has been rightly decided. Before I enter on a discussion of that case I think I should examine the meaning and effect of section 2 of the Prevention of Frauds Ordinance (hereinafter referred to as the Ordinance). That section reads :—

> " 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, and no notice, given under the provisions of the *Thesawalamai* Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, 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 witnesses. "

The above section declares that no transactions specified therein " shall be of force or avail in law " unless it is in writing and signed by the party making it or some person on his behalf in the presence of a notary and two witnesses present at the same time, and is duly attested by the notary and the two witnesses. The words that call for interpretation are self-explanatory and mean what they state, i. e. that a transaction which does not satisfy the requirements of the section is of no force or avail in law. The words " in law " have in my view been used in this context with the object of excluding even equitable relief to those who do not comply with the provisions of the statute ; for, the word " law " in its widest sense includes equity. (*The Queen v. Darlington Local Board of Health*)[3].

[1] *27 L. J. (Q.B.) 361.* [2] *(1917) 20 N. L. R. 1.*
[3] *6 B. & S. 562 at 569, 122 E. R. 1303 at 1305.*

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According to the meaning of the material words in this context the transactions which are obnoxious to the section are not valid and have no efficacy. The words " of no force or avail in law " are very strong words and have the effect of making transactions which do not satisfy the requirements of the statute null and void. Such transactions must be treated as if they never came into existence. It is a canon of construction of statutes that where by the use of " clear and unequivocal language " capable of only one meaning anything is enacted by the legislature, it must be enforced without regard to the consequence of such enforcement. It would be wrong therefore to introduce the considerations which influenced the decisions on the Statute of Frauds in England into the construction of our Ordinance. Not only because the English statute is so different from ours ; but also because in England there has been some laxity in permitting considerations of equity to over-ride the plain words of the statute. We should therefore guard ourselves against adopting the attitude of the English Courts.

In the Sixth Interim Report of the Law Revision Committee (Cmd. 5449 of 1937) under the Chairmanship of Lord Wright, which recommended the repeal of so much of section 4 of the Statute of Frauds as remained, the members observed :

> " In the two and a half centuries during which the statute has been in operation, widely divergent opinions have been expressed by high authorities as to its policy and merits . . . . Mitigating expedients, such as the doctrine of part performance, strained construction of its language, such as that which excluded contracts to marry from agreements in consideration of marriage, and statutory amendments, have softened its asperities. "

Nor can the plain meaning of the section, as has been done in some of our decisions, be disregarded in order to bring it into line with concepts of the English doctrine of part performance and of use and occupation.

Mellish L.J. in commenting on the laxity of interpretation in England stated in *Edwards v. Edwards* [1] :

> " If the Legislature says that a deed shall be null and void to all intents and purposes whatsoever, how can a Court of Equity say that in certain circumstances it shall be valid. "

Even where a statute is clearly in conflict with the common law or equity the Courts have no power to depart from the true meaning of the statute. It would appear from the case of *Britain v. Rossiter* [2] that in England a provision such as our section 2 would not have been given the same effect as section 4 of the Statute of Frauds. The words of Cotton L.J. in that case are as follows :—

> " If such contracts had been rendered void by the legislature, Courts of Equity would not have enforced them ; but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them ; and Courts of Equity were accustomed to dispense with that evidence in certain instances. "

[1] *L. R. 24 Ch. D. 291.* [2] *11 Q. B. D. 123.*

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The older English cases which gave equitable relief against the operation of a statute are according to Mellish L. J. in *Edwards v. Edwards* (supra) no longer followed :

> " The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament, but this has not been done in the case of modern acts, which are framed with a view to equitable as well as legal doctrines. "

It has also been recognised in England that in the endeavour to mitigate what appears to be the hardships caused by the Statute of Frauds greater harm has been done than could have been occasioned by a strict adherence to the words of the statute. In *Maddison v. Alderson* [1] Lord Blackburn, dealing with a case in which in a contract for the sale of land the vendee had been put in possession, stated :

> " This is, I think, in effect, to construe the 4th section of the Statute of Frauds as if it contained these words, ' or unless possession of the land shall be given and accepted '. Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was *res integra* in refusing to interpolate such words, or put such a construction on the statute. But it is not *res integra* and I think that the cases are so numerous that this anomaly, if, as I think, it is an anomaly, must be taken as to some extent at least established. "

Story in his Equity Jurisprudence, Vol. I., p. 753 (12th Ed. 1877) cites the following remarks of Lord Redesdale in the case of *Lindsay v. Lynch* [2] the report of which is not available :—

> " The statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas, it is manifest, that the decisions on the subject have opened a new door to fraud ; and that, under pretence of part execution, if possession is had in any way whatsoever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. And I remember, it was mentioned in one case, in argument, as a common expression at the bar, that it had become a practice *to improve gentlemen out of their estates*. It is, therefore, absolutely necessary for courts of equity to make a stand, and not carry the decisions farther. "

These words of caution seem to have passed unheeded in England ; but we have every reason to take them to heart and avoid the mistakes that were made in that country.

[1] *L. R. 8 App. Cas. 467.* [2] *2 Sch. & Lefr. 4, 5, 7.*

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In view of the vital difference between our statute and the English statute a detailed discussion of the English cases will serve no useful purpose. Another reason why reference to English cases will not be profitable is that the English Act has undergone considerable change since the better known cases on section 4 of the Statute of Frauds were decided and those cases are now only of academic interest. In 1925 by sections 207, 209 and Schedule 7 of the Law of Property Act the words " or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them " were repealed. In 1954 by section 1 of the Law Reform (Enforcement of Contracts) Act the following words were repealed :—

(*a*) " whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate ; or "

(*b*) " or to charge any person upon any agreement made upon consideration of marriage ", and

(*c*) " or upon any agreement that is not to be performed within the space of one year from the making thereof. "

The relevant portion of section 4 of the Statute of Frauds now reads :

> " No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. "

As a matter of interest it might be mentioned that section 40 of the Law of Property Act 1925 (c. 20) still retains the prohibition against the bringing of actions upon contracts for the sale of land which are not in writing. That section reads :

(1) " No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised. "

(2) " This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court. "

It is sufficient to say that the view of Mellish L.J. in *Edwards v. Edwards* (supra) is shared by the South African Courts. Innes C.J. in *Jolly v. Herman's Executors* [1] stated :—

> " Had the 4th section of the Statute enacted that the agreements covered by its terms should, if not reduced to writing, be considered void *ab initio*, I cannot imagine that any place would have been found by English courts of equity for the doctrine of part performance in relation to such contracts. "

[1] (*1903*) *Transvaal Law Reports S. C. 515, at page 523.*

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I shall now turn to our case of *Nagur Pitchi v. Usoof* [1] which we have been invited to reconsider in this appeal. De Sampayo J. has in that case examined almost all the previous decisions of this Court. I do not therefore propose to refer to them, beyond stating that I am in accord with his remarks regarding them at p. 6. He says :—

> " I was certainly much impressed at the argument with the number of them, and with the long period of time which they covered. But when the cases are closely examined, it will be found that they are neither individually strong, nor collectively such as to form a *cursus curiae*. None of them contains any discussion of principles or exposition of the law. "

The facts of that case are as follows :—The plaintiff advanced to the defendant a sum of Rs. 945 on an oral agreement for the lease to him by the defendant of two parcels of land. The plaintiff changed his mind and later did not wish to take the lease though the defendant was willing to execute it. The plaintiff then instituted legal proceedings to recover the advance paid by him. The trial Judge held that the defendant was entitled in law to retain the amount as forfeit. The plaintiff appealed and the case came up before a bench of three Judges. Ennis J. dismissed the appeal resting his decision on a passage in Halsbury's Laws of England (Vol. XXV, p. 402) which reads :

> " Where a deposit has been paid under a verbal contract for the sale of land, a vendor who resists the purchaser's action on the contract by the plea of the Statute of Frauds is liable to return the deposit as money had and received to the use of the purchaser ; but it seems that if the purchaser sets up the Statute in order to escape from his contract, he cannot recover the deposit. "

De Sampayo J. followed the course taken by Ennis J. and adopted the principle of the English decisions and dismissed the appeal. The other Judge Wood Renton C.J. agreed with Ennis and De Sampayo JJ. At p. 5 De Sampayo J. observes :

> " The more important question is whether the principle of the English decisions should be adopted here. I was doubtful on this point, but on consideration I cannot see why it should not. There is no essential difference between the English Statute and our Ordinance which may deprive us of the benefit of the English authorities. It is true that section 4 of the Statute of Frauds only provides that no action shall be brought on a contract which is not in writing as thereby required, and therefore other rights arising out of a contract, which is not void, though unenforceable may be established and secured by action. Section 2 of our Ordinance of Frauds and Perjuries, on the other hand, declared the contract to be of no force or avail in law. At the same time, that section of our Ordinance requires notarial writing only for the purposes therein mentioned ; it does not declare a non-notarial contract to be void for other purposes, and much less illegal. Therefore, I think the two Statutes, so far as

[1] *(1917) 20 N. L. R. 1.*

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the point under consideration is concerned, are brought in essence into line with each other ; as it may be said here, as it has been said in England, that the contract exists as a fact, which the Court can take cognizance of for other purposes than those stated, and that the only effect of the Statute is to render the kind of evidence required indispensable when it is sought to enforce the contract. (*Maddison v. Alderson* (1883) L. R. 8 A. C. 475). That being so there does not appear to be any difficulty in concluding that with us also a party who advances money on an informal agreement is entitled to a refund only if the other party refuses, or is incapable of completing, the transaction, and the consideration for the advance therefore fails. "

With the greatest respect to so eminent a Judge as De Sampayo I cannot agree with his statement that section 4 of the English Statute of Frauds and section 2 of our Prevention of Frauds Ordinance " are brought in essence into line with each other ". A comparison of the two sections above will show that there is a vast difference between the two enactments, and under our enactment which declares transactions contrary to it of no force or avail in law, the contract cannot be said to exist in fact as it had been said in England. The learned and distinguished Judge has failed to give effect to the language of our enactment although his observations seem to indicate that he held the view that transactions contrary to our enactment are void. It is difficult to reconcile his view that transactions contrary to our enactment are void with his conclusion that in essence the enactments have the same effect. A transaction which is void must be regarded as if it never came into existence. I cannot see how such a transaction can be invoked for any purpose at all. As stated by Innes J. in *Wilken v. Kohler* [1] a transaction which is void can under no circumstances confer any right of action. The case of *Carlis McCusker* [2] referred to in *Wilken's* case supports the view taken in the latter case. Although the case of *Nagoor Pitchi* has had the approval of Bertram C.J. (*Appuhamy v. Dissanayake* [3]) I find myself unable to agree that the reasoning of De Sampayo J. is sound. I say so in all humility. This is not the first time that the correctness of Nagur Pitchi's case has been questioned. It appears to have been done in the case of *Peris v. Vieyra* [4]. Dalton J. in that case expressed some difficulty in accepting *Nagur Pitchi's* case as sound law ; but as the Bench was constituted by two Judges he felt himself bound by it. At page 279 he stated :

" The first question that arises is as to the nature of the agreement between the parties, and whether it was enforceable or of any effect whatsoever. On this point we have been referred to the decision of this Court in *Nagur Pitchi v. Usoof*. In spite of the essential difference between the provisions of Ordinance No. 7 of 1840 and the Statute of Frauds, the Court held that so far as the point under consideration is concerned the Ordinance and the Statute are in essence in line with one another, and that it may be said here, as in England, that the contract exists as a fact which the Court can take cognizance

[1] *1913 A. D. 135.*
[2] *1904 T. S. 917.*
[3] *(1921) 23 N. L. R. 88.*
[4] *(1926) 28 N. L. R. 278.*

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of for other purposes than those stated in the Ordinance. I must admit I have the greatest difficulty in agreeing with that conclusion, but under the circumstances as the decision of a Court of three judges it is binding upon this Court."

It would appear from the foregoing remarks of Dalton J. that had he not been fettered by the binding decision of three Judges of this Court he was inclined to hold otherwise.

Since the decision of *Nagur Pitchi v. Usoof* (supra) the Privy Council has had occasion to consider our section and point out the vital difference between it and the corresponding provisions of the English Statute of Frauds.

In the case of *Adaicappa Chetty v. Caruppen Chetty* [1], the Privy Council drew attention to the difference between the two provisions in the following words :—

"This section is much more drastic than the fourth section of the Statute of Frauds. The latter section does not render a parol agreement of or concerning land invalid. It merely provides that the agreement cannot be enforced in a Court of law unless it, or a note or memorandum of it in writing, be signed by the party to be charged therewith, or some person thereunto lawfully authorized, be given in evidence. Under the latter Statute if the defendant in a suit brought to enforce the agreement has signed it, or a note of it in this manner, the agreement can be enforced though the plaintiff has not signed either. But the party who has signed it or the memorandum cannot sue to enforce it against the party who has not signed either. In both cases the contract entered into is the same. It is not illegal or invalid, but it can only be enforced in a Court of law if proved in a certain way.

"The fourth section of the Statute of Frauds has consequently often been well described as merely an enactment dealing with evidence. In the present case the second parol agreement is in their Lordships' view as invalid as the first . . . . This second agreement therefore falls within the express words of this same section 2 of Ordinance No. 7 of 1840, and not being in writing would be invalid.

"Evidence tendered by a party litigant relying upon an agreement as valid and enforceable, which, if admitted, would establish that the agreement was of no force or avail, is inadmissible. It would be a travesty of judicial procedure to admit it."

In the later case of *Saverimuttu v. Thangavelautham* [2] the Privy Council affirmed the decision in *Adaicappa Chetty v. Caruppen Chetty* [3] and extended its application to written agreements which were not attested by a notary. It stated :

"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

[1] *(1921) 22 N. L. R. 417 at page 426.* [2] *(1954) 55 N. L. R. 529.*
[3] *(1921) 22 N. L. R. 417.*

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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 thus 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. "

It is not clear what our authority is for introducing the equitable principle of the English Courts of Equity that the Statute of Frauds should not be made an engine of fraud. But as observed by the Privy Council in the case cited above the application of that rule to section 2 of our Ordinance would destroy its effect. In regard to trusts in relation to immovable property it is not necessary to introduce the English equitable principles in view of the express provisions of section 5 (3) of the Trusts Ordinance.

It would appear from what has been stated above that *Nagur Pitchi v. Usoof* has been wrongly decided and should be set aside.

This is a convenient point at which to refer to the approach of the South African Courts to a problem such as the one which arises for consideration here. In the case of *Jolly v. Herman's Executor*[1] the Court refused to enforce an agreement contrary to a Besluit to the effect that all contracts concerning the cession of rights to minerals or concerning rights to mine which did not conform to the provisions of the first paragraph of section 14 of Law No. 7 of 1883 should be *ab initio* void, and no one should have any action whatever on such agreements. This was a case in which the plaintiff was granted the exclusive right to prospect for and to work coal on a farm for the period of five years at

[1] *(1903) T. S. Vol. 1, p. 515.*

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a fixed rental, with a right of renewal on three months' notice duly given for further successive periods of five years, up to an inclusive term of forty years. The rent had been paid for the first five years of the lease and the plaintiff at the end of it tendered a year's rent in advance and claimed a renewal. Now section 14 of the statute referred to in the Besluit provided that no grant of rights to minerals on any farm shall be lawful unless embodied in a notarial deed and duly registered in the office of the Registrar of Deeds. It was argued on behalf of the plaintiff that the defendants (the Executors of the original grantors) ought not to be allowed to take advantage of the provisions of the Besluit, because they had received payment of rent under the agreement for five years, and that to allow them to contest its validity after five years, would amount to permitting a fraud on the plaintiff. This argument was rejected and the Court refused to apply to contracts governed by the Besluit the doctrine of part performance applied by the English Courts of Equity to certain contracts falling within the Statute of Frauds.

This case was followed in the case of *Wilkin v. Kohler* [1]. In that case the Court was called upon to interpret the words of section 49 of the Orange Free State Ordinance the material portion of which read :

> " No contract of sale of fixed property shall be of any force and effect unless it be in writing and signed by the parties thereto, or by their agents duly authorised in writing. "

In construing this section Innes J. said :

> " The language of the section is perfectly plain ; no unwritten contract of the kind referred to is to be of ' any force and effect '. Now, a contract which is of no force and effect is void. No emphatic adjectives, and no redundant repetition, could express a conclusion of nullity more effectually than do the simple words which the Legislature has employed. Nor is there any reason why we should refuse to give effect to these plain provisions. The language is precise and clear, and it is for the party who would water it down to show some ground for so doing. "

Dealing with the argument that the parties were free to waive the benefit of the provisions of the Ordinance, Innes J. said :

> " Speaking generally, it is true that statutory provisions introduced simply for the benefit of an individual or a class may be waived by the person or persons for whose advantage they were devised. And a right given on those lines to treat a contract as void might be exercised or not at the pleasure of the party concerned ; the agreement would in effect be voidable at his option. But that principle has no operation where the Legislature as a matter of policy has directed that a particular transaction shall be void or of no force and effect. "

He then goes on to state the effect of the words ' no force and effect ' thus :

> " A transaction which has no force and effect is necessarily void *ab initio*, and can under no circumstances confer any right of action. "

[1] *(1913) A. D. 135.*

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In the same case Solomons J. in dealing with the words of section 49 stated :

> " The words are very clear and precise, and in my opinion can have only one meaning. The effect of the provision is that a verbal contract of sale is of no force and effect, or, in other words, is null and void. For I can see no distinction in meaning between saying that a contract is of no force and effect, and saying that it is null and void. The two expressions, in my opinion, mean exactly the same thing, for that which is of no force and effect is necessarily null and void. "

The meaning given to the words ' no force and effect ' in *Wilken v. Kohler* (*supra*) was adopted with approval in the case of *Souter v. Norris* [1]. There the Court was called upon to interpret a provision of the Patent Act which provided that no assignment of a patent ' shall be of any force or effect unless registered at the patent office '. Referring to those words Curlewis J.A. stated :

> " Now the language used by the Legislature is clear and emphatic, and the words used admit of no doubt as to their meaning. "

These words and the word ' void ' again came up for consideration in the case of *Moser v. Milton* [2] where the Court was called upon to interpret the following regulation :

" No agreement for the sale of immovable property shall be of any force or effect unless—

(*a*) such agreement has been reduced to writing and signed by the parties thereto or by their agents duly authorised in writing ; and

(*b*) the purchaser, the purchase price and other terms and conditions of such agreement have been approved by the Minister. "

In this case by a contract of sale dated 22nd June 1944 signed by both parties the plaintiff sold to the defendant a land, stock and certain movables for a sum of £2,500. The plaintiff received £500 from the defendant at the time of signing of the contract and the balance on the execution of the deed of transfer. The deed stipulated that possession of the property should be taken on 1st July 1944 and that it should be at the risk and profit of the purchaser from that date onwards. Clause 6 contained the following stipulation :—

> " This agreement is subject to the approval of the Minister of Agriculture and in the event of the Minister fixing a lower price than that stipulated herein or refusing to sanction the said sale, the vendor shall not be bound thereby and this agreement shall be cancelled, whereupon the vendor shall immediately refund to the purchaser the said sum of £500 to be paid in terms of Clause 2 hereof. Pending such refund the purchaser shall retain possession of the said movables which shall thereupon be pledged to her as security for such refund. "

The Minister approved the sale as on 13th July 1944 and on 12th July 1944 the defendant purchaser withdrew from the agreement. The

[1] (*1933*) *A. D. 41.* [2] (*1945*) *A. D. 517.*

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plaintiff vendor thereupon instituted this action claiming payment of the balance of the purchase price due and tendered transfer against such payment. The defendant denied liability and pleaded that the agreement was of no force or effect until the approval of the Minister was given. The High Court held against the defendant on the ground that the Minister's approval gave validity to the instrument with retrospective effect. He successfully appealed from that decision. The appellate division held that he had a right to resile from the agreement before the Minister's approval was given and that the Court had no right to enforce the agreement.

I shall now deal with the case on the basis of the pleadings which I have summarised at the beginning of this judgment in order to determine which of the plaintiff's causes of action are affected by section 2 of the Prevention of Frauds Ordinance because under our procedure it is necessary that the determinations in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case made thereby (*1866*) *11 Moo. Ind. App. 7 at 20*). The first cause of action is clearly based on the agreement which admittedly is not in conformity with the Prevention of Frauds Ordinance and is therefore of no force or avail in law. Paragraph 4 of the plaint reads :—

> " The plaintiff states that the failure to effect the said conveyance within the said period was due to the default of the defendant in that the defendant did not make available to the plaintiff within the said 15 days the title deeds to the said property. The plaintiff makes no claim for damages sustained by reason of the said breach by the defendant of the said agreement but restricts his claim on this cause of action to a refund of the said sum of Rs. 5,000 paid in advance under the said agreement. "

Such an agreement is inadmissible in evidence as was held by the Privy Council in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) and cannot be proved. His claim on the first cause of action cannot therefore succeed.

I now come to the second cause of action. It is not disputed that in fact the plaintiff was placed in possession of the mill by the defendant ; but he denies the plaintiff's allegation that he brought 261,700 coconut husks to the premises. He however admits that the plaintiff brought coconut husks to the value of Rs. 960/71. The learned trial Judge has accepted the plaintiff's evidence on this cause of action and given judgment for the full sum of Rs. 3,250, but at the hearing of this appeal it was conceded that on the plaintiff's own evidence he was not entitled to claim more than the value of 144 cwt of fibre and that the amount allowed under this head should be Rs. 1,872 and not Rs. 3,250.

This claim does not arise on the agreement nor is it based on it ; but is independent of it. The defendant does not claim that he is entitled to the husks or fibre on the premises when he resumed possession. The dispute was only as regards the quantity actually on the site when the defendant regained possession. As the amount has been agreed on now and as there is no legal objection to the claim being sustained the plaintiff is entitled to judgment in the sum of Rs. 1,872.

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On the alternative cause of action it was also contended that the sum of Rs. 5,000 paid as advance was recoverable as money had and received. This is a principle known to the English law and is thus stated in Halsbury Vol. 8 (3rd Edn) p. 235, s. 408.

> " Where one person has received the money of another under such circumstances that he is regarded in law as having received it to the use of that other, the law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled thereto, and in default the rightful owner may maintain an action for money had and received to his use. "

The precise nature of the action is not yet settled and Halsbury (*supra*) s. 409 sets out the different schools of thought thus :

> " One approach is to regard the defendant as liable because he has been unjustly benefited. Another is to regard him as liable on an implied promise to pay. A third school of thought considers that the matter is still open and that the true nature of the action has yet to be established. Finally, it has been suggested that although the basis of the action is an implied promise to repay, such a promise will be implied only where an element of unjust enrichment exists. "

Whichever view is taken it cannot be said that in the instant case the sum of Rs. 5,000 received by the defendant was received by him in such circumstances that he can be regarded in law as having received it to the use of the plaintiff. It was clearly understood that if the plaintiff failed to carry out his part of the contract the defendant was to retain the sum of Rs. 5,000. In such circumstances it cannot be said that the defendant was unjustly enriched. There is nothing unjust about such an agreement especially as it had been stipulated that if the defendant defaulted he should pay Rs. 10,000. The intention of the parties was that if the plaintiff defaulted the defendant was to be enriched to the extent of Rs. 5,000 and if the defendant defaulted the plaintiff was to be enriched in a sum of Rs. 10,000. There is no reason why that intention should not be given effect to. There is nothing illegal in such an agreement nor is it contrary to public policy. Lord Wright in the Fibrosa case (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1]) quotes the analysis of the action for money had and received made by Lord Mansfied in *Moses v. MacFerlan* [2], and states :

> "This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations, it has needed and received qualifications in practice. There is, for instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for moneys paid under an illegal or excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it. "

[1] (*1943*) *A. C. 32.* [2] (*1760*) *2 Burr 1005, 1012.*

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Lord Mansfield said :

> " It lies for money paid by mistake ; or upon a consideration which happens to fail ; or for money got through imposition (express, or implied) ; or extortion ; or oppression ; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. "

It is not necessary to discuss the law of money had and received at any length because the instant case is not one that falls within the scope of that law. It is sufficient to quote the words of Lord Wright in the *Fibrosa* case (*supra*). At page 67 after examining the various principles governing the law he states :

> " These principles, however, only apply where the payment is not of such a character that by the express or implied terms of the contract it is irrecoverable even though the consideration fails. The contract may exclude the repayment. "

As I have pointed out above even if this contract had been notarially attested the plaintiff would not be entitled to recover the money as he was the defaulter. The plaintiff is therefore not entitled to rely on the ground of " money had and received ".

I do not propose to go into the doctrine of unjust enrichment as it does not arise for decision here. It is sufficient to mention that it has been discussed in a number of recent decisions both in England and in South Africa. The doctrine is known to Roman and Roman-Dutch Law and the books contain many instances in which a person is not permitted to enrich himself at the expense of another. The judgment of Watermeyer J.A. in *Jajbhay v. Cassim* [1] contains a full analysis of the Roman and Roman-Dutch authorities on the subject of unjust enrichment. It being conceded that both under the English Law and under our Law the Courts will intervene to prevent unjust enrichment, the onus of proving that another person has unjustly enriched himself at his expense is on the person asserting the proposition. As was stated by Morton J. in the case of *Guarantee Investment Corporation Ltd v. Shaw* [2] :

> " The plaintiffs must prove not only that the defendant was enriched but also that he was unjustly enriched. "

In the same case it is stated that :

> " the broad principle that no one shall be unjustly enriched at the expense of another is one which must be applied with caution. "

The true question that arises for consideration in cases of unjust enrichment is—Is there an enrichment which equity demands should be restored to the plaintiff whose claim is not barred by legal principles ; for instance

[1] *(1939) A. D. 537 at 545 et seq.* [2] *(1953) 4 S. A. L. R. 479 at 482.*

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because the rights between the parties are governed by contract or because the plaintiff's remedy is barred because of the *in pari delicto* rule, no circumstances being shown why that rule should be relaxed; or because of a *turpis causa*. In the case of *Wilson v. Smith & another* [1] following the dictum of Van den Heever J. in *Pucjlowski v. Johnston's Executors* [2], Kuper J. refused to grant relief on the ground of impossibility of performance. The remarks relied on are :

> " Where as in this case, a party to a putative agreement puts the other party into possession or leaves him in possession not as lessee, but for the objects of the intended contract, I cannot see on what equitable basis he can claim a rental or the value of use and occupation—unless one relies upon a vague and superficial notion of equity which is not reflected in the law. "

Kuper J. summed up the decision thus :

> " Furthermore it seems to me that where both parties have suffered loss from the partial execution of the contract, the applicant because he has been deprived of the use and occupation of the lot for some 5 months, the first respondent because he has been deprived of the use of the £400 paid in by him and he has been put to certain expenses in the preparation of the lease and the contemplated mortgage bond, the Court should not be astute to determine any differences on a strict mathematical basis and should leave each party to bear his own loss, a loss occasioned by the frustration of the contract not due to the fault of either party. "

In the instant case apart from the fact that the agreement is of no force or effect it was the plaintiff's default that prevented the sale going through. There can be no unjust enrichment in such a case. The plaintiff must bear the loss. The general rule of Roman-Dutch law is not to grant relief where the action arises on a *turpis causa* or *injusta causa* on the basis of the maxim *ex turpi causa non oritur actio*. Relief was also not granted where the parties were equally to blame for the illegal or void transaction which they sought to undo on the basis of the maxim *in pari delicto potior conditio possidentis*. In *Brandt v. Bergstedt* [3], where a cow had been sold on a Sunday contrary to the provisions of Ordinance No. 1 of 1838 and was delivered by the plaintiff to the defendant the following morning, the Court refused to grant relief to the plaintiff who sought to recover the cow or its value on the basis of the maxim *in pari delicto melior est conditio possidentis*. Kotze J. in the course of his judgment referred to the following words of Lindley L.J. In this connexion it is well to remember the words of Lindley L.J. in *Scott v. Doering McNab & Co.* [4], wherein he says :

> " No Court will allow itself to be made the instrument of enforcing transactions which are founded on illegality, when the party invoking the aid of the Court is himself concerned in the illegality. The Court

[1] *(1956) 1 S. A. L. R. 393.*
[2] *(1946) W. L. D. 1.*
[3] *(1917) C. P. D. 344.*
[4] *(1892) 2 Q. B., p. 728.*

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cannot aid a party to defeat the clear intention of an Ordinance or statute."

The words I have underlined are noteworthy in the present context.

It is an established rule that a Court of Justice will not recognise and give validity to that which the legislature has declared null and void, nor will it permit anything which cannot be done directly to be done indirectly. Principles such as that no man shall be allowed to take advantage of his own wrong, and that no one can be permitted to enrich himself at the expense of another cannot be invoked for the purpose of permitting persons to act contrary to or ignore the express requirements of a Statute such as Section 2 of our Ordinance.

In his judgment in the *Jajbhay* case (*supra*) Watermeyer J.A. sums up his judgment thus :

"Under the general principle which has been discussed in this judgment, the Court will not assist a party to recover what he has paid or transferred to defendant in terms of the illegal contract, save in exceptional cases, but there is no reason to go further and to deprive him of rights which he has not transferred to defendant. What he has voluntarily paid or transferred he cannot recover, but there is no reason why he should lose what he has not intended to part with."

In the case of *Sandeman v. Solomon* [1] occurs the following quotation from Paulus at p. 149 :

"If, however, anything has actually been given in performance of such a void contract, the law will not compel restitution, unless the party be innocent. But if the party seeking restitution of what he has given be not a wrong doer, the law will enforce restitution. The party claiming restitution must come to Court with clean hands."

In this case Beaumont J. summarises his opinion thus :

"But looking to the strict sense in which our law has been interpreted by the most competent authorities, there seems to be no room for doubt that under our law, whatever may be the practice under the English law, the Court cannot take cognisance of a claim based directly or indirectly on what the law forbids, and where both parties are to blame it cannot help either."

The plaintiff is for the above reasons not entitled to succeed in his claim based on unjust enrichment as well.

In view of the conclusions I have reached on the main questions arising on this appeal it is not necessary to discuss at length whether the agreement is divisible or separable and whether time is of the essence of the contract.

In regard to the question of the divisibility of the contract it is sufficient to say that the instrument under consideration clearly shows that the

[1] *28 Natal Law Report 140.*

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parties intended the contract to be single and entire and not separable. A divisible contract is a contract the whole performance of which is divided into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promissor. (Williston on Contracts, Vol. 3, p. 2408, Sec. 860A)

The question whether time is of the essence of the contract generally arises in actions for specific performance.

What is the meaning of "time is of the essence of the contract" ? It means that the performance by one party at the time specified in the contract is essential in order to enable him to require performance from the other party. It means that time is so material that exact compliance with the terms of the contract in this respect is essential to the right to require counter-performance. The first point to be determined in deciding whether time is of the essence of a particular contract is whether the parties have expressly made it so. By that I do not mean that it is essential to use the very words "time is of the essence" in the contract, but it should appear from the expressed terms and the surrounding circumstances taken as a whole that time is of the essence of the contract. It is therefore primarily a matter of interpretation of the contract. If the answer to the question whether time is of the essence is in the affirmative then the defaulter cannot enforce performance by the other party.

In this matter there is an important difference between contracts for the sale of goods and contracts for the sale of land. Section 11 of the Sale of Goods Ordinance provides that unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be the essence of a contract of sale.

In English common law stipulations as to time in contracts for the sale of land were always regarded as of the essence of the contract. The Court of Chancery in the exercise of its jurisdiction to decree specific performance adopted the rule that time was not essential unless either it was made so by express stipulation or it appeared to be so from the nature of the contract.

In the instant case the plaintiff is not seeking to enforce specific performance, but a reference to the contract shows that even if the contract was valid the plaintiff would not succeed as time has been made an essential term. What could be clearer than these words—

> "And that if the balance amount is not paid and the deed of conveyance is not executed within 15 days from this date and that the same could not be performed the sum of Rupees Five Thousand (Rs. 5,000/–) paid by the said Mr. D. L. Abeyasekera as advance and the authority assigned as aforesaid shall hereby be forfeited and null and void and that if I the vendor Mr. K. E. J. Perera neglected to execute the said deed and deliver the same, I have hereby agreed to pay a sum of Rupees Ten Thousand as compensation."

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The appeal is allowed with costs both here and below except in regard to the claim in respect of the coconut husks brought on the land by the plaintiff. The plaintiff's claim is allowed in respect of that item to the extent of Rs. 1,872.

DE SILVA, J.—I agree.

GUNASEKARA, J.—

I concur in the view taken by my brother Sansoni that the agreement as to the destination of the deposit of Rs. 5,000 is severable from the agreement for the sale of the mill and that it is valid. The authorities cited in the judgment of my lord the Chief Justice make it clear that in that view the respondent must be held to be entitled to recover the deposit if the party in default was the appellant.

The learned district judge holds that it does not appear to have been intended by the parties that time should be of the essence of the contract. " All that appears to have been contemplated ", he says, " was that the transaction should be finished within a reasonable time and 15 days appear to have been set out as an indication of what that reasonable time was without any real intention of enforcing that limit. " This finding is supported by the evidence, and there appears to be no sufficient ground for disturbing it.

According to the appellant's own evidence in chief he had told the respondent that he would instruct Mr. Ranasinghe to let the respondent inspect the deeds if he came to Mr. Ranasinghe's office. The learned district judge has accepted the evidence that on the morning of the 8th November the respondent and his proctor, Mr. Peiris, went to Mr. Ranasinghe's office to inspect them but Mr. Ranasinghe could not make them available for inspection. He holds that the appellant having failed to see that the deeds were available for inspection cannot blame the respondent for not executing the conveyance within the period of 15 days specified in the agreement. I see no reason to disagree with this finding. It seems to me, therefore, that even upon the assumption that the parties intended that time should be of the essence of the contract it must be held that it was the appellant's default that prevented the execution of the conveyance by the 8th November. Moreover, even if they originally regarded the stipulation as to time to be an essential term there can be no doubt that they later agreed to an extension of the time, and that it was by reason of the appellant's default that the conveyance was not executed within the extended period. I am unable to agree with Mr. Perera's contention that the question whether the parties agreed to an extension is not included in the issues tried. In my opinion it is covered by the 1st and 12th issues, which raise the question as to which party was in default.

I agree with my lord the Chief Justice that on the second cause of action the respondent is entitled to only 144 cwt. of mattress fibre or

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Rs. 1,872 as its value. The decree under appeal must be varied accordingly. Subject to this variation the appeal must be dismissed with costs.

PULLE, J.—

I find myself in agreement with the learned trial Judge that time was not of the essence of the agreement dated 29th October, 1949. Both the parties to the action and the person who drafted the agreement were unfamiliar with legal niceties and I am of opinion that it would be artificial to impute to the parties an intention that, if the deed of transfer could not owing to an unexpected event be prepared in time there would not be a reasonable extension of time to complete the transaction. The parties must be presumed to have contracted on the footing that the purchaser would have to take legal advice on title which oftentimes entails lengthy and laborious examination of the chain of deeds on which the vendor bases his title. Delays in examination of title are unpredictable. Again, the parties must have contemplated that the deed of transfer should be drawn up by the purchaser in a form that would meet the wishes of the vendor. There was a mortgage for Rs. 10,000. How was this debt to be discharged if the purchaser was to get the property free of encumbrances ? The agreement P1 is silent because it did not provide for all contingencies in implementing it and I think it was left to the good sense of the contracting parties to work out details during a period of negotiations extending beyond the 8th November. The events that occurred on this date and thereafter up to the 19th November, 1949, on which the learned judge has commented, support the contention of the purchaser that time was not of the essence of the agreement. On this part of the case, for the reasons fully set out in the judgment of Sansoni, J., I agree that the purchaser did not render himself liable to have his deposit of Rs. 5,000 forfeited.

On the second cause of action I agree with my Lord, the Chief Justice, that the sum of Rs. 3,250 awarded as damages should be reduced to Rs. 1,872. In the result I am of opinion that subject to this reduction the appeal should be dismissed with costs.

SANSONI, J.—

I agree with My Lord the Chief Justice that the plaintiff is entitled to recover a sum of Rs. 1,872 as damages on the second cause of action. I agree with my brother Gunasekara and my brother Pulle that the defendant's appeal fails in regard to the first cause of action and I shall state briefly my views on the more important questions of law argued before us.

Mr. Perera's position was that the document P1 could not be ignored merely because the agreement could not be specifically enforced. He urged that the condition regarding forfeiture should be enforced according to the terms of the agreement, and this submission was linked with his further submission that it was the plaintiff who was in default because he did not complete the purchase by 8th November, 1949.

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Mr. Choksy's first submission was that as the agreement was one affecting land it was altogether void, and even the subsidiary agreement relating to the deposit of Rs. 5,000 was invalid and could not be considered. His second submission (and I think this was the one he pressed more earnestly) was that the agreement could be considered only in so far as it concerned the deposit of Rs. 5,000, and the Court would then have to decide who was in default in respect of that part of the agreement. He did not seriously contest the position that if the plaintiff was in default, he could not recover his deposit. On the other hand, if the defendant was in default and refused to wait till the agreed time for signing the deed on 8th November had arrived he submitted that the plaintiff was entitled to the return of his deposit.

Now I entertain no doubt on the question whether notice could be taken of, and effect given to, the subsidiary agreement relating to the deposit. Just as the Privy Council in *Arsecularatne v. Perera* [1] decided that a non-notarial writing affecting land was void as an agreement to effect a transfer of the leasehold interest, but could be referred to for the purpose of establishing a partnership, so in my opinion the fate of this deposit of Rs. 5,000 could be decided by considering the terms which the parties made concerning it.

The next point to be considered—and I regard it as fundamental to the decision of this dispute—is whether time was of the essence of this contract. If it was, it would have been necessary to examine the evidence carefully to see in consequence of whose default the transaction of sale was not completed by the agreed date. If it was not, then one has to see whose default was responsible for the transaction having ultimately fallen through.

Mr. Perera argued that as the document P1 provides that the advance of Rs. 5,000 should be forfeited if the plaintiff's purchase price is not paid and the deed of conveyance not executed within fifteen days, the only conclusion possible is that time was regarded as the essence of this contract. In passing, I would remark that this document is not signed by the purchaser but only by the seller, but I make no point of that. The issue I wish to consider is whether such an agreement for forfeiture renders time of the essence of the contract, and here I have been guided by certain cases to which I shall immediately refer.

In *Jamshed Khodaram Ivari v. Burjorji Dhanjibhai* [2] the Privy Council had to consider a case where the defendant agreed to sell his leasehold interest in a land to the plaintiff for Rs. 85,000. The plaintiff paid Rs. 4,000 as a deposit or earnest and the parties agreed that the conveyance was to be prepared and received within two months from the date of the agreement. It was also agreed that should the purchaser not pay the balance consideration within the fixed period, *he was to have no right to the deposit or earnest money of Rs. 4,000 and any claim of his was to be void*, and the vendor was after that date to be at liberty to re-sell. Thereafter the plaintiff's solicitors investigated the title of the land and they called for various documents, one such document being called for after

[1] *(1927) 29 N. L. R. 342.* [2] *(1915) A. I. R. (P. C.) 83.*

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the two months period had expired, with the result that the plaintiff was not ready to complete the purchase within the period of two months. The defendant's solicitors did not comply with the requisitions of the plaintiff's solicitors, and when three months had expired after the date of the agreement they asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the plaintiff had failed to complete his purchase within the date fixed.

In delivering the judgment of the Privy Council Lord Haldane said :

> " If these requisitions were made in time Their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy and the answer to it is decisive of the appeal. "

He considered the law of England as regards contracts to sell land and said :

> " Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. "

He added that the special jurisdiction of equity to disregard the letter of the contract may be excluded by any plainly expressed stipulation if the languge of the stipulation " plainly excludes the notion that these time limits were of merely secondary importance in the bargain, that to disregard them would be to disregard nothing that lay at its foundation ". Again, equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. But the construction of the contract cannot be affected by what takes place after it has once been entered into.

Lord Haldane, having stated these principles, applied them to the agreement in question and was of the opinion that there was nothing in its language or in the subject matter to displace the presumption that time was not of the essence of the bargain. I might add that the doctrine that time is not of the essence of the contract does not apply also when there has been a sale of land and an agreement to reconvey it within an

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agreed period, because the title of the purchaser is practically in abeyance until after the expiry of the period mentioned in the agreement. It would only be just to the purchaser that he should know at what point of time his title would be perfected. But I would emphasise that the provision for forfeiture of the deposit was not considered by the Privy Council to have the effect of making time of the essence of the contract in that case.

In *Howe v. Smith* [1], the Court of Appeal considered a case where a sum of money was paid as a deposit and in part payment of the purchase money on a contract for the sale of land. The contract provided that the purchase should be completed on a day named and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell. It was held in that case that the purchaser could not recover his deposit but the reasons for this conclusion are important. Cotton, L.J. pointed out that there had been undue delay on the part of the purchaser who had been given extensions of time, and it was clear that he was never, even at the time when he brought the action to recover the deposit, ready with the money to perform the contract. His conduct amounted to a repudiation of the contract and he could not therefore take advantage of his own default to recover the deposit. Fry, L.J. was also of the opinion that the purchaser could not show a readiness and willingness to complete either on the day fixed or within a reasonable time after, and there was such a protracted default on his part as justified the vendor in treating the contract as rescinded.

In *Microutsicos v. Swart* [2] the Appellate Division of the Supreme Court of South Africa considered the question as to when delay on the part of a buyer in making provision for payment of the purchase price of land is regarded as equivalent to total failure which entitles the seller to regard it as terminating the contract. It was decided in that case that Roman Dutch Law, like English Law, does not regard the mere fact that the debtor makes default on the stipulated date, if there is one, as sufficient for this purpose. Fagan, A. J. A. said that " where a time for the performance of a vital term in a contract has been stipulated for and one party is *in mora* by reason of his failure to perform it within that time, but time is not of the essence of the contract, the other party can make it so by giving notice that if the obligation is not complied with by a certain date, allowing a reasonable time, he will regard the contract as at an end.

In *Smith v. Hammerton* [3] the principles enunciated by Lord Haldane in the case I have referred to were applied by Harman, J. That was a case where on a contract for the purchase of a house for £3,000 the intending purchaser paid a deposit of £300 and completion of the purchase was fixed for 4th April 1949. On 29th March the purchaser, having experienced difficulty in raising the balance consideration, informed the vendor that it would not be possible for her to complete the purchase on the date fixed as she could not raise the money. The vendor wrote on 5th April that he could not agree to an extension of time but that he was

[1] *(1884) 27 Ch. D. 89.* [2] *(1949) 3 S. A. L. R. 715.*
[3] *(1951) Ch. 174.*

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prepared, without prejudice, to delay enforcing his rights until 19th April. The purchaser could not complete the sale even by 19th April and the vendor informed her that he had forfeited the deposit and he thereafter sold the property. One of the conditions of the sale adopted provided that if the purchaser failed to complete his purchase according to the conditions *his deposit should thereupon be forfeited* (unless the Court otherwise directs) to the vendor. In an action brought by the purchaser for the return of her deposit, Harman, J. followed the Privy Council judgment. He held that time was not of the essence of the contract and that the condition for forfeiture referred to only meant that the purchase should be completed on 4th April or within a reasonable time thereafter. He also held that the vendor could not, by writing the letter of 5th April, make time of the essence of the contract, for he could do so only if there had been such delay or improper conduct on the part of the purchaser as to render it fair that if steps were not immediately taken to complete, the vendor should be relieved from his contract.

In the present case the defendant's conduct has been quite different from that of the vendor in the case just cited. Assuming that there was a default on the part of the plantiff in not completing his purchase on 8th November 1949, far from notifying the plaintiff that he would terminate the contract the defendant clearly indicated that he was prepared to give the plaintiff further time to complete the purchase. He elected to treat the agreement as still subsisting and he gave no notice to the plaintiff to complete the purchase within a stated time. I fail to see how he can now fall back on the agreement to forfeit. It is only on this hypothesis that he, as he admits, went several times to meet the plaintiff and the plaintiff's Proctor. On 17th November, on receipt of a telegram from the plaintiff's Proctor, he went to Negombo in order to sign the deed of transfer, and he went again on 18th November for the same purpose. He made a significant admission under cross-examination when he stated that he had told the plaintiff that he would come on the 8th November to Mr. Pieris's office at about 2 p.m. His admitted failure to wait till 2 p.m. in order to complete the transaction puts him in default, and I think Mr. H. V. Perera conceded that it was the defendant who ultimately "cried off". I think Mr. Perera also conceded that if time was not of the essence of the contract the default was on the part of the defendant.

Could it be said that if the defendant was in default or repudiated the contract, as he did by his letter D5 of 18th November, he was not liable to return the deposit to the plaintiff ? I cannot accept any submission which would lead to such an unconscionable result. The deposit was made on the basis that a deed of sale would be executed, and it was to be taken as part of the purchase price. I have already held that the purchaser was not in default and that the vendor had no right to forfeit the deposit. Clearly then there was a failure of consideration so far as the plaintiff was concerned, because the money was paid on the understanding that it was to form part of the purchase price of the land. It was urged that there can be no failure of consideration in such a case where the contract itself is void. It is in just such a case, I think, that the money paid for that particular purpose can be recovered from the

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payee. The payee received it for that purpose, he refused or neglected to carry out his part of the bargain, and his duty is to return it to the payer.

I think the principle of unjust enrichment would also apply. It cannot be said in this case that there was an intention on the part of the plaintiff that the defendant should retain the money. Such intention must be judged in the light of the implied condition that time was not of the essence of the contract and "if one party after receiving the benefit of the inchoate arrangement desired to retain that advantage while refusing to carry out his undertaking, he would be enriching himself at the expense of another, whom a Court of law would in such circumstances undoubtedly assist"—*Wilken v. Kohler* [1]. If, however, time had been of the essence of the contract and the plaintiff had been in default, the plaintiff would probably have been in a difficulty if he had sought to recover the deposit, for in such circumstances a Court may infer that the intention of the parties is that the defendant should retain the deposit.

For these reasons I would dismiss this appeal with costs subject to the variation in regard to the quantum of damages.

Appeal dismissed.

Decree varied.

1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

SABARATNAM *et al.*, Appellants, *and* KANDAVANAM, Respondent.

S. C. 124—D. C. (Inty.) Point Pedro, 4,431

Deed—Sale by two or more persons of their shares of a land—Failure of one of them to sign the deed—Binding effect of deed.

Co-owners—Transfer of entire property by a co-owner—Transferee's rights—Prescription—Ouster.

(i) A, B and C purported to sell to D by the same deed an undivided 8/32 share of a land. The 8/32 share consisted of the 6/32, 1/32 and 1/32 shares of A, B and C respectively. Although the deed of sale (P1) recited C as one of the parties to it, his interest did not actually pass as he either omitted or declined to sign it. Subsequently A transferred the entirety of the land to E. In the present action instituted by D claiming 7/32 share as against E—

Held, that the failure of C, one of the intended executants, to sign the deed P1 did not have the effect of not binding the other parties who executed it.

(ii) Where a person who is in possession of property as a co-owner transfers the entirety of the common property to a stranger but continues to be solely on the land, his continued possession, though covertly on behalf of the transferee, is not adverse to the other co-owners in the absence of evidence of ouster by him of the other co-owners.

[1] *(1911) A. D. 133.*

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APPEAL from an order of the District Court, Point Pedro.

C. Thiagalingam, Q.C., with *A. Nagendra*, for the 1st and 2nd defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *K. Rajaratnam*, for the plaintiff-respondent.

Cur. adv. vult.

March 4, 1957. WEERASOORIYA, J.—

In accordance with our previous order the proceedings were remitted to the District Court to enable the plaintiff-respondent to produce the duplicate of deed No. 11385 dated the 20th October, 1911, which is in the custody of the Registrar of Lands. This deed has now been produced marked P1A, and the learned District Judge has held that the presumption in section 90 of the Evidence Ordinance relating to the due execution and attesting of it may be applied. We see no reason to disturb that finding.

This deed purports to be a sale of certain interests in the land in suit, aggregating an undivided 8/32 share, in favour of one Velar Kandiah, by Sathasivampillai (who is the predecessor in title of the 2nd defendant-appellant) in respect of an undivided 6/32 share, and Nagalingam and Sivasambu each in respect of an undivided 1/32 share. Meenatchipillai the mother of Sathasivampillai also joined in the conveyance in respect of her life interest over the share of Sathasivampillai. Although the the deed recites Sivasambu as one of the parties to it, his interest did not actually pass as he either omitted or declined to sign it. The claim of the plaintiff-respondent to the balance undivided 7/32 (or 42/192) share rests mainly on this deed.

We were invited by learned counsel for the defendants-appellants to hold that the failure of Sivasambu to sign the deed has the result that it is not binding even on those parties who executed it since, according to his submission, the parties who executed it must have done so on the faith that it would be executed by Sivasambu as well, and he invoked the English rule of equitable relief as stated by Jessel, M.R., in *Luke v. South Kensington Hotel Co.* [1] (and for which the earlier case of *Bolitho v. Hillyar* [2] is also an authority) that "if two persons execute a deed on the faith that a third party will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two". But even if this rule is applicable in an appropriate case I do not see how it can be availed of by the defendants-appellants who were not parties to the deed. Moreover, it was held in *Ex parte Harding* [3] that such equity "must be alleged and proved". No issue regarding this was raised at the trial, nor is there any evidence that the other parties executed the deed on the faith that Sivasambu himself would do so. Hence

[1] *(1879) 11 Ch.D. 121 at 125.* [2] *(1865) 34 Beav. 180.*
[3] *(1879) 12 Ch.D. 557 at 564.*

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counsel's submission that the deed is not binding on the parties who executed it cannot be accepted.

In view of this deed it clearly would not be open to the 2nd defendant-appellant to take up the position that Sathasivampillai was the sole owner of the land in suit or acted under that belief. The 2nd defendant-appellant is the daughter of Sathasivampillai, and on the occasion of her marriage to the 1st defendant-appellant, Sathasivampillai, ignoring the other co-owners, purported to convey the entirety of the land to her by way of dowry on deed 2D1 of the 15th August, 1920. The trial Judge held, in regard to such of the interests of Sathasivampillai conveyed on 2D1 as had already been sold on P1A, that 2D1 by reason of its prior registration prevailed over P1A, and this finding has been accepted by the plaintiff-respondent. But apart from those interests Sathasivampillai had, at the time of the execution of 2D1, certain other undivided interests as well, and these undoubtedly passed under 2D1. The only question remaining for decision is whether by reason of the alleged exclusive possession of the entire land by the 2nd defendant-appellant after the execution of 2D1 she has prescribed against the other co-owners.

The principle is now well recognised that where a co-owner purports to sell the entire common property to a stranger and the latter enters into possession claiming title to the entirety, prescription begins to run at once and uninterrupted possession over a period of ten years results in the acquisition of a prescriptive title to the land. Most of the cases affirming this principle are referred to in *Kanapathipillai v. Meerasaibo et al.*[1] where, however, it was held that the principle did not apply if the stranger was aware that his vendor was only a co-owner. Relying on these decisions learned counsel for the defendants-appellants contended that despite the fact that Sathasivampillai was only a co-owner of the land, the principle referred to would apply in the present case as the 2nd defendant-appellant is in the position of a stranger to whom the entirety of the land had been transferred and there is no evidence that she had knowledge of the true capacity in which her father Sathasivampillai was in possession of the land nor should such knowledge be inferred merely from her relationship to Sathasivampillai.

The evidence regarding the possession of the land subsequent to the execution of 2D1 is by no means satisfactory. According to those witnesses called by the defendants-appellants who claimed to be in a position to speak to possession, the land was a barren one which could not be cultivated except "once in a way", for about three or four years one Mandalam was in occupation of it, ostensibly under Sathasivampillai, and another person called Ponniah had been running a boutique on a portion of it for many years. It is clear, however, that during this period the other co-owners had no reason to think that the land was otherwise than in the occupation of Sathasivampillai, and in his capacity as a co-owner, whoever may have been actually on the land from time to time. The 1st defendant-appellant himself stated that he commenced

[1] *(1956) 58 N. L. R. 41.*

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possessing the land (on behalf of the 2nd defendant) only after Sathasivampillai's death which, it is clear, took place within ten years of the institution of the action. Even if the possession of the land by the 2nd defendant-appellant from that point of time onwards be regarded as adverse to the other co-owners (and I express no opinion on this question) the period is insufficient for her to have acquired a prescriptive title to it. But she would have acquired such a title if her possession through Sathasivampillai during the period subsequent to the execution of 2D1 is held to be adverse to the other co-owners.

The present case is, however, different from any of the earlier cases in which the principle relied on by learned counsel for the defendants-appellants was applied, as in each of them the stranger himself would appear to have entered on possession of the land after the sale to him. The *ratio decidendi* of those cases seems to be that the possession of a stranger in such circumstances is in itself sufficient notice to the other co-owners of the adverse nature of it. The same cannot, in my opinion, be said of a stranger who possesses the land through the very co-owner who sold it to him (even conceding that he was ignorant of the fact that his vendor had no title to the entirety of it).

In the case of *Fernando v. Podi Nona* [1] it was stated by Gratiaen J. that where "a stranger enters into possession of a divided allotment of property, claiming to be sole owner, although his vendor had legal title to only a share, *Corea v Appuhamy* [2] has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title". Having regard to the evidence in the present case it is manifest that the continued occupation of the land by Sathasivampillai after the execution of 2D1, though covertly on behalf of the 2nd defendant-appellant, was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title.

The effect of the decision of the Judicial Committee of the Privy Council in *Corea v Appuhamy* (*supra*) is that where a person who is in fact a co-owner is in possession of the whole of the common property, then in the absence of evidence of ouster by him of the other co-owners, his possession is referable to the right which he has to the enjoyment of the land by virtue of his being a co-owner, and it cannot, therefore, be regarded as adverse to the other co-owners. Notwithstanding that 2D1 purported to be a conveyance of the entire land, the 2nd defendant-appellant acquired only certain undivided intersts on that deed and her possession of the land thereafter through Sathasivampillai was consistent with her rights as a co-owner. There is no room, therefore, for holding that her possession of the land up to the time of Sathasivampillai's death was adverse to the other co-owners.

The appeal is dismissed with costs. The plaintiff-respondent will, however, pay the defendants-appellants their costs of the proceedings

[1] (*1955*) *56 N. L. R. 491.* [2] (*1913*) *15 N. L. R. 65.*

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in which, in terms of our previous order, the plaintiff-respondent was given an opportunity of producing the duplicate of deed No. 11385 dated the 20th October, 1911.

SANSONI, J.—

I agree and only wish to add some observations on two submissions made by Mr. Thiagalingam. They are :—

(1) that deed P1A was ineffective because Sivasambu, one of the intended executants, did not sign it ; and

(2) that even though Sathasivampillai was a co-owner when he executed the deed 2D1 in favour of his daughter the 2nd defendant, prescription began to run in her favour from that point of time as it was a deed executed by a co-owner in favour of a stranger for the entire land, and Sathasivampillai's possession thereafter was his daughter's possession.

On the first point the rule enunciated by Jessel, M.R., in *Luke v. South Kensington Hotel*[1] , to which my brother has referred, has been criticised by the House of Lords in *Lady Naas v. Westminster Bank Limited*[2], where it was held that the rule was expressed far too widely. Lord Russell of Killowen, at page 391 said :—

> " I do not think that the proposition can be carried further than this, that the equity arises where a deed is sought to be enforced against an executing party, and owing to the non-execution by another person named as a party to the deed the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact executed the deed ".

Lord Wright and Lord Romer were in substantial agreement with this view, and the latter said at page 410 :—

> " The equitable principle that they lay down is that where, owing to the non-execution of a deed by one of the parties, the others who have executed it would by the application of the common law rule be bound by a covenant or transaction different in kind from that which it was their intention to enter into, they can be relieved in equity from the results of their execution of the deed ".

These opinions show that the appellants who are no parties at all to the impugned deed P1A cannot derive any assistance from this equitable principle.

On the second point it must remembered that so long as Sathasivampillai was in possession of the common land prior to his transfer to his daughter in 1920, he was there as a co-owner. " His possession was in law the

[1] *(1879) 11 Ch. D. 121.*

[2] *(1940) A. C. 366.*

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possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result "— per Lord MacNaghten in *Corea v. Appuhamy* [1]. Assuming, then, that Sathasivampillai continued to be solely on the land and that he intended to be there and possess it on behalf of his daughter from 1920, such possession will not assist the appellants because neither ouster nor its equivalent has been established.

But it is said that although Sathasivampillai could not have prescribed against his co-owners on his own behalf, he was able to prescribe on his daughter's behalf because this was a case where a co-owner transferred the entirety of a common land to a stranger. This is to ignore the very reason of the rule which permits a stranger in such a case to prescribe against the other co-owners. That rule has been stated as follows :—

> " while the possession of one co-owner is, in itself, rightful, and does not imply hostility, the position is different when a stranger is in possession. The possession of a stranger in itself indicates that his possession is adverse to the true owners. . . . When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequences "—

see the judgment of Leach, C.J., in *Palania Pillai v. Amjath Ibrahim Rowther* [2]. The rule cannot therefore apply in this case because there was no such possession by the stranger (2nd defendant) as would indicate to Sathasivampillai's co-owners that prescription had commenced to run against them. It is impossible for these reasons to uphold Mr. Thiagalingam's argument that the 1st and 2nd defendants had acquired prescriptive title to this land by reason of Sathasivampillai's possession on their behalf from 1920.

I agree to the order proposed by my brother.

Appeal dismissed.

1957 *Present :* **H. N. G. Fernando, J.**

N. D. L. GUNARATNE, Appellant, *and* A. J. M. DE SILVA, Respondent

S. C. 201—C. R. Colombo, 56,393

Execution—Decree for possession of immovable property—Procedure in event of resistance or obstruction to execution of writ—Right of appeal—Civil Procedure Code, ss. 324–327.

[1] *(1913) 15 N. L. R. 65.* [2] *55 Madras L. W. 532.*

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In every case of resistance or obstruction to execution of a decree for the possession of immovable property, application for relief is first made under section 325 of the Civil Procedure Code, and the three succeeding sections (including the new section 327A added in 1949) provide for alternative orders which may be made upon such an application.

Where the complaint is one of hindrance subsequent to delivery of constructive possession, the application under section 325 should be made within one month of the date of the hindrance.

Where the Court purports to act summarily under section 327A (after the inquiry under section 377 (*b*)) upon the ground of frivolousness or vexatiousness set out in section 327A, the order is not appealable.

APPEAL from an order of the Court of Requests, Colombo.

M. M. Kumarakulasingham, for the 10th respondent-appellant.

H. W. Jayewardene, Q.C., with *Neville Samarakoon* and *A. K. Premadasa*, for the plaintiff-respondent.

Cur. adv. vult.

April 2, 1957. H. N. G. FERNANDO, J.—

The plaintiff in this action had successfully sued his lessee one Gunawardene for cancellation of the lease-bond and for ejectment. Writ of possession was issued on 21st September 1955 but was returned by the Fiscal with a report that the tenant was not in occupation, and that the persons in occupation were one N. D. L. Gunaratne and others. The Court thereupon ordered constructive possession to be delivered under section 324 of the Code and possession was delivered accordingly. On 26th November 1955 the plaintiff went to the premises with his Proctor for the purpose of taking effectual possession but was obstructed by certain persons, of whom some claimed to be holding under the plaintiff's tenant; Gunaratne claimed that he was himself the tenant of the premises under the plaintiff, a position which the plaintiff denies. Thereafter on 7th December 1955 (within one month of the alleged obstruction) the plaintiff applied for an order ejecting all the persons in occupation, and the Court made an interlocutory order—presumably in pursuance of section 377 (*b*) read with section 325 of the Code—appointing 30th January 1956 for inquiry into the plaintiff's application. After hearing evidence on that day, the Court made the following order :—

"Acting under section 327 (*a*) of the Code I direct the issue of writ to eject the 2nd, 5th, 6th, 7th, 9th, 10th, and 14th respondents from the premises and order the said respondents to pay Rs. 31/50 as costs of this inquiry."

The present appeal is by N. D. L. Gunaratne against that order.

One argument urged on behalf of the appellant is that, since the alleged resistance was not by a person claiming under the original ejected tenant, an application under section 325 does not lie, and that application for relief, if any, should have been made under section 327. But section 325

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is not in any way restricted to the case of persons claiming under a tenant ; resistance, obstruction or hindrance *by any person* can be the basis of an application under section 325. Moreover, it is in my opinion a misconception to say that *an application* for relief may be made under section 327 ; *in all cases the application is made under section 325* and the three succeeding sections (including the new section 327A added in 1949) provide for alternative orders which may be made upon such an application.

Secondly it is urged that the application should have been made within one month of the date of delivery of constructive possession ; but in this case clearly the complaint is of hindrance *after* the date of constructive delivery and fell to be made within one month of the hindrance. The complaint is not of obstruction or resistance to the Fiscal's officer, but of hindrance to the plaintiff in obtaining effectual possession.

A more important argument for the appellant is that the Judge could not have acted under section 327A in a summary manner. It is contended that where the person who refuses to vacate the property is one who claims " on his own account or on account of a person other than the judgment debtor ", the procedure set out in section 327 of registering the complaint as a plaint and of investigating the claim as if it were an action by the decree-holder against the claimant must be followed before an order under section 327A may be made. But if this contention be correct, nothing has been achieved by section 327A, because it would always have been possible to deal with a frivolous or vexatious claimant under section 327 *after* the trial there contemplated. Read together, sections 325, 326, 327 and 327A have clearly to be construed as follows :—

(1) An interlocutory order under section 377 (*b*) is made if the right of the petitioner is *prima facie* established ; (2) An inquiry is held (section 377 (*b*)) if the claimant appears to oppose the petitioner's complaint ; (3) On the hearing of the matter of the petitioner's complaint—

(*a*) if the obstruction or resistance was occasioned by the judgment debtor or by some person at his instigation, the Court has power to commit the person to gaol and to order delivery of possession— (section 326) ;

(*b*) if the resistance or obstruction was occasioned by any person (other than the judgment debtor) on his own account, or on account of a person (other than the judgment debtor), claiming in good faith . . . ., the procedure for registration of the complaint as a plaint is applicable—(section 327) ;

(*c*) if the resistance or obstruction was occasioned by a person (other than the judgment debtor) and the Court finds the *claim of that person to be frivolous or vexatious*, the Court may direct the judgment-creditor to be put in possession— (section 327A).

The distinction drawn in section 327 and in section 327A is that between what appears to the Court to be *a bona fide claim* by a " third party " on the one hand, *and a frivolous or vexatious claim* on the other. In

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the former case, the claim must be investigated as in an action and the success or failure of the petition under section 325 will depend on that investigation ; in the latter case, an order for possession will be made forthwith and it is for the claimant *thereafter* to establish (if he can) his claim in an action brought within one month of the order. In the present case the Judge has purported to act under section 327A (after the inquiry under section 377 (*b*)) and upon the ground of frivolousness or vexatiousness set out in section 327A. The order cannot be challenged because the correct preliminary procedure was followed.

I would hold also that the provision in section 327A that the order is final means that it is not appealable. A perfectly reasonable alternative remedy is provided to the claimant in that he can bring within one month an action to establish his right to possession and if successful in that action be restored to possession. Just as what appears to be a *bona fide* claim " keeps out " the judgment creditor until the claim is regularly investigated (section 327), so also what appears to be a frivolous or vexatious claim is insufficient to entitle the claimant to continue in possession and he is compelled to seek a remedy by regular action. In each case the powers of this Court in appeal cannot be invoked until the regular action is tried.

There being no right of appeal against the Commissioner's order, the appeal is rejected with costs.

Appeal rejected.

1956 *Present :* **K. D. de Silva, J., and Sansoni, J.**

P. B. PERERA, Appellant, *and* KIRI HONDA, Respondent

S. C. 268—D. C. Kurunegala, 7,931/L

Sale of land—Several vendors—Is there a presumption that each of them owned an equal share ?—Exceptio rei venditae et traditae—*Scope of its applicability.*

Where several vendors join in conveying a land or a portion of a land, it cannot be presumed that the deed of sale was a conveyance by them in equal shares, particularly where the rest of the evidence shows that they were never considered as owning the land in equal shares. Accordingly, if A, B, C and D sell to E a greater portion of a land than they are altogether entitled to and subsequently A alone acquires title to an additional portion of the same land, the doctrine of *exceptio rei venditae et traditae* can operate against A in respect of even the entirety of the additional portion although the total extent of A's share thereby allotted to E amounts to more than one-fourth of the portion of land originally sold to E.

Under the *exceptio rei venditae et traditae* a sale made by a vendor without title may be relied upon as against a purchaser from that vendor after the vendor has acquired title.

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APPEAL from a judgment of the District Court, Kurunegala.

T. B. Dissanayake, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera*, for the 2nd defendant-respondent.

Cur. adv. vult.

June 21, 1956. SANSONI, J.—

The dispute between the plaintiff-appellant and the 2nd defendant-respondent in this case turns on the effect to be given to the deed 2D2 of 1936.

It is common ground that the four vendors on that deed, Salanchia, Ranamali, Tikkavi and Rapia were entitled, as shown in the pedigree attached to the plaint, to $\frac{1}{8}$th, 1/16th, 1/16th and $\frac{1}{4}$th share respectively, or 8/16 in all. By that deed, however, they conveyed 12/16 to Ukkuwa, who by deed 2D3 of 1946 conveyed that share to the 2nd defendant. After the execution of deed 2D2, Salanchia inherited 1/8 from his brother Esa, and transferred that share to the plaintiff. The 2nd defendant claimed that he had a preferent right to this 1/8 share by reason of the *exceptio rei venditae et traditae*, since he had still to get title to 4/16 after his purchase on 2D2. It was submitted for the plaintiff, however, that according to the decision in *Carlina v. Nonhamy*[1] Salanchia must be deemed to have conveyed only a 3/16 share to Ukkuwa by deed 2D2, and as title to 2/16 had already passed from him on that deed, the 2nd defendant was entitled to claim only a further 1/16 share from that source. In the result, the plaintiff claims that he is still entitled to 1/16th out of Esa's 1/8th share, while the 2nd defendant's position is that the entire 1/8th share has devolved on him.

In the case cited, Gratiaen, J. (Basnayake J. agreeing) had to deal with a case where four persons conveyed the entirety of a land, and two of those four persons had no interests at all to convey. The deed passed title only to a $\frac{1}{2}$ share. Subsequently, one of the two vendors who had no interest, by name Jacoris, acquired title to a $\frac{1}{2}$ share and the vendee claimed that under the *exceptio* referred to this $\frac{1}{2}$ share passed to him. Gratiaen J. held that as no specific undivided shares were conveyed by the four vendors in the earlier deed " it follows in accordance with the accepted principles of construction that each must be deemed to have purported to convey a one-fourth share in the land. It follows that the doctrine of *exceptio rei venditae et traditae* could operate against Jacoris only in respect of an undivided one-fourth share of the land ". This decision was relied upon by the plaintiff-appellant's Counsel.

The judgment does not cite any authorities as laying down the principle of construction which was applied in that case, and I do not think it can be applied in all cases where several persons join in conveying a land or a share of a land. There is no presumption that persons owning a land in common in this country, especially those who have obtained their shares in the land by inheritance, own the land in equal shares. It follows that there is no presumption that where four such co-owners

[1] (*1949*) *41 C. L. W. 7.*

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join in transferring the entire land or a share of it, each of them is to be deemed to have transferred a proportionate share. This very case provides an illustration of what happens every day when four co-owners deal with their interests in a land owned in common.

We have not been referred to another case where it has been held that each of several vendors is presumed to have conveyed an equal share of the land, but it was held in *Sinno Appu v. Dingirihamy* [1] that there is no presumption that a Crown grant in favour of several grantees was a grant to them in equal shares. Lascelles, C.J., said that it frequently happened in this country that several persons contributed the purchase money in unequal shares and the grant would be made out in favour of the vendees simpliciter, leaving it to them to adjust their shares in accordance with the agreement between themselves. Both the Chief Justice and Wood Renton, J., who agreed, said that a construction of a Crown grant which applied such a presumption would lead to serious practical difficulties. This judgment was referred to in the case of *Appu v. Silva* [2], where de Sampayo, J. said that the earlier case merely decided that there is no irrebuttable presumption that several grantees become entitled in equal shares. The learned Judge went on to say " to my mind when a property is purchased by several persons and the deed does not specify what share is conveyed to each, the deed itself is prima facie evidence that they acquired title in equal shares. This inference may of course be rebutted by specific evidence as to the intention of the purchasers ".

These decisions perhaps support the proposition that in the absence of other evidence a grant in favour of several persons may be construed as a grant to them in equal shares. I cannot, however, accept the converse proposition that a deed of sale by several vendors should be presumed to have been a conveyance by them in equal shares, particularly where the rest of the evidence shows quite plainly that they were never considered as owning the land conveyed in equal shares. In the face of such evidence I think it would be unreasonable to apply a presumption which is contrary to the known facts.

If, then, there is no presumption that Salanchia sold only a 3/16 share on the deed 2D2 I see no obstacle to the *exceptio rei venditae et traditae* being applied in full force to this case, and the 1/8 share, which the plaintiff bought from Salanchia, being allotted to the 2nd defendant. As the Privy Council held in *Goonetilleke v. Fernando* [3], under this *exceptio* a sale made by a vendor without title may be relied upon as against a purchaser from that vendor after the latter has acquired title.

It was also pointed out in that case that this Roman Dutch law doctrine is broader in its effect than the English law rule as to conveyance by estoppel. I think that if one applies the doctrine in this case, one is entitled to say that neither Salanchia nor the plaintiff can be heard to dispute the 2nd defendant's title to the 12/16 share conveyed on the deed 2D2.

For these reasons I would dismiss this appeal with costs.

DE SILVA, J.—I agree.

Appeal dismissed.

[1] *(1912) 15 N. L. R. 259.* [2] *(1922) 24 N. L. R. 428.*
[3] *(1921) 22 N. L. R. 385.*

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[IN THE COURT OF CRIMINAL APPEAL]

1957 *Present:* **Basnayake, C.J. (President), Weerasooriya, J., and Sinnetamby, J.**

THE QUEEN *v.* E. N. ASSEN MOHIDEEN

Appeal No. 5 of 1957 with Application No. 5 of 1957

S. C. 17—M. C. Colombo, 24,083/A

Evidence Ordinance—Section 120—Married woman—Marriage subsequently annulled—Competency to testify against former husband.

In criminal proceedings for violence inflicted on a person other than the accused's wife, a witness who was the wife of the accused at the time of the non-summary inquiry is competent to give evidence for the prosecution at the trial if, prior to the date of the trial, she obtained an order of nullity in respect of her marriage with the accused.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

K. Charavanamuttu (Assigned), for Accused-Appellant.

A. C. Alles, Acting Deputy Solicitor-General, with *P. Colin-Thome*, Crown Counsel, for Attorney-General.

February 25, 1957. BASNAYAKE, C.J.—

The only point that arises for decision in this appeal is whether the evidence of the witness Rahuma Beebi was rightly admitted at the trial of this case. This witness was the wife of the appellant at the time she was examined in the Magistrate's Court at the preliminary inquiry under Chapter XVII of the Criminal Procedure Code. When she was called to give evidence for the prosecution at the trial she was not his wife as she had obtained an order of nullity in respect of her marriage with the appellant. It would appear that Rahuma Beebi's marriage with the accused was registered on 10th March 1955. On 12th July 1955 an application was made by her to the Kathi Court for an order of nullity, on the ground that her marriage had been registered under duress and before she had attained puberty. Summons was issued on 18th July. On 20th July the parties were present and the Kathi tried to bring about a reconciliation and as he failed to do so he fixed the case for 25th August 1955. On that day the Kathi again tried to bring about a reconciliation which he failed and he fixed the case for 11th September 1955. On that day too the Kathi made a further attempt at reconciliation but as he was unsuccessful he put off the case for 2nd October. Attempt at reconciliation having again failed he postponed the case for 16th October. On that day the applicant applied for a postponement on the ground that it was the month in which the Prophet Mohamed's birthday occurred and

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the case was postponed to 27th October and on that day to 24th November 1955, on which day the case was partly heard and the hearing was adjourned till 18th December 1955. On 12th December 1955 the appellant murdered Rahuma Beebi's mother. The decree for nullity of the marriage was not entered till 18th March 1956.

Section 120 of the Evidence Ordinance provides that the wife of an accused is competent to give evidence only if called by him except where he is accused of using violence on her. In the instant case Rahuma Beebi was not the appellant's wife on 3rd January 1957, the date of the trial, and her evidence was rightly admitted. The fact that her marriage had not been dissolved at the time she was examined in the Magistrate's Court does not in our view render her evidence inadmissible at the trial when the bar against her competency as a witness no longer existed. The effect of a decree of nullity of marriage is that the marriage is regarded as never having taken place.

The appeal is therefore dismissed and the application refused.

Appeal dismissed.

1956 *Present :* **T. S. Fernando, J.**

G. VERONICA, Appellant, *and* W. A. N. PERERA (S. I. Police), Respondent

S. C. 586—M. C. Gampaha, 28,273

Excise Ordinance (Cap. 42)—Section 51 (2)—Order of confiscation thereunder—Quantum of evidence to justify such order.

A vehicle in which an excisable article was transported is liable to be confiscated under section 51 (2) of the Excise Ordinance if there is evidence of circumstances showing that the owner was aware of the purpose for which the car was being used and acquiesced in its use for that purpose. The failure of the owner to give evidence explaining such circumstances would raise a very strong presumption of guilt against him.

APPEAL from an order of the Magistrate's Court, Gampaha.

E. A. G. de Silva, for the party noticed-appellant.

B. E. de Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 21, 1956. T. S. FERNANDO, J.—

On January 19, 1956, the complainant sub-inspector of Police charged four persons (1) Edwin, (2) Jayasena, (3) Ekmon and (4) Thomas *alias* Darlin in the Magistrate's Court of Gampaha in case No. 28,273 with the

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unlawful possession and transport of an excisable article, to wit, 192 drams of fermented toddy, the equivalent of four gallons. Upon the 1st accused Edwin and the 3rd accused Ekmon pleading guilty to the charges, the complainant withdrew the charges against the 2nd and 4th accused, and they were therefore discharged.

At the time of the detection of the offences referred to above, the toddy was being transported in motor car No. X 4635. The complainant on January 20, 1956, moved in the Magistrate's Court that notice be issued on the appellant, who is the registered owner of the car, to show cause why the car should not be confiscated under the provisions of section 51 (2) of the Excise Ordinance. After notice had been served on her, the appellant appeared in court on January 30, 1956, and stated that she had cause to show. On the same day she was allowed to remove the car which was then in the court's custody on her furnishing security to enable her to have the car licensed for purposes of hiring. It is not clear why she was permitted to get the car so licensed before the question of confiscation was determined. On February 27, 1956, the appellant appeared in court and " gave an undertaking to sell the car and produce proof of sale in court ". It is not clear why such an undertaking was demanded or given.

This same car was again seized on February 28, 1956, while it was transporting fermented toddy. On this occasion there were in it 8½ gallons of toddy and it was being driven by a man called Abraham. On March 26, 1956, the Magistrate issued a notice also on Thomas *alias* Darlin, the discharged 4th accused in case No. 28,273, and husband of the appellant, to show cause why the car should not be confiscated. This step appears to have been taken by the Magistrate on the basis that Thomas *alias* Darlin is the reputed owner of the car.

The driver Abraham was prosecuted in case No. 28,940 on a charge of unlawful transport of toddy and he pleaded guilty to the charge. When the appellant and her husband appeared in court to show cause against the proposed order of confiscation of the car, they were represented by counsel, and the Police led evidence on May 2, 1956, relating to the circumstances in which the car came to be seized on January 17th and again on February 28th. It was established that the husband of the appellant was in the car when it was seized on January 17th at the time it was carrying 4 gallons of toddy. The Police also called at the inquiry Abraham, the driver of the car on February 28th, who stated that it was the appellant's husband who put the 8½ gallons of toddy in the car. He stated further that a conversation took place at the house of the appellant, in the presence of the appellant, in the course of which the appellant's husband and he discussed the arrangements in regard to the transport of the toddy.

At the conclusion of this evidence, the learned Magistrate again called upon the appellant and her husband to show cause why the car should not be confiscated. Counsel on their behalf stated to court that they were not giving evidence nor calling any witnesses on their behalf. The learned Magistrate, holding that there is evidence that both the appellant

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and her husband are the owners of the car, made order on May 10, 1956, confiscating the car. The appellant has appealed against this order. Her husband not being the legal or registered owner of the car has, logically enough, not taken any step to prefer an appeal.

On behalf of the appellant, counsel appearing before me has contended that the learned Magistrate has irregularly admitted evidence relating to the facts surrounding the seizure of the car on the second occasion, viz., on February 28, 1956. There would have been some force in this contention had not the learned Magistrate called upon the appellant to show cause after the evidence relating to the second seizure had been elicited in her presence. Her counsel cross-examined both witnesses who gave evidence of the facts surrounding the second seizure, and if, as is now contended, she came to court on May 2nd, 1956, only to meet a charge that she was implicated in the offence committed on January 17, 1956, and was unprepared to meet the additional charge, she could have applied for a postponement to enable her to meet this additional charge. She did not make any such application and I am not prepared to say she had no notice of the further allegation especially as she must have known that the car released to her on a certain undertaking had again been seized by the Police on February 28th when it was transporting toddy.

It has also been contended that, although the appellant is the registered owner, the Police have not been able to establish that she was in any way implicated in the offence of unlawful transport of toddy either on January 17 or on February 28, 1956. I was referred in this connection to the judgment of Schneider J. in *Sinnetamby v. Ramalingam* [1]. While this judgment lays down the correct test to be employed in making an order of confiscation under section 51 (2) of the Excise Ordinance, I would like to refer to the following observations of Lyall-Grant J. in the unreported case of *Dissanayake v. Velupillai Sanmugam et al* [2], which appear to be peculiarly appropriate to the case now before me :—

> " The real question, as pointed out by Schneider J. in *Sinnetamby v. Ramalingam*, is whether the owner was a willing party to the offence, whether he knew that his car was being used for this purpose and acquiesced in its use . . . . It was argued that there is no direct evidence against the owner, but in cases of this sort, it is possible for very strong presumptions to arise which can only be defeated by a clear and candid statement. "

Even if the facts surrounding each of the seizures of this car are considered separately, it will be difficult to resist the conclusion that the appellant was aware of the purpose for which the car was being used each day and acquiesced in its use for that purpose. We find that on January 17th the appellant's husband was in the car of which the appellant is the registered owner at a time when it was unlawfully transporting toddy. If her husband was transporting toddy without her knowledge or was using the car for a purpose of his own after obtaining it from her for use

[1] *(1924) 26 N. L. R. 371.*
[2] *(1930) S. C. No. 213—P. C. Mullaitivu 10,744—S. C. Minutes of May 16, 1930.*

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for some other purpose, what difficulty lay in her way in testifying to that effect in court ? Her failure to give any evidence suggesting that she was innocent of any unlawful purpose for which her car was being used entitles one to presume that she could not truthfully say so. Even if the learned Magistrate had not before him evidence relating to the circumstances of the second seizure, I am not prepared to say that a confiscation of the car would have been unjustified. In regard to the seizure on February 28th, the learned Magistrate has after careful scrutiny accepted the evidence of the driver Abraham. It follows from an acceptance of this evidence that not only was toddy being transported in the car on that day at the instance of the husband of the appellant, but that such transporting was with the knowledge and acquiescence of the appellant herself. In these circumstances there is no good reason for this Court to interfere with the order of confiscation that has been made and I dismiss the appeal.

Appeal dismissed.

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1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

M. SIVANATHAN (Assistant Government Agent), Appellant, *and* J. V. VANDERPOORTEN *et al.*, Respondents

S. C. 99—D. C. (Inty.) Batticaloa, 84/L. A.

Land acquisition—Decision of Land Commissioner to acquire a land under Land Redemption Ordinance—Jurisdiction of District Court to question its validity—Land Redemption Ordinance, No. 61 of 1942, s. 3 (1) (4) (5)—Land Acquisition Act, No. 9 of 1950, ss. 5, 10.

Having regard to the limited and special jurisdiction of a District Court in land acquisition proceedings under the Land Acquisition Act, a District Court is not the proper forum to adjudicate on the validity of a determination made by the Land Commissioner that a particular land which is sought to be acquired by him is of the description contained in section 3 (1) of the Land Redemption Ordinance.

APPEAL from an order of the District Court, Batticaloa.

M. Tiruchelvam, Deputy Solicitor-General, with *V. Tennekoon* and *J. W. Subasinghe*, Crown Counsel, for the plaintiff-appellant.

T. P. P. Goonetilleke, for the 1st defendant-respondent.

Walter Jayawardene, with *M. Shanmuganathan*, for the 2nd defendant-respondent.

Cur. adv. vult.

June 18, 1957. WEERASOORIYA, J.—

This is an appeal by the plaintiff, as the acquiring officer, from a preliminary order of the District Judge in the course of proceedings initiated on a reference made to the District Court of Batticaloa under section 10 (2) of the Land Acquisition Act, No. 9 of 1950 (hereinafter referred to as "the Act").

The reference came to be made as one of the steps taken under the Act for the acquisition of certain portions of a land called Mankai Mariamman Estate situated in the Batticaloa District. The plaint constituting the reference recites that at the inquiry held by the acquiring officer (under section 9 of the Act) the 1st and 2nd defendants, who are the only respondents who were represented at the hearing before us, between them claimed the entirety of the extent sought to be acquired while the 3rd and 4th defendants claimed 3/20 and 1/20 shares respectively and the 5th and 6th defendants by their attorney the 7th defendant, together claimed 2/20 shares ; that the acquiring officer at the conclusion of the said inquiry made a decision in regard to these claims, and that the 1st and 2nd defendants applied in terms of section 10 (2) of the Act for a reference to Court of the dispute between them and the other claimants.

2——J. N. B 67848—1,593 (8/57)

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It would appear from the document P 10, which is the statutory notice of the decisions made by the plaintiff, that he allowed in full the respective claims of the 3rd, 4th, 5th and 6th defendants amounting to 6/20 shares, and that the balance shares were allotted among the 1st and 2nd defendants in the proportion of 9/20 to the 1st defendant and 5/20 to the 2nd defendant. The only matter, therefore, that arose for the determination of the Court on the reference before it was whether the 1st and 2nd defendants were between them entitled to the entirety of the land sought to be acquired to the exclusion of the other claimants.

While appropriate issues relating to this dispute were raised at the trial, counsel appearing for the 1st and 2nd defendants also raised certain other issues the effect of which was to question the validity of the declaration made by the Minister under section 5 of the Act, the steps taken by the acquiring officer under the Act pursuant to that declaration and also the jurisdiction of the Court to entertain the reference. These issues are numbered (1) to (4), and it was in view of them that counsel for the plaintiff framed the additional issues numbered (16) to (18) relating to the competency of the Court to go into those matters.

It is common ground that the acquisition proceedings commenced as a result of a determination made by the Land Commissioner, purporting to act under the provisions of the Land Redemption Ordinance, No. 61 of 1942, that the land should be acquired for the purposes of that Ordinance. From the terms of issue No. 1 it may be gathered that the declaration of the Minister under section 5 of the Act is being challenged on the ground that the purported determination made by the Land Commissioner under the Land Redemption Ordinance is invalid for the reason that the land to which that determination relates does not fall within paragraphs (*a*) and (*b*) of section 3 (1) of that Ordinance. In the order appealed from the learned District Judge held that while the Court was precluded from reviewing the merits of the investigation made by the Land Commissioner in arriving at his determination it could, nevertheless, ascertain, by hearing evidence if any is adduced, whether the land is of the description contained in section 3 (1) as a matter affecting the jurisdiction of the Court to take cognizance of the reference.

Section 3 (5) of the Land Redemption Ordinance provides that when the Land Commissioner makes a determination for the acquisition of any land which he is empowered to acquire under that Ordinance, the provisions of the Act subject to certain exceptions, substitutions and modifications, shall apply for the purposes of the acquisition of that land. One of the exceptions is that sections 2, 3 and 4 of the Act, which provide for the taking of certain preliminary steps before the Minister makes a declaration under section 5, shall not apply. Section 5 (as modified) provides in sub-section (1), *inter alia*, that where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance the Minister shall make a written declaration that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under the Act, and in sub-section (2) that such declaration shall be conclusive evidence that the land referred to in it is needed for that purpose.

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The greater part of the arguments addressed to us in appeal on both sides revolved on the question as to the exact significance of the conclusive effect given to the Minister's declaration under section 5 (2) of the Act, but in the view that I have taken of this case, as will presently appear, it is not necessary that I should discuss the numerous authorities that were cited to us in that connection.

Immediately prior to the coming into operation of the Act the law relating to the compulsory acquisition of land by the Crown was contained in the Land Acquisition Ordinance (Cap. 203). That Ordinance provided for the Surveyor-General or an officer authorised by him making a preliminary report as regards the suitability of the land for the purpose for which it was sought to be acquired and on receipt of the report, whatever may have been its terms, the Governor was empowered, if he considered it fit to do, to direct the Government Agent to take steps for the acquisition of the land. Then follow the provisions relating to the giving of public notice of the proposed acquisition, the preferring of claims by persons having interests in the land, the holding of an inquiry into the value of the land and the compensation to be paid therefor, and the reference for determination by a District Court or Court of Requests of disputes as to the amount of compensation or questions respecting the title to the land or any rights thereto or interests therein arising between or among two or more persons.

In the case of *The Assistant Government Agent, Kalutara v. Wijeysekere*[1], in dealing with the question whether it was open to a defendant on a reference to Court under that Ordinance to question the statement in the Governor's mandate that the land was needed for a public purpose, de Sampayo, J., observed that the nature and purpose of the reference to Court precluded the raising of such question. "The Court's jurisdiction", he said, "is limited by the Ordinance ; it is either to make an award of compensation where the claimants and the Government Agent are disagreed on that point or to decide the question of title to the land where there is any dispute among the claimants or where all the parties interested have not appeared before the Government Agent". Accordingly he held that the Court has no right to decide that the Governor had exercised a wrong discretion in considering that the land was needed for a public purpose and on that ground to decline jurisdiction on a reference made to it by the Government Agent. He also rejected the argument that because the corresponding Indian Act contained a provision giving conclusive effect to the statement in the statutory declaration that the land was needed for a public purpose therefore under the Ceylon Ordinance, which contained no such provision, it was open to a party to question the decision of the Governor that it was needed for such a purpose and to lead evidence to the contrary. An appeal was unsuccessfully taken before the Judicial Committee of the Privy Council from the decision of this Court in that case. In dismissing the appeal their Lordships observed[2] that the "nature of the objection raised is such that it would be obviously unsuitable for the District Court, which is concerned with the question of compensation which would arise if the land is to be taken". They also

[1] *(1917) 4 C. W. R. 251.*

[2] *(1919) A. C. 646 at 649.*

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approved an earlier decision of this Court on the same point in the case of *The Government Agent v. Perera.*[1]

Ever since the decision of these cases the question whether on a reference under the Land Acquisition Ordinance the Court can go behind the Governor's mandate that the land was needed for a public purpose and decline jurisdiction on the ground that it was not so needed has been regarded as effectively settled. It seems to me that the same question is now sought to be raised under the guise of the provisions of the Act, which replaced that Ordinance only comparatively recently. Before the Act came into operation the procedure for the acquisition of land in respect of which the Land Commissioner had made a determination under the Land Redemption Ordinance was that contained in the Land Acquisition Ordinance. We were referred to the case of *Perera v. Unantenna et al.*[2] where, on a determination having been made by the Land Commissioner, proceedings were taken for the acquisition of the land and a reference made to Court under the Land Acquisition Ordinance. While the judgment in that case does appear to contain certain observations which suggest that on a reference so made it was competent for the Court to entertain an objection to the validity of the reference on the ground that the Land Commissioner had acted in excess of jurisdiction in making his determination, there is nothing in the judgment to indicate that the effect of the earlier decisions to which I have referred had been considered. I do not think, therefore, that the last mentioned case can be regarded as in any way affecting the authority of the earlier decisions, one of which is a decision of the Privy Council.

Of the many arguments addressed to us with great persuasive force by Mr. Jayewardene who appeared for the 2nd defendant-respondent one was that a valid determination by the Land Commissioner is a condition precedent to the Minister's exercise of his powers under section 5 (1) of the Act to make a declaration that the land to which that determination relates is needed for a purpose deemed to be a public purpose, and that it is only in such a case that conclusive effect given in section 5 (2) applies to the declaration. But conceding that to be so, I do not think that it is competent to the Court to which a dispute is referred for determination under the Act to decline jurisdiction on some ground affecting the validity of the Land Commissioner's determination. No doubt, when a question is raised as to the jurisdiction of a Court or other tribunal, it has always the power to decide it, but the authority of the Court or tribunal to decide that question must necessarily be circumscribed by the very nature of the jurisdiction conferred on it in regard to the particular matter submitted to it for adjudication. The limits of this jurisdiction are to be looked for in the statute under which the Court or tribunal is constituted, and may be either as to the kind and nature of the action or proceeding of which the Court so constituted has cognizance or as to the area over which its jurisdiction shall extend. A comparison of the provisions of the Land Acquisition Ordinance relating to the steps to be taken subsequent to the Governor's mandate and leading up to the reference to Court, with the corresponding provisions in the Act consequent on the Minister's declaration under section 5 (2), would show

[1] (*1903*) *7 N. L. R. 313.*

[2] (*1953*) *54 N. L. R. 457.*

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that the provisions in the two enactments are not substantially different. Furthermore, it would appear that where the Land Commissioner, in the purported exercise of his powers under the Land Redemption Ordinance, makes a determination that a land should be acquired for the purposes of the Ordinance and that determination is communicated to the Minister, the latter is called upon under section 5 (1) of the Act (as modified) to make his written declaration that the land is needed for a purpose deemed to be a public purpose and will be acquired ; and the conclusive effect referred to in section 5 (2) would apply to that declaration. The communication of the Land Commissioner's determination to the Minister is a purely administrative act and no authority is conferred on the Minister to inquire into the validity of the determination before he makes his declaration.

Section 10 of the Act provides what matters may be referred by the acquiring officer to the determination of a Court, namely, every claim made by any person to any right, title or interest to, in or over the land which is to be acquired or over which a servitude is to be acquired, and every dispute that may have arisen between any claimants as to any such right, title or interest. The acquiring officer may in the first instance refer such claim or dispute to Court without making his decision thereon. Or where he has made his decision, any party to the dispute or a claimant whose claim is wholly or partly disallowed may apply to him for the reference of the claim or dispute to Court. The section also contains provision that the reference shall be to the District Court or the Court of Requests having jurisdiction over the place where the land which is to be acquired is situated according as the total amount of the claims for compensation for the acquisition of the land exceeds or does not exceed three hundred rupees.

It would undoubtedly be open to a Court before which a reference is pending to inquire into and decide objections to its jurisdiction on the ground that the reference has not been made by the proper authority or that by reason of the situation of the land which is to be acquired or over which a servitude is to be acquired, or of the total amount of the claims for compensation for the acquisition of the land or servitude, the Court is not the appropriate Court to which the reference should be made. But a consideration of section 10 and the preceding provisions of the Act lead me to the conclusion that it is not open to the Court to consider objections to the reference on the ground of the invalidity of either the Minister's declaration or the Land Commissioner's determination and decline jurisdiction on that ground. I am fortified in this view by the decisions to which I have already referred. Especially do I consider that the observations quoted earlier from the judgment of de Sampayo, J., in *The Assistant Government Agent, Kalutara v. Wijeyesekera* (*supra*) are equally applicable to a reference to Court under the Act as they are to a reference under the Land Acquisition Ordinance.

If the view that I have taken is right a question may arise as to what legal remedy is available to a party against the determination of the Land Commissioner that a land should be acquired for the purposes of

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the Land Redemption Ordinance. The Ordinance itself does not provide for an appeal from the Land Commissioner's determination, and it may well be that no remedy is available. Where, however, the Land Commissioner has acted in excess of his jurisdiction in making the determination I do not see that the remedy of *certiorari* would not be available to quash it even in a case where the Minister has in pursuance of the determination made his declaration under section 5 (1) of the Act. It is well established that the conclusive effect given in a statute to an act or declaration, whether of an administrative, judicial or quasi-judicial body, will not by itself exclude the remedy of *certiorari*. As, however, the question did not directly arise in this appeal and was not fully argued before us, it is not necessary that I should express a definite opinion on it.

For the reasons already given the order appealed from is set aside and the case is remitted to the Court below so that the trial may be proceeded with on issues (5) to (15) only of the issues already framed and such further issues (if any) as may in terms of this judgment be properly raised as relating to the particular matter referred to the determination of the Court.

The plaintiff will be entitled to receive from the 1st and 2nd defendants his costs of appeal as well as of the proceedings held on the 8th March, 1956.

SANSONI, J.—

I agree and have very little to add.

The Privy Council judgment in *Wijeyesekera v. Festing* [1] proceeds on two grounds : (1) that the District Court in a proceeding under the Land Acquisition Ordinance No. 3 of 1876 was concerned with the assessment of compensation ; and (2) that the decision of the Governor that the land was wanted for public purposes was final, and was intended to be final, and could not be questioned in any Court.

The first ground seems to me to apply to the present case, even though the Land Acquisition Act No. 9 of 1950 has repealed and taken the place of the Ordinance of 1876. Under both statutes the District Court or Court of Requests has been empowered to adjudicate on the respective rights and claims of the parties who claim the compensation, but only in order that the compensation may be correctly apportioned among the claimants.

When one examines the provisions of the Land Acquisition Act relating to a reference of a claim or dispute by an acquiring officer to the District Court or the Court of Requests, it seems clear that the particular Court to which the reference is made has jurisdiction only to decide that claim or dispute and nothing else. Special provisions deal with the conduct of the proceedings, the stamp duty leviable, the award of costs, and the right of appeal, on a reference. These provisions indicate that a reference

[1] *(1919) A. C. 646.*

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is not the equivalent of a regular action in a District Court or Court of Requests. It is therefore not open to a plaintiff or defendant in a reference to raise issues which are appropriate only to such an action.

But the principle would still apply that "wherever jurisdiction is given to a Court by an Act of Parliament or by a Regulation in India (which has the same effect as an Act of Parliament) and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise"—see the judgment of the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynoodeen Khan* [1]. This principle would enable the District Court to enquire whether the reference is valid or not, by seeing whether the conditions laid down in the Act governing references have been fulfilled. One such condition is the time limit of 14 days within which the claimant should apply to the acquiring officer to refer the claim to Court; another condition is that the Court must be one having local jurisdiction in respect of the land which is to be acquired—section 10 (2).

But the 1st and 2nd defendants-respondents would go further, and it was argued on their behalf that the District Court in these proceedings could and should inquire into the validity of the determination of the Land Commissioner made by that officer under section 3 (4) of the Land Redemption Ordinance No. 61 of 1942. I do not accept this submission because it does not seem to me that a valid determination of the Land Commissioner is a condition governing the exercise of jurisdiction by the Court. I think we must look in the Land Acquisition Act itself and not outside it for the terms upon which that jurisdiction can be exercised.

Let it be assumed that the Land Commissioner has acted without jurisdiction in making his determination. It may well be that the validity of such a determination could have been questioned in appropriate proceedings. There would be much force in the argument that the determination of the Land Commissioner who acts under a limited jurisdiction conferred on him by the Land Redemption Ordinance has not the same binding effect as the decision of the Governor made under section 6 of the Land Acquisition Act of 1876. The provisions of the two statutes on this point are so dissimilar that the second ground on which the decision in *Wijeyesekera v. Festing* [2] went would hardly be applicable to the determination of the present appeal.

I would therefore rest my decision in this appeal on the ground that, having regard to the limited and special jurisdiction of a District Court in land acquisition proceedings, it is not the proper forum to adjudicate on the validity of the Land Commissioner's determination.

I agree with the decision of my brother that the trial should proceed on issues (5) to (15) only, and such further issues as may be properly raised having regard to our judgments.

Order set aside.

[1] *(1855) 6 Moore's I. A. 154.*

[2] *(1919) A. C. 646.*

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1957 *Present :* **Sansoni, J., and L. W. de Silva, A.J.**

H. P. JAMES, Appellant, *and* R. MEDDUMA KUMARIHAMY, Respondent

S. C. 381–382—D. C. Kegalle, 8,773/L

Kandyan Law—Diga marriage—Is marriage certificate sufficient proof?—Burden of proof—Forfeiture of paternal inheritance—Evidence Ordinance (Cap. 11), s. 114—Amended Kandyan Marriage Ordinance, No. 3 of 1870.

In cases governed by the Amended Kandyan Marriage Ordinance of 1870 the production of a diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance ; the burden thereafter shifts to her, or to those claiming through her, to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place.

Co-owners—Prescriptive possession as between them.

A person who buys a share of a land and enters into possession of that share as a co-owner, and thereafter purports to buy shares totalling to unity, cannot, by forming a secret intention as to the character of his possession, acquire prescriptive title to the entire land by possessing the whole land.

Costs—Courts Ordinance (Cap. 6), s. 72—Civil Procedure Code, s. 211.

The plaintiff brought this action in the District Court claiming a declaration of title to 4/5 share of a land. He was in fact entitled to 1/25 share only, which could have been recovered in the Court of Requests. The defendant, however, denied that the plaintiff had any share at all in the land.

Held, that in the circumstances the provisions of section 72 of the Courts Ordinance, read with section 211 of the Civil Procedure Code, did not disentitle the Court from awarding costs to the plaintiff in the lowest class in the District Court scale.

APPEAL from a judgment of the District Court, Kegalle.

Sir Lalita Rajapakse, Q.C., with *J. N. Fernandopulle*, for the plaintiff-appellant in No. 381 and the plaintiff-respondent in No. 382.

H. W. Jayewardene, Q.C., with *C. R. Gunaratne* and *B. S. C. Ratwatte*, for the defendant-respondent in No. 381 and the defendant-appellant in No. 382.

Cur. adv. vult.

July 4, 1957. SANSONI, J.—

The land in dispute in this action formerly belonged to Appuhamy Korala who by deed P1 of 1857 conveyed it to his only daughter Dingiri Menike, her two binna husbands Loku Banda and Medduma Banda, and their two sons Dingiri Banda and Punchi Banda. Loku Banda, Medduma Banda and Dingiri Menike died leaving 5 children, namely, Dingiri Banda and Punchi Banda already mentioned and 3 daughters, Bandara Menike, Dingiri Amma and Tikiri Kumarihamy.

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The plaintiff brought this action claiming a declaration of title to 4/5 share of the land on the footing that Dingiri Amma inherited the shares of all her brothers and sisters except Punchi Banda, and that on Dingiri Amma's death her surviving daughter Ran Menike by deed P2 of 1950 sold that 4/5 share to the plaintiff. The plaintiff complained that the defendant was in wrongful possession of her share. In her answer the defendant pleaded that Dingiri Amma had gone out in diga and forfeited her right to inherit any share of this land. The defendant further pleaded that on a series of deeds two outsiders, Walgama Tikiri Banda and Rupasinghe Tikiri Banda, became entitled to the shares of Dingiri Amma's brothers and sisters. These deeds are Fiscal's conveyance D1 of 1888 purporting to transfer the right, title and interest of Dingiri Banda and Punchi Banda in 4/5 share of the land to Walgama Tikiri Banda, deed D4 of 1889 executed by Bandara Menike in favour of Walgama Tikiri Banda for a 1/6 share which she claimed by paternal inheritance, and deed D3 of 1888 executed by Tikiri Kumarihamy in favour of both Walgama and Rupasinghe Tikiri Banda for a 1/5 share which she claimed by paternal and maternal inheritance. The share of Dingiri Amma was not purchased by either of them at any time, and as I have already pointed out it is her share that the plaintiff claims.

It is not necessary to give details of the subsequent deeds executed by the co-owners Walgama and Rupasinghe Tikiri Banda, but in 1910 the defendant purported to buy an undivided 1/2 share from Rupasinghe Tikiri Banda on deed D6, and in 1918 the defendant's husband (through whom the defendant claims) purported to buy 41/120 share of the land from two of the successors in the title of Walgama Tikiri Banda. It is admitted in the answer and in the evidence led for the defendant that there is a share outstanding in certain other successors in title of Walgama Tikiri Banda, and that those co-owners take their share of the produce of the land. The position therefore is that the defendant does not claim to be the sole owner of the land either by prescription or on paper. The defendant does, however, contest the plaintiff's right to any share of the land on two grounds :—(1) on the ground that Dingiri Amma by her diga marriage forfeited her right to inherit any share of the land, and (2) on the ground that the defendant has acquired a prescriptive title to the share which the plaintiff claims.

After trial the learned District Judge held that although the marriage certificate of Dingiri Amma proved that she was married in diga to one Punchi Banda in 1872, she did not forfeit her paternal inheritance because there was no evidence that she left the mulgedera. He also held that the defendant's possession of the land was that of a co-owner who had not prescribed against the plaintiff. In the result he held that the plaintiff was entitled to an undivided 3/25 share of the land and damages at Rs. 30 a year. He ordered the plaintiff to pay the defendant the costs of the action, on the ground that the plaintiff had succeeded in proving title only to a small fraction of the share claimed by him. The plaintiff has appealed only on the question of costs, but the defendant has filed an appeal contesting the plaintiff's right to any share of the land.

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With regard to the question of forfeiture, it was urged for the defendant that the production of the marriage certificate of Dingiri Amma (D 2) containing the entry that the marriage was in diga was sufficient proof that Dingiri Amma forfeited her right to the paternal inheritance. Reliance was placed on *Mampitiya v. Wegodapola* [1] where it was held that " as between or as against the parties, or their representatives in interest, the register of the marriage is conclusive of the intention with which the marriage was celebrated, unless the case is shown to be one of mistake or fraud, or can otherwise be brought within the equitable exceptions of section 92 of the Evidence Ordinance ". This case was followed in *Seneviratne v. Halangoda* [2] and in *Chelliah v. Kuttapitiya Tea and Rubber Co.* [3].

Now in this case neither party is seeking to contradict the register ; but while the defendant-respondent insists that the entry in the register is sufficient to bring about the forfeiture, the plaintiff-appellant insists that there should be other evidence, oral or documentary, to prove that Dingiri Amma left the mulgedera and settled in her husband's home. In considering this question in the light of the decided cases, I think it is very important to bear in mind the facts of those cases. One is otherwise apt to pick out dicta from the judgments and give them an interpretation which can be quite inaccurate and even misleading, when they are isolated from the facts with which the judges were dealing.

With regard to *Mampitiya v. Wegodapola* [1] it is essential to remember that although the husband and wife there were married in diga, evidence was led of their subsequent conduct which proved that the bride was never conducted to her husband's home. The crucial issue that arose out of that state of things was whether the registration of the marriage in diga automatically and instantly worked a forfeiture, which no amount of evidence of subsequent conduct could affect. It was contended that even where a diga marriage wife remains in the mulgedera she nevertheless forfeits her right to inherit from her father, but this contention was rejected by Bertram C.J. It is true that throughout his judgment the learned Chief Justice stresses the part played in the matter of forfeiture by the departure of the bride from the mulgedera, but we must remember that he was doing so in a case where evidence had been led to prove that the bride had not left the mulgedera. On page 132 he says—" I think, therefore, that we must take it to be the law that what works the forfeiture is not the ceremony but the severance. No doubt by contracting a marriage in diga in which the bride's family participated, the parties bound themselves to each other and the family that the bride should be conducted in accordance with custom, and should settle in the home of her husband. *But if this, for whatever reason, was not done and if* with the acquiescence of her family, the bride remained in the mulgedera, then the forfeiture was never consummated ". In the same case Ennis J. said : " Now it has been held by de Sampayo J. in the case of *Menikhamy v. Appuhamy* that the forfeiture of the bride's rights in the paternal estate turns on the question of fact, whether the bride left the parental home in accordance with the contract. *In*

[1] *(1922) 24 N. L. R. 129.*

[2] *(1921) 22 N. L. R. 472.*

[3] *(1932) 34 N. L. R. 89.*

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the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, but I can see no good reason for excluding oral testimony relating to the carrying out of this term of contract, which was not a matter of fact occurring at the time of the contract". After saying that, on the question of fact, he saw no reason to interfere with the finding that the wife had not severed her connection with the mulgedera, the learned Judge went on to say: "In the circumstances it would seem that there was a valid contract of marriage in diga, but the term of the contract relating to residence was not carried out. *From the facts as found* a tacit consent by the plaintiff (the bride's brother) to the residence of the defendants (the bride and the bride-groom) in the mulgedera must be inferred. In the circumstances the bride retained her rights of inheritance in her father's estate".

Two months later the case of *Seneviratne v. Halangoda* [1] was decided. There too oral evidence was led as to the conduct of the parties after a diga marriage had been registered, and in the course of his judgment de Sampayo J. expressed the view that *such evidence* may lead to the result that notwithstanding her diga marriage, the bride had preserved or regained her binna rights. The learned Judge then said: "The only consequence of a diga married daughter preserving or subsequently acquiring binna rights is that the forfeiture of the rights of paternal inheritance does not take place, but she inherits as though she was married in binna". I consider this case to be further authority for the view that, on production of the certificate of registration of marriage in diga, the court must in law draw the inference that the bride left the mulgedera and forfeited her paternal inheritance in accordance with the contract, unless the contrary is proved by the party who denies that the forfeiture took place. This may be proved by facts which the court would recognize as sufficient to rebut the inference. The certificate raises what Lord Denning has termed a "compelling presumption" which would give rise to a separate issue on which the legal burden is on the other party to prove that there was no forfeiture. See the article "Presumptions and Burdens" in The Law Quarterly Review, vol. 61 page 379.

I would finally refer to the judgment of Garvin S. P. J. in *Chelliah v. Kuttapitiya Tea and Rubber Co.* [2]. In that case the diga marriage certificate was produced, but the evidence of the husband proved that he and his wife continued to live after marriage in the wife's father's house. A daughter was born, and in his judgment Garvin S.P.J. makes it clear that the daughter was bound by the marriage register and could only claim to inherit from her maternal grandfather "upon proof that though the marriage contracted by her parents was a marriage in diga, her mother did not in fact leave the roof of her parents, that there was no severance from the family and consequently no forfeiture of rights, or upon proof that if a forfeiture ever took place her mother reacquired the rights of a binna married daughter". The learned Judge upon a consideration of the evidence on these matters came to the conclusion that the wife was fully vested with rights of inheritance and did in fact inherit her father's property, which at her death passed to her daughter.

[1] *(1921) 22 N. L. R. 472.*

[2] *(1932) 34 N. L. R. 89.*

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I therefore have no hesitation in holding, on the strength of these authorities, that in cases governed by the Amended Kandyan Marriage Ordinance of 1870 the production of a diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance ; the burden thereafter shifts to her, or to those claiming through her, to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place. In the result I hold that Dingiri Amma forfeited her right to inherit from her father Appuhamy Korala. It is conceded, however, that she was entitled in any event to inherit from her mother Dingiri Menike ; therefore Dingiri Amma on her death was entitled to 1/25 share of this land and this share has passed to the plaintiff.

On the question of prescription, Dingiri Amma and her successors in title were always co-owners, as the learned trial Judge has pointed out. He has held also that the major portion of the land was lying fallow till 1943 when it was asweddumised at the instance of the defendant. But it was contended for the defendant that as she and her husband had bought shares in this land at different times, and those shares when added up cover the entire land, prescription would run in favour of the defendant and her husband from 1918, which is the year in which the last deed was obtained. I reject this submission as being without substance. The defendant and her husband entered as co-owners and they could not by forming a secret intention as to the character of their possession acquire prescriptive title to the entire land even if they did possess the whole land. It is obvious that the principle that a stranger who had purported to purchase the entire land from a co-owner, and entered into possession of that land in the belief that he was sole owner, can prescribe to it, does not apply here. It must also be remembered that the defendant admits in her answer, and her chief witness admitted in his evidence, that a 1/10 share has always been regarded as outstanding in another co-owner of this land who appropriates his share of the produce. The plea of prescription put forward by the defendant fails.

I would therefore set aside the decree appealed against and direct that a decree be entered declaring the plaintiff entitled to an undivided 1/25 share of the land in dispute and possession thereof, and damages at Rs. 10 a year from the date of action. In regard to costs, the plaintiff has partially succeeded although he has been found to have unduly exaggerated his claim. But the defendant denied that the plaintiff had any share at all in the land, and she has failed in this contention. In appeal too the defendant's counsel argued that the plaintiff had no share in the land ; to support that position, he pressed the issue of prescription on behalf of his client. I consider that the learned Judge was wrong in ordering the plaintiff to pay the defendant the costs of this action in spite of the plaintiff having partially succeeded. In all the circumstances, I would award the plaintiff his costs in both courts in the lowest class in the District Court scale.

L. W. de SILVA, A. J.—

I agree with my brother and refer to two points raised during the argument. The marriage certificate of Dingiri Amma in the year 1872 proves

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that hers was a diga marriage. No evidence was led at the trial that she had severed her connection with the mulgedera. The nature of the marriage and the intention of the parties are common cause. The plaintiff's counsel contended that it was obligatory on the defendant to prove further that Dingiri Amma after her diga marriage had left the mulgedera and thus forfeited her right to the paternal property. The argument was that the right to a paternal inheritance under the Kandyan Law cannot in the circumstances be taken away by a mere entry in the marriage register.

So far as I am able to gather from the reported cases, the problem does not seem to have arisen in this way. Those cases proceeded on the footing that a daughter married in diga forfeits her interest in her paternal inheritance, not by virtue of the marriage, but because it involves a severance of her connection with her father's house, vide *Punchi Menike v. Appuhamy et al.* [1]. The question here is whether it is sufficient for the defendant to prove only the intention. I am of the opinion that it is sufficient, for this is a case to which Section 114 of the Evidence Ordinance (Cap. 11) applies :

> " The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. "

In the absence of evidence to the contrary, we are entitled to presume that, according to the terms of the marriage contract, the common course of natural events followed consistent with the ordinary habits of Kandyan society, resulting in a severance of the diga married woman from her father's house. This involved a forfeiture of her right to the paternal inheritance. I should add that, by the Ordinance No. 3 of 1846, the Law of Evidence in Ceylon was the English Law when the Amended Kandyan Marriage Ordinance No. 3 of 1870 was enacted. The provisions of section 114 of the Evidence Ordinance, which is a later enactment, conform to the English Law in force at the material point of time.

The learned District Judge has ordered the plaintiff to pay the costs of the action " as he has succeeded only to a small fraction of the interests claimed by him. " Learned counsel for the defendant relied on section 72 of the Courts Ordinance (Cap. 6) and argued that the plaintiff was not entitled to costs as a matter of right and the order was therefore justified. This is not a good ground for depriving the plaintiff of costs since the section is as follows :—

> " If any action or suit shall be commenced in any District Court for any debt or demand which might have been recovered in some Court of Requests, the plaintiff or plaintiffs in any such action or suit shall not by reason of any judgment for him or them, or otherwise, have or be entitled to any costs whatever, but it shall be competent for the Judge to make such order as to costs as justice may require. "

[1] *(1917) 19 N. L. R. 353 at 355.*

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In my opinion the justice of the case required that the plaintiff, who was the successful party though only partially, should have been awarded some costs. It is true that the interests to which the plaintiff is entitled could have been recovered in the Court of Requests. The merits in controversy involved a claim to the entire land by the defendant who sought to absorb it for herself on a plea of prescription which failed. It is apparent that she put the plaintiff to unnecessary expense and compelled him into litigation. Section 72 of the Courts Ordinance as well as section 211 of the Civil Procedure Code confers on the Court a discretionary power with regard to the award of costs, but the exercise of the discretion has to be made upon reasonable and just grounds.

Appeal No. 381 partly allowed.

1955 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

K. D. ABILIAN, Appellant, *and* K. D. DAVITH SINGHO *et al.*, Respondents

S. C. 28 (Cr.)—D. C. Avissawella, 6,510

Contempt of Court—Chapter 65 of Civil Procedure Code—Proper procedure—Right of appeal—Courts Ordinance, s. 57—Criminal Procedure Code, ss. 335, 338—Civil Procedure Code, ss. 796, 797, 798—Partition Act, No. 16 of 1951, s. 53.

In an appeal from a conviction for contempt of Court under section 53 of the Partition Act—

Held, (i) that section 335 of the Criminal Procedure Code does not apply in the case of an appeal under section 798 of the Civil Procedure Code.

(ii) that a person cannot be convicted of contempt of Court under the provisions of Chapter 65 of the Civil Procedure Code on the basis of the answers given by him in the course of an interrogation by the Judge.

APPEAL from a judgment of the District Court, Avissawella.

H. W. Tambiah, with *U. P. Weerasinghe* and *H. L. de Silva*, for the 1st defendant-appellant.

S. J. Kadirgamar, with *P. Somatilakam*, for the plaintiff-respondent.

Cur. adv. vult.

September 13, 1955. H. N. G. FERNANDO, J.—

The appellant has been convicted of the offence of contempt of Court on the ground that, after a Fiscal's officer had given symbolic possession of a land to the plaintiff in execution of a partition decree, the appellant (a defendant in the partition action) refused to give up physical possession of the land to the plaintiff and also tapped the rubber trees and plucked coconuts on the land. The learned District Judge purported to act under section 53 of the Partition Act, No. 16 of 1951, which enacts a new provision empowering the Court to punish as for a contempt persons guilty of disobedience, resistance or obstruction of the description specified in

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the section ; it is not necessary for the purposes of this appeal to consider whether the conduct of the appellant falls within the specified description, and I shall assume that the section was applicable.

In the absence of specific provision in the Act as to the procedure to be followed in cases falling under section 53, the learned Judge rightly decided that the provisions of Chapter 65 of the Civil Procedure Code would apply. Section 57 of the Courts Ordinance confers on a District Court a special jurisdiction to punish *inter alia* offences " declared by any law to be punishable as contempts of Court ", and section 53 of the Partition Act is but one instance of a law contemplated in the Courts Ordinance. Hence the procedure in the case of offences declared by section 53 of the Act would be the procedure " in that behalf by law provided ", namely Chapter 65 of the Code.

The learned Judge sentenced the appellant to two weeks simple imprisonment. The preliminary objection has been taken that, having regard to the sentence imposed, leave of Court was necessary as required by section 335 of the Criminal Procedure Code. It was argued that this requirement applied, because section 798 of the Civil Procedure Code provides that the procedure in an appeal from a conviction for contempt shall " follow the procedure laid down in the Criminal Procedure Code regulating appeals from orders made in the ordinary criminal jurisdiction ". I do not think that the argument is sound. In the first place, section 798 confers a right of appeal " from every order, sentence or conviction " for contempt ; and it is at least doubtful whether this apparently absolute right of appeal is limited by any qualifying provision in the Criminal Procedure Code. Moreover, it is only the *procedure* laid down in the Criminal Procedure Code regulating appeals, that is declared to be applicable ; but the limitations in section 335 (though contained in a code of procedure) are substantive restrictions of the right of appeal conferred by section 338 and are not merely procedural. I would therefore hold that section 335 of the Criminal Procedure Code does not apply in the case of an appeal under section 798 of the Civil Procedure Code.

The procedure prescribed by Chapter 65 of the Code requires the Court to commence the hearing by asking the accused person whether or not he admits the truth of the charge ; this the learned Judge failed to do in the present case. Even if that failure does not invalidate the conviction, there was a more serious irregularity in the proceedings. After recording evidence in support of the charge against the appellant, the learned Judge " called upon him " for his statement if any. Thereafter the Judge questioned the appellant and recorded his answers. The appellant was also permitted to be cross-examined. The order convicting the appellant was based to an appreciable extent on the answers given by him in the course of this interrogation by the Judge.

Section 797 contemplates that the Court will hear the accused person's explanations, but that obviously would mean hearing an explanation voluntarily given ; the section cannot be construed as authorising the procedure which the learned Judge has adopted in this case.

I would accordingly set aside the conviction and sentence and acquit the accused.

SANSONI, J.—I agree. *Appeal allowed.*

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1956 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

EASTERN HARDWARE STORES, Appellant, *and*
J. S. FERNANDO, Respondent

S. C. 559—D. C. Colombo, 34,849/M

Landlord and tenant—Notice to quit—Waiver—Acceptance of rent "without prejudice"—Effect on pending suit—Rent Restriction Act, s. 13 (1) (a).

Compromise of suit—Mode of proving it—Civil Procedure Code, s. 408.

Evidence—Estoppel—Principles applicable.

Acceptance of rent for a period subsequent to notice to quit does not revive a tenancy if the money is taken by the landlord without prejudice to a pending action instituted by him to eject the tenant.

Once an action has been instituted, the Court will not take cognizance of a compromise of it unless it is proved by way of an application made under section 408 of the Civil Procedure Code ; it cannot be proved by way of issues framed at the hearing of the action.

In order to create a valid estoppel there must be not only action by one party on the faith of the declaration or act of the other party but also such action must be to his detriment. Performance, therefore, of what is a legal obligation cannot create an estoppel. Further, there must be a direct connection between the action taken by the party prejudiced and the false impression created by the representation (or conduct) of the other party.

APPEAL from a judgment of the District Court, Colombo.

V. Thillainathan, for the plaintiff-appellant.

Ananda Karunatilleke, for the defendant-respondent.

Cur. adv. vult.

November 23, 1956. SINNETAMBY, J.—

The facts of this case briefly are as follows :

Plaintiff instituted this action on 19/3/55 to eject the defendant from premises bearing No. 554, Skinners Road South. The premises in question are subject to the provisions of the Rent Restriction Act and in order to dispense with the authorisation of the Rent Restriction Board the plaintiff pleaded that the defendant had been in arrears of rent for over a month after the same had become due within the meaning of section 13 (1) (*a*) of the Act. The plaintiff averred in his plaint that rents were due from 1/1/54. By letter dated 20/10/54, P6, the plaintiff through his proctor gave the defendant notice to quit and deliver possession on 30/11/54. With the plaint the plaintiff also asked for an interim injunction restraining the defendant from removing the machinery, fittings, equipment, etc., in the premises. This application for an interim injunction was perhaps made by plaintiff in order that he may effectively exercise his landlord's lien. Along with the summons that issued on the defendant there was also served a notice requiring the defendant to show cause why an injunction should not be issued and, pending hearing of the application, enjoining him from disposing of machinery, fittings, equipment, etc. The evidence is that on service

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of summons and notice of interim injunction the defendant hurried to the landlord and paid him a sum of Rs. 778·82 on account of rent and damages up to February, 1955, and a further sum of Rs. 221·18 being Counsel fees, stamp charges and proctor's fees. The plaintiff's proctor received that sum without prejudice to the case and issued to the defendant receipt D2 in which it was so expressly stated, viz. that the money was accepted without prejudice to the case. A similar receipt D1 on the same terms was issued in respect of fees and stamp charges.

Several issues were framed at the trial based mainly on questions of law. The facts stated above were not disputed. The defendant, however, contended that plaintiff's action must fail chiefly on two grounds : first because there was a waiver of the notice by the acceptance of rent on document D2 for a period subsequent to the notice ; and secondly because the plaintiff expressly undertook to withdraw the action when the amounts referred to in D1 and D2 were paid. There was also a plea of estoppel on which defendant relied. The learned District Judge held with the defendant on all the issues covering these matters and this appeal is against his findings.

The plaintiff denied the allegation of the defendant that on the 23rd March there was an agreement by which plaintiff, in consideration of the payments, agreed to withdraw the action but the learned judge disbelieved him on this point and held that there was in fact such an agreement. It is quite manifest that on this matter the learned judge has completely misdirected himself. He has not considered the significance of the express stipulation in documents D1 and D2 that the payments in question were *without prejudice to the case*. This can only mean one thing, viz., that payments were accepted subject to the condition that the acceptance was not to affect adversely plaintiff's rights in the case. How the learned judge came to overlook so important a stipulation is difficult to comprehend. Obviously the payments were made because the issue of the interim injunction unless dissolved would have dislocated defendant's business as he himself admits. Acceptance of rent for a period subsequent to the notice revives the tenancy only if from the facts established in the case an intention to waive can reasonably be inferred. Every such payment does not *ipso facto* amount to a renewal. In this case the very terms of the receipt issued for the payment negatives in no uncertain terms any such inference. The learned judge was clearly wrong in accepting the uncorroborated testimony of the defendant and in holding that the payment amounted to a waiver of the notice.

The learned judge also held that on the 23rd March, 1955, there was an agreement by plaintiff to withdraw the action. The only evidence on which he came to that finding is the oral testimony of the defendant, but it is quite obvious that the learned judge has not taken a realistic view of the facts deposed to by the plaintiff and the defendant. If his evidence is true one would have expected him as a normal prudent man to have obtained some writing to safeguard his interests from the plaintiff. Defendant filed an answer after the alleged agreement but in his answer he makes no mention of any undertaking by plaintiff to withdraw the action : indeed, his averment is that plaintiff undertook to withdraw

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only the injunction though he adds that he was to continue as a tenant. This is in the teeth of receipts D1 and D2. There is, however, a more fatal objection to the acceptance of this plea. Rights of parties have to be determined as at the date of action and the Court must in deciding issues arising in a case do so only on evidence relating to facts which existed before the date of action. This is an elementary rule of law but the learned judge tries to overcome it by stating that a party to an action is entitled to waive any right that he has. A party undoubtedly is entitled to compromise a suit by reaching an agreement after action brought, but a Court can take no cognizance of it unless it is duly notified to Court and the Court passes a decree in accordance therewith in terms of section 408 of the Civil Procedure Code. Such a course, if adopted, does not in any way infringe the cardinal rule of law that in an action rights of parties must be determined as at the date of action. The defendant, not having taken steps under section 408, is not entitled to rely on an alleged agreement to withdraw the action as a defence to plaintiff's claim. Any compromise of a suit must be determined in an application under section 408 of the Civil Procedure Code and not by way of issues framed at the hearing of the action. It may be open to a Court, however, to stay proceedings in an appropriate case to enable a party to take steps under section 408 but such a course was not adopted in this case.

On the question of estoppel too the learned District Judge has come to a wrong finding. His main observations on this matter are as follows :

> " The plaintiff has agreed on 23/3/55 that there would be no further arrears and the defendant has acted upon that belief both on the 4th of April and later when he continued to pay further rents or damages or whatever they may be called in the receipts. In these circumstances I hold that a valid estoppel has been created. "

An important—indeed, the most important—element required to create a valid estoppel the learned judge has lost sight of. He has failed to appreciate that in order to create a valid estoppel there must be not only action by one party on the faith of the declaration or act of the other party but also such action must be to his detriment. What is the action the defendant is alleged to have taken ? The learned judge refers to two. First, he refers to the defendant's appearance in Court on the 4th of April. But is that the result of the representation or is it because the defendant was required to so appear in response to the summons ? Secondly, the learned judge refers to the fact that the defendant continued to pay rent even thereafter. I fail to see how it could possibly be contended that defendant's action was to his detriment or that payment of rent by the tenant was because of the alleged representation to withdraw the action. Would it not be more reasonable to attribute the payment to the obligation created by law for an overholding tenant to pay damages or for a tenant whose tenancy was not terminated to pay rent in terms of the agreement of tenancy ? In a plea of estoppel it is most important that direct connection between the action taken by the party prejudiced and the false impression created

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by the representation—or conduct—must be established (vide *Rodrigo v. Karunaratne* [1]). The defendant has not established that he has been in any way prejudiced by the alleged settlement, nor has he shown any direct connection between his actions and the alleged agreement to withdraw the case. The plea of estoppel therefore fails.

For these reasons I would therefore set aside the judgment of the learned District Judge and enter judgment for plaintiff as prayed for less any sums paid by defendant after date of action. Plaintiff will be entitled to costs both here and in the Court below.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

1957 *Present :* **H. N. G. Fernando, J.**

M. U. R. C. MEERA, Petitioner, *and* N. Q. DIAS (Controller of Immigration and Emigration) *et al.*, Respondents

S. C. 198—Application for a Writ of Certiorari and for a Writ of Mandamus

Immigrants and Emigrants Act, No. 20 of 1948—Sections 10 and 14 (3) (b)—Effect thereon of Amending Act No. 16 of 1955, ss. 7, 26 (1)—Constitution Order in Council, 1946, s. 29 (2)—Interpretation Ordinance (Cap. 2), s. 6 (3) (b).

A non-citizen holding a temporary residence permit issued under the Immigrants and Emigrants Act No. 20 of 1948 is precluded by section 10 of that Act, as amended by Act No. 16 of 1955, from having it renewed or extended, although, prior to the date of the Amending Act, he would have been entitled to the renewal or extension of the permit under section 14 (3) (*b*) of the principal Act. The amended section 10 of the Immigrants and Emigrants Act is not *ultra vires* of the Legislature as being in conflict with the provisions of section 29 (2) of the Constitution Order in Council.

The right conferred by the former section 14 (3) (*b*) of the principal Act cannot properly be deemed to be a "right acquired" within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance.

APPLICATION for a writ of *certiorari* and for a writ of *mandamus* on the Controller of Immigration and Emigration.

L. G. Weeramantry, with *M. S. M. Nazeem* and *N. R. M. Daluwatte*, for the petitioner.

V. Tennekoon, Acting Deputy Solicitor-General, with *J. W. Subasinghe*, Crown Counsel, for the respondents.

Cur. adv. vult.

[1] *(1920) 21 N. L. R. 360.*

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July 16, 1957. H. N. G. FERNANDO, J.—

The petitioner has applied for a writ of Mandamus directing the Controller of Immigration and Emigration to issue to the petitioner a temporary residence permit authorising the continued residence in Ceylon of the petitioner. A temporary residence permit had been issued under the Immigrants and Emigrants Act No. 20 of 1948 to the petitioner for a period of two years commencing from 23rd February 1951, and thereafter other such permits were issued to him, the last of which expired on 19th February 1956. Before its expiration, the petitioner applied to the Controller for an extension of his permit for a period of one year and for present purposes I can assume that his application was either for an extension of the then existing permit or for the issue of a new permit and that the application on whichever basis it was made has been refused by the Controller by his letter of 8th February 1956.

Section 10 of the Act of 1948 in effect prohibited the entry of a non-citizen into Ceylon unless he had in his possession a passport and a visa or a residence permit. Section 14 then provided *inter alia* for the issue of permanent residence permits for indefinite periods and of temporary residence permits for definite periods exceeding six months, as well as for extension of the period of temporary permits: sub-section 3 (*b*) of the same section declared that a temporary residence permit shall not be refused in the case of British subjects who had been ordinarily resident in Ceylon for at least five years immediately prior to the appointed date which was 1st November 1949, and the allegation of the applicant that he was a person to whom that sub-section applied has not been challenged. If, therefore, section 14 of the Act remained in its original form it would appear *prima facie* that the applicant might well have been entitled to the grant either of a temporary residence permit or of an extension of his last permit. But the question whether he would have been so entitled has become academic in consequence of Act No. 16 of 1955 which amended the principal Act in certain very important respects. The Amending Act replaced the original section 14 and substituted for it a new section which provides only for the issue of visas to persons seeking to enter Ceylon and contains no provision of any description corresponding to sub-section 3 (*b*) of the original section; and under section 10 as amended a visa is now the only prescribed entry document. In the absence of provision in the existing law for the grant or renewal of temporary residence permits, there is no statutory duty (to issue such a permit) which the Controller can now be enjoined to perform by writ of Mandamus.

It is argued for the petitioner, however, that the new section is *ultra vires* the Legislature and that the former section is therefore still law. The ground of this argument is that in prohibiting the entry into Ceylon of persons who are not citizens except under the authority of visas granted by the Controller, and in not providing at the same time, (as the former sub-section (3) (*b*) of section 14 did) a right upon persons of the description there mentioned to documents entitling them to enter and reside in Ceylon, the present section is void as being in conflict with the provisions of section 29 of the Constitution. In support of this ground

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of objection it is stated that the new section imposes upon persons of the community described as the "Indian community" disabilities to which members of other communities are not made liable, or else confers on members of other communities privileges not conferred on the members of the Indian community.

Citizenship of Ceylon is regulated by the Citizenship Act No. 18 of 1948 and by the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 which generally provide for citizenship by birth and by registration respectively. Those Acts have been held by their Lordships of the Privy Council in *G. S. N. Kodakan Pillai v. P. B. Mudanayake* [1] to be *intra vires* and the same decision also held to be *intra vires* the Parliamentary Elections Amendment Act No. 48 of 1949 which restricted the franchise to citizens of Ceylon. While clearly declaring that what is prohibited for the Legislature by section 29 of the Constitution cannot be done even indirectly, the Privy Council held that, although standards such as those adopted in the case of the Citizenship Acts may operate to exclude the immigrant to a greater extent than they exclude other people, they do not create disabilities on a community as such, and their Lordships expressed the opinion that "the migratory habits of Indian Tamils are facts directly relevant to their suitability as citizens of Ceylon and had nothing to do with them as a community." The legislation which was the immediate occasion of the case which went before the Privy Council was what is referred to in the judgment as the Franchise Act, but it would appear that the argument put forward was that that Act read together with the Citizenship Acts was offensive to section 29 (2) of the Constitution ; and while their Lordships held that both enactments are *intra vires* they did not consider it necessary to examine the Franchise Act *separately* with reference to section 29 for the reason (obvious in the context) that if both read together were not *ultra vires*, then each separately is *intra vires*. In the present application of course the petitioner is precluded from arguing that either or each of the Citizenship Acts is *ultra vires* and he is restricted to the argument that section 14 of the Immigrants and Emigrants Act in its present (amended) form is *ultra vires*.

This argument raises for decision the same question which Their Lordships asked themselves, namely "what is the pith and substance or the true character of the legislation", and the answer in my opinion is that the Legislature has controlled the entry into Ceylon of non-citizens by a system of visas, conferring on an executive authority the discretion to refuse an entry document. The discrimination if any, therefore, which ensues from the legislation is a discrimination between citizens and non-citizens, a feature not in any way rare in legislation of a similar type enacted by other Sovereign Legislatures. If it was proper for the Legislature of Ceylon to deny the franchise to non-citizens, it clearly follows that it was not improper for the same Legislature to deny rights of entry to non-citizens. Indeed, in my opinion, the decision in *Kodakan Pillai v. Mudanayake*, that the Citizenship Acts properly laid down qualifications for citizenship and do not offend against section 29 of the Consti-

[1] *(1953) 54 N. L. R. 433.*

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tution, has the necessary consequence that the Legislature is free to confer rights or privileges exclusively on citizens or to impose restrictions or disabilities applicable solely to non-citizens. I would hold, therefore, that section 14 of the Immigrants and Emigrants Act is *intra vires*.

There is one point, however, to which I should refer although it was not argued by Counsel for the petitioner. Section 26 (1) of the amending Act 16 of 1955 contains a saving provision for, *inter alia*, temporary residence permits issued before the coming into operation of the amending Act and provides that any such permit in force immediately preceding the date of operation "shall continue in force after that date for the duration of such permit and shall thereafter cease to have effect." The section thereafter reads as follows: —" . . . . and the provisions of written law applicable to such permits before such date shall apply to such permits after that date during the period of the validity of such permits in like manner as they were applicable before that date."

If the provision last set out above were to be read by itself it may be possible to contend that the phrase *the provisions of written law applicable to permits before such date* includes those parts of the original section 14 of the Act which authorized the extension of temporary residence permits and declared that a temporary residence permit will not be refused to a resident British subject, or (to be specific) includes the former sub-section (2) and the former sub-section (3) (*b*) of section 14. But the provision itself reserves the application of the former written law *during the period of the validity of such permit*, and one has therefore to ascertain the meaning of this latter phrase. In my opinion that meaning cannot be determined without reference to the first part of the savings section. Read as a whole, section 26 (1) first declares that a temporary residence permit in force prior to the amending Act *shall continue in force* for the duration of such permit and shall thereafter cease to have effect. Each existing permit is thus given validity *for its duration*, that is to say, for the period specified in it at the time when the Amendment took effect. The subsequent provision which keeps alive the earlier written law is only ancillary to the first part of the saving section, the intention clearly being that once a permit is continued in force for a particular period it may be necessary to utilise or have recourse to the former written law applicable to such permits. But any construction of the latter part of the section which would authorise an extension of the duration of the permit or confer a right to a new permit would in my opinion be quite inconsistent with the substantive saving enactment which as already pointed out *validates an existing permit only for the duration therein specified* and explicitly terminates its effect thereafter.

I have considered also whether the former section 14 (3) (*b*) of the principal Act conferred on the petitioner such a right as would, notwithstanding the subsequent repeal, be kept alive by section 6 (3) (*b*) of the Interpretation Ordinance, which preserves "any right acquired" under repealed law. In construing, in the case of *Abbot v. Minister of Lands* [1], a similar section which preserved "any right acquired or accrued" under repealed law, the Privy Council held that "the mere right existing

[1] *1895 A.C. 425.*

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in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a 'right accrued' within the meaning of the enactment". Numerous statutes confer rights in the same general sense as did section 14 (3) (*b*) of the principal Act, that is they declare members of the public or of a specified class *to be qualified to obtain or secure* some advantage, privilege or permission whether from the Executive or a private party, and if the Interpretation Enactment does save such rights, then nearly every repeal would be ineffective to alter prior law unless there were appended special provision to bar the operation of section 6 (3) (*b*) of the Interpretation Ordinance. The decision of the Privy Council draws a distinction between what may be termed an abstract right, and a specific right which is already being possessed or enjoyed at the time of a repeal or towards the securing of which some statutory step has been taken at that time. While therefore section 6 (3) (*b*) *may* have assisted the petitioner if his application for a permit had been pending at the time of the repeal of the former section 14 of the Act of 1948, it affords him no advantage in the present context.

The application for a writ of Mandamus is refused with costs which I fix at Rs. 210.

Application refused.

1957 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

L. H. BABUN NONA, Appellant, *and* N. B. ARIYASENA *et al.*, Respondents

S.C. 122 (Inty.)—D. C. Matara, 810/P

Summons on defendant—Personal service necessary—Civil Procedure Code, s. 59.

The provisions of section 59 of the Civil Procedure Code regarding service of summons on a defendant are imperative and can be satisfied only if the summons is delivered or tendered to the defendant personally.

APPEAL from an order of the District Court, Matara.

R. A. Kannangara, with *A. S. Vanigasooriyar*, for Defendant-Appellant.

N. E. Weerasooria, Q.C., with *D. E. V. Dissanayake*, for Plaintiffs-Respondents.

February 28, 1957. BASNAYAKE, C.J.—

The defendant-appellant sought unsuccessfully to have the interlocutory decree in this case set aside on the ground that she had not been served with summons. The process server, who was called as a

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witness, admits that he did not serve the summons on the defendant herself. He states that he delivered the summons to her husband, and that the defendant was in the house at the time. The defendant denied that she was in her husband's house on the date on which the Fiscal stated that he delivered the summons to her husband and pleaded that she had not been served with summons in the manner prescribed by the Civil Procedure Code. Section 59 of the Civil Procedure Code requires that service of summons shall be made " by delivering or tendering to the defendant personally a duplicate thereof ". The requirement of the section is satisfied only if the summons is delivered or tendered to the defendant personally. The provisions of the section are imperative and should be strictly observed. Clearly in the instant case, the statutory requirement has not been complied with. The defendant is therefore entitled to the relief she seeks. We therefore set aside the order of the learned District Judge refusing to vacate the interlocutory decree and direct that the interlocutory decree be vacated and that the appellant be allowed to file answer and defend the action. The appellant is entitled to the costs of this appeal.

SINNETAMBY, J.—I agree.

Order set aside.

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