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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, 1955, TO SEPTEMBER, 1956

Chief Justice

The Hon. Mr. H. H. Basnayake

Puisne Justices

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

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

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

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

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Abatement of Action—

Abatement of action—Actio rei vindicatio—*Transfer of subject-matter by plaintiff pending action—Effect of abatement order on separate action instituted by plaintiff's transferee—Civil Procedure Code, ss. 396, 403, 404—Registration of Documents Ordinance, s. 11 (1) and (3).*

Section 403 of the Civil Procedure Code, which prohibits a fresh action being brought when an action has abated, directly affects only those persons who, while they are precluded from instituting separate proceedings on the same cause of action, nevertheless enjoy the alternative remedy of having the order of abatement vacated in order that the original action may be proceeded with.

A instituted against B an action for the recovery of certain property. The *lis pendens* was not registered. During the pendency of the action, A transferred the property in dispute to C. Subsequently A died, and, as his legal representatives took no steps to continue the proceedings, an order of abatement was made by Court under section 396 of the Civil Procedure Code. Before A's action had abated, C had instituted the present action in his own right to have the same defendant, B, ejected from the premises.

Held, that the provisions of section 403 of the Civil Procedure Code did not prevent the maintenance of the present action.

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See MOTOR VEHICLES (1).

2. *Appeal—Security for costs of appeal—Deposit of sum of money—Requirement of hypothecation—Civil Procedure Code, s. 757.*

When money is deposited in Court as security for costs of appeal in terms of section 757 of the Civil Procedure Code, failure to hypothecate the money is a fatal irregularity.

CAREEM *v.* UVAIS 72

3. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 15—Right of appeal thereunder—Powers of the appellate Court.*

An order made under section 14 (7) (*b*) of the Indian and Pakistani Residents (Citizenship) Act is appealable under section 15 of that Act.

In an appeal preferred under section 15 of the Indian and Pakistani Residents (Citizenship) Act the Supreme Court has no power to remit the case back to the Commissioner for further investigation.

PITCHAMUTTU *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 184

4. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Appeal from order of Commissioner—Time limit.*

The time limit for appeal under the Indian and Pakistani Residents (Citizenship) Act is three months from the date on which the order appealed from is communicated to the applicant.

SUBRAMANIAM *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 186

5. *Appeal—Points of law—Certification—Form—Criminal Procedure Code, s. 340 (2) and Schedule II, Form 12.*

The accused appellant had no right of appeal except on a matter of law. The petition of appeal, in which the grounds of appeal were all grounds of law, bore a certificate by a proctor in these terms :—" I certify that the points of law raised in this petition of appeal are fit matters for adjudication by the Supreme Court."

Held, that the certificate complied sufficiently with the requirements of section 340 (2) of the Criminal Procedure Code although it did not follow the very words of the prescribed Form.

SENEVIRATNE *v.* SUBRAMANIAM 187

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6. *Appeal*—Ex parte *hearing—Right of respondent to object to decree—Civil Procedure Code, ss. 28, 771.*

An appeal was heard *ex parte* in the absence of the respondent, and judgment was given against him. It was subsequently shown that the respondent's Proctor had, prior to the disposal of the appeal, informed the respondent that he had duly retained Counsel to represent him although, in fact, he had not done so. Further, during the pendency of the appeal, the Proctor had been suspended from the practice of his profession for a certain period.

Held, that there was " sufficient cause " within the meaning of section 771 of the Civil Procedure Code to re-hear the appeal.

KALAWANE DHAMMADASSI THERO *v.* MAWELLA DHAMMAVISUDDHI THERO 400

7. *Appeal—Security for costs of appeal—Procedure for furnishing it—Civil Procedure Code, ss. 756 (1) and (3), 757.*

A notice of security for costs of appeal given in terms of section 756 of the Civil Procedure Code is not invalid if the amount of security i snot specified in it.

Where the security bond was perfected upon its acceptance by an officer of the court and before the security was accepted by the Judge—

Held, that the provisions of sub-section 3 of section 756 of the Civil Procedure Code could not be invoked to cure the defect.

RANASINGHE *v.* PIERIS 538

8. *Appeal—Notice of tendering security—Signed by appellant's proctor and served on respondent's proctor—Validity—Civil Procedure Code, ss. 24, 29, 756 (1).*

A notice of tendering security issued under section 756 (1) of the Civil Procedure Code is not invalid if it is signed by the appellant's proctor and addressed to, and served on, the respondent's proctor.

URBAN COUNCIL OF DEHIWELA-MOUNT LAVINIA *v.* ANDY SILVA .. 562

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See CONTRACTS (4).

2. *Arbitration—Procedure—Section 676 of Civil Procedure Code—Compliance therewith—Scope of terms of reference.*

(i) The parties to this action signed an agreement in which they expressly stated their desire to submit their dispute to arbitration. In the same agreement they authorised their proctors to apply to the Court for a reference. This agreement was filed in Court two days later, and, in the presence both of proctors and counsel, the Court entered a minute that a joint motion was filed, it being clear that every one had assumed either that there was in fact a joint motion or that the agreement already signed by the parties constituted the necessary joint motion.

Held, that there was substantial and sufficient compliance with the procedure prescribed by Section 676 of the Civil Procedure Code.

Menike v. Ukku Amma (1915) 18 N. L. R. 413, followed.

Madasamy v. Amina (1951) 45 C. L. W. 40, not followed.

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(ii) The arbitrator was required by the terms of reference to determine " all matters in dispute in this action and all other matters in dispute ". At the stage when the reference was made, issues had not been framed between the parties nor had answer been filed. The matters in dispute were therefore those upon which the plaintiff relied in his plaint. Notwithstanding that the arbitrator was authorised to determine other matters in dispute, every issue suggested to the arbitrator was one which arose upon the averments in the plaint, and the only matters ultimately determined by the award were matters arising upon those averments.

Held, that in the circumstances the validity of the award could not be challenged on the grounds that no specific issues had been agreed upon for adjudication by the arbitrator and that the reference related to matters outside the plaintiff's pleadings.

W. H. Bus Co. Ltd. *v.* Heen Banda 337

3. *Co-operative Societies Ordinance—Section 45—Reference of dispute to Registrar—Procedure—Requirement of agreed reference—Award of arbitrator—Appeal therefrom—Parties must be heard—Referability of dispute to arbitration—Crucial date—Validity of Rule 38 (13) made under Section 46 (2) (t)* 505

See Co-operative Societies Ordinance (1).

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See Criminal Procedure (12).

Betting on Horse-racing Ordinance—

1. *Betting on Horse-racing Ordinance (Cap. 36)—Section 3A (1) (b), read with s. 16—" Occupier ".*

In a prosecution of two or more persons for unlawful betting in breach of section 3A (1) (*b*), read with section 16, of the Betting on Horse-racing Ordinance the fact that one of the accused was " working " in the premises where the betting took place, without any evidence as to the nature of his work, does not necessarily mean that he was an " occupier " of the premises within the meaning of that expression in section 2 of the Ordinance.

Silva *v.* Warnasuriya 197

2. *Betting on Horse-racing Ordinance (Cap. 36)—Section 17 (b)—Possession of instruments of unlawful betting—Not an offence.*

Possessing instruments of unlawful betting is not *per se* an offence under Section 17 (*b*) of the Betting on Horse-racing Ordinance.

Jauffer *v.* Alexander 375

3. *Betting on Horse-racing Ordinance (Cap. 36), as amended by Ordinance No. 55 of 1943—Prosecution thereunder—Quantum of evidence—" Instruments of unlawful betting "—Sections 2, 3 (3), 10, 17—Newspapers—Evidentiary value of their contents—Evidence Ordinance, s. 81.*

The accused was charged with unlawful betting on a horse race in breach of section 4 (3) of the Betting on Horse-racing Ordinance. It was proved by the prosecution that a police officer arrested the accused and on searching him found betting slips and copies of three different newspapers each of which contained the race programme in Colombo for the day in question.

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Held, that, although section 81 of the Evidence Ordinance created no presumption that the contents of a newspaper or journal are true, the fact of publication of the race programme containing the names of the horses mentioned in the betting slips could be considered in interpreting whether the betting slips were records of unlawful betting on a horse race within the meaning of the definition of " instruments of unlawful betting " in section 2 of the Betting on Horse-racing Ordinance.

MIHINDUKULASURIYA *v.* DAVID 382

4. *Betting on Horse-racing Ordinance (Cap. 36)—Prosecution thereunder—Quantum of evidence—Sections 3 (3), 15, 17 (b).*

In a prosecution for unlawful betting on a horse race, the presumption which is said to arise from the fact that the accused, when he was searched, was found to be in possession of betting slips can be relied on only if the conditions prescribed by Sections 15 and 17 (*b*) of the Betting on Horse-racing Ordinance were fulfilled.

THAIBO *v.* ABRAHAMS 456

Bills of Exchange Ordinance—

See NEGOTIABLE INSTRUMENTS.

Breach of promise of marriage—

1. *Breach of promise of marriage—Plea that defendant was already married at time of promise—Validity of such plea.*

Under the Roman Dutch Law an action for damages for breach of promise of marriage cannot be founded on a promise made by a man who was already married at the time he made such promise.

CHANDRASENA *v.* KARUNAWATHIE.. 298

2. *Breach of promise of marriage—" Written promise "—Dowry as condition—Quantum of evidence—Marriage Registration Ordinance (Cap. 95), s. 19 (3).*

An action for damages for breach of promise of marriage lies if, in a letter addressed by the defendant to the plaintiff, there is either confirmation or at least an unqualified admission of a subsisting oral promise of marriage.

Where there is a written promise to marry, the party who made the promise is not entitled to resile from it on the ground that a dowry, which both parties had confidently anticipated but was not a condition to the promise, was not settled in due course.

BOANGE *v.* UDALAGAMA 385

Bribery Act—

Bribery Act, No. 11 of 1954—Indictment—Requirement of signature of Attorney-General—Sections 3 (2), 5, 6 (1), 8, 9 (1), 19 (b), 25, 78 (1)—Criminal Procedure Code, ss. 148 (e), 165 F, 186, 393.

In a prosecution for bribery under the Bribery Act, an indictment signed by a Crown Counsel contravenes the requirements of sections 5, 8 and 78 (1) that the indictment should not be signed except by the Attorney-General. A District Judge has no jurisdiction to try the accused upon such an indictment.

ATTORNEY-GENERAL *v.* WILLIAM 9

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Buddhist Ecclesiastical Law—

1. *Buddhist Temporalities Ordinance (Cap. 222)—Section 23—Abandonment of robes by bhikkhu—Pudgalika property—Devolution.*

Under Section 23 of the Buddhist Temporalities Ordinance uninherited pudgalika property acquired by a bhikkhu for his exclusive personal use and not alienated by him during his lifetime becomes, on his death, the property of the temple to which he belonged, even though he abandoned the robes and became a layman.

WILLIAM SINGHO *v.* REV. DHAMMAJOTHI ISTHAWEERA .. 16

2. *Buddhist Ecclesiastical Law—Sripadasthana—Nomination of Trustee by Viharadhipathi—Public Trustee's refusal to issue letter of appointment to Trustee—Dispute as to person entitled to be Viharadhipathi—Remedy of Trustee—*Mandamus *or regular action ?—Procedure for election of Viharadhipathi—Buddhist Temporalities Ordinance (Cap. 222), ss. 2, 10 (1), 11, 33, 41—Public Trustee Ordinance (Cap. 73), s. 3—Civil Procedure Code (Cap. 86), s. 217 (E) and (G).*

Sub-section 2 of section 11 of the Buddhist Temporalities Ordinance provides :—

> Whenever a nomination is duly made under sections 9 or 10 and reported to the Public Trustee it shall be the duty of the Public Trustee to forthwith issue a letter of appointment to the persons so nominated unless such appointment would contravene the provisions of this Ordinance.

Sub-section 3 (*b*) further provides :—

> Whenever by reason of any disputes as to the person entitled to make such nomination more than one person is reported to the Public Trustee as having been duly nominated trustee of any temple, the Public Trustee shall, pending a legal nomination, ... if he thinks fit provisionally appoint as trustee any person duly qualified.

Defendant, the Public Trustee, refused to issue a letter of appointment to the plaintiff when the latter was nominated as Trustee of Sripadasthana by D who was duly elected on February 18, 1934, as Viharadhipathi of Sripadasthana. He alleged, on clearly untenable ground, that the office of Viharadhipathi had been duly filled by the election of one R on February 14, 1934, and that R had made his own nomination to the trusteeship. In these circumstances plaintiff sued the Public Trustee asking (1) for a declaration that he was the duly appointed Trustee of Sripadasthana, and (2) that the Public Trustee be directed to issue to him a letter of appointment as such Trustee.

Held, (FERNANDO, A.J., *dubitante*), that it was wrong to refuse the plaintiff relief on the ground that he should have applied for a writ of *Mandamus ;* the District Court had jurisdiction to grant in a regular action the relief for which the plaintiff prayed, if it found that D was the properly elected Viharadhipathi.

Custom and procedure relating to the election of the Viharadhipathi of Sripadasthana in the Ratnapura District of the Province of Sabaragamuwa reviewed.

WIJEWARDENA *v.* THE PUBLIC TRUSTEE 78

3. *Buddhist Ecclesiastical Law—Viharadhipati—Renunciation of status—Proof.*

An intention of a bhikkhu to renounce his status as Viharadhipati of a Vihare will not be inferred unless that intention is clearly expressed by facts and circumstances. A Viharadhipati does not forfeit his right to the office when he leaves the temple of which he is Viharadhipati and takes up residence in another of which he is also Viharadhipati.

The residence of a pupil in his tutor's Sanghika Vihare for whatever length of time cannot confer on him the right to be Viharadhipati of that vihare as against the senior pupil.

JINARATANA THERO *v.* DHAMMARATANA THERO 372

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4. *Buddhist Ecclesiastical Law—Viharadhipati—Renunciation of office.*

A bhikkhu who is Viharadhipati of a temple is entitled to renounce his office of Viharadhipati.

Not only may a pupil who succeeds to the office of Viharadhipati by virtue of being the senior pupil of his tutor renounce his office, but also a junior pupil nominated by his tutor as his successor is free to renounce his right.

NANDARAMA *v.* RATHANAPALA 445

5. *Buddhist Ecclesiastical Law—Dedication of temple—Viharadhipati—Appointment need not be in writing—Bhikkhu—Residence in temple—Right to claim incumbency thereby.*

When a Buddhist temple is built for the first time by laymen and offered to the Sangha, there is no requirement of law or custom that the viharadhipati should be appointed by a written document.

Where a bhikkhu who is a viharadhipati of more than one temple places bhikkhus in whom he has confidence, not necessarily his pupils, in charge of the different temples of which he is viharadhipati, while adopting for his usual residence only one of them, the performance of their duties by the bhikkhus so appointed does not have the effect of making them viharadhipatis of the respective temples. There being no particular duties, spiritual or temporal, which a viharadhipati need perform for the purpose of keeping alive his rights, such rights cannot be said to be lost because another bhikkhu who is actually residing in the temple manages its affairs and prevents the temple from falling into decay.

A bhikkhu residing at a Sanghika temple who, by virtue of his residence therein, asserts in a Court of Law the right of the temple to its property does not thereby acquire a right to be its viharadhipati.

DHAMMAVISUDDHI THERO *v.* DHAMMADASSI THERO .. 469

6. *Buddhist Ecclesiastical Law—Sisyanu sisya paramparawa—Extinction of line of succession—Appointment of new Viharadhipathi—Proper procedure—Prescription.*

Upon the extinction of the line of pupillary succession to a Buddhist temple governed by the rule of succession known as sisyanu sisya paramparawa, the temple vests in the Sangha and the right of appointing a new Viharadhipathi vests in the Mahanayake of the fraternity which has jurisdiction over it. The fact that a stranger has functioned as Viharadhipathi for a long period does not entitle him to defeat the Mahanayake's right of appointment, which is a right that cannot be lost by prescription.

DHAMMALOKA THERO *v.* SARANAPALA THERO 518

Burden of Proof—

See COURT OF CRIMINAL APPEAL DECISIONS (5), (8).

Certiorari—

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Citizenship—

1. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 13—Inquiry thereunder—Documents used by Commissioner as evidence—Notice to applicant necessary.*

In the inquiry into an application for citizenship by registration under the Indian and Pakistani Residents (Citizenship) Act, the Commissioner examined, apart from the documents submitted by the applicant, certain other documents, purporting to be householder's lists, that he found in the Assistant Food Controller's office. He based on what he found in those documents inferences adverse to the credibility of the applicant. The applicant's attention had not been drawn to this new evidence and he had been given no opportunity of explanation before the Commissioner made his order.

Held, that the use of the documents as evidence without notice to the applicant was contrary to the principles of natural justice and vitiated the Commissioner's order which was in large part based on that evidence.

SOOSEY FERNANDO *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 67

2. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 6 (2) (ii) as amended by Act No. 45 of 1952—Difference between "non-residence" and "occasional absence"—Residence of wife or child—Need not necessarily commence prior to the period exempted owing to war conditions.*

The failure of a wife or child of an applicant for citizenship to commence residence in Ceylon within twelve months of marriage or birth, as required by section 6 (2) (ii) of the Indian and Pakistani Residents (Citizenship) Act, if shown to have been attributable to the war conditions mentioned in the clause added to that section by Act No. 45 of 1952, comes within the scope of the exception granted by that clause. In that clause the Legislature had in mind, not merely interruptions of residence, but *non-residence*, which includes a failure to commence residence within the stipulated time.

FAKRUDEEN *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 111

3. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 15—Right of appeal thereunder—Powers of the appellate Court.*

An order made under section 14 (7) (*b*) of the Indian and Pakistani Residents (Citizenship) Act is appealable under section 15 of that Act.

In an appeal preferred under section 15 of the Indian and Pakistani Residents (Citizenship) Act the Supreme Court has no power to remit the case back to the Commissioner for further investigation.

PITCHAMUTHU *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 184

4. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Appeal from order of Commissioner—Time limit.*

The time limit for appeal under the Indian and Pakistani Residents (Citizenship) Act is three months from the date on which the order appealed from is communicated to the applicant.

SUBRAMANIAM *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 186

5. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Sections 9 and 20—Application for citizenship—Refusal under Section 9—Notice by registered post—Effect of non-delivery—"Shall be deemed".*

A registered letter was posted to an applicant for citizenship informing him, under section 9 (1) of the Indian and Pakistani Residents (Citizenship) Act, that unless he showed cause within three months his application

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would be refused. As the applicant was temporarily absent from his place of residence the letter never reached him and was returned to the Commissioner as " unclaimed ".

Held, that the words " shall be deemed to have been duly served " in section 20 rendered the mere act of posting the registered letter equivalent to personal service ; accordingly, the proved non-receipt of the letter could not assist the applicant in re-opening the matter of the refusal of his application for citizenship.

MARIMUTTU *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 307

6. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for citizenship—Evidence of applicant's residence in Ceylon—Assessment.*

In an application for citizenship by registration under the Indian and Pakistani Residents (Citizenship) Act the evidence of a witness who testifies to the residence in Ceylon of the applicant and against whose integrity nothing can be urged should not be discounted on the ground that he is also an applicant for registration as a citizen.

RAJ RETTY *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 402

7. *Privy Council—Conditional leave to appeal—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, s. 15—Judgment of Supreme Court—Right of appeal therefrom—" Civil suit or action "—Appeals (Privy Council) Ordinance (Cap. 85), s. 3, Rule 1 (b) of Schedule.*

A judgment given in an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act is a judgment in a " civil suit or action in the Supreme Court " within the meaning of section 3 of the Appeals (Privy Council) Ordinance.

TENNEKONE *v.* DURAISWAMY 436

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

In an application for citizenship under the Indian and Pakistani Residents (Citizenship) Act, proof of a mother's continuous residence in Ceylon during a period in which children were born to her raises a very strong inference that the children, while of tender age, were cared for by their mother in a home provided by their father.

KUMARASAMY *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 540

Civil Procedure—

1. *Costs—Adjournment of hearing of a case—Power of Court to order payment of " incurred costs "—Civil Procedure Code, ss. 143, 214* .. 46

See COSTS (1).

2. *Execution—Decree for possession of immovable property—Issue of writ of possession—Obstruction by a transferee* pendente lite*—Application for re-issue of writ—Power of Court to grant it—Civil Procedure Code, ss. 324 to 328* 94

See EXECUTION OF DECREES (1).

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3. *Civil Procedure Code—Section 189—Amendment of judgments and decrees—"Accidental slip or omission".*

Where, in an appeal preferred by the contesting defendants in an action, the plaintiff's claim was dismissed, but the Supreme Court inadvertently omitted to make a formal order that a decree granting the defendants' counterclaim for delivery of possession of the property in dispute should be entered in addition to the decree for the dismissal of the plaintiff's claim—

Held, that as the omission was an accidental one within the meaning of section 189 of the Civil Procedure Code the judgment and decree could be duly amended.

THAMBIPILLAI *v.* MUTHUCUMARASWAMY 97

4. *Execution—Decree to pay money—"Subsequent order directing the payment of money to be made at a specified date"—Civil Procedure Code, s. 337 (1) (b)* 140

See EXECUTION OF DECREES (2).

5. *Civil Procedure Code—Section 461—Action on contract—Requirement of notice of action—Ingredients of such notice.*

Under section 461 of the Civil Procedure Code notice must be given to the Attorney-General before an action can be instituted against him for breach of contract.

Action was instituted against the Crown for Rs. 3,532·50, whereas the notice given under section 461 of the Civil Procedure Code stated the figure to be Rs. 3,192·69.

Held, that the slight variation in the quantum of relief claimed did not render the notice invalid.

PELIS SINGHO *v.* THE ATTORNEY-GENERAL 143

6. *Framing of issues—Duty of Court to clarify issues—Civil Procedure Code, ss. 77, 146* 145

See INSURANCE.

7. *Jurisdiction—Court where an action may be instituted.*

See JURISDICTION.

8. *Civil Procedure—Claim by a defendant against a co-defendant for substantive relief—Jurisdiction of Court to entertain it.*

The Civil Procedure Code does not empower a Court to entertain substantive claims for relief preferred by defendants *inter se*. Therefore, if A sues B for declaration of title to certain property and makes C, a co-owner, a party defendant in order to ensure a more complete and effectual adjudication of the issues arising in the action, C cannot, while supporting A's allegations against B, ask for a declaration of rights and an award of damages on his own account against B.

KANDAVANAM *v.* KANDASWAMY 241

9. *Issues—Belated application to add certain issues—Award of costs—Civil Procedure Code, s. 146.*

The Court is not entitled to penalise a party in costs for suggesting belatedly an issue which arises on the pleadings.

MELIS *v.* ADONISA 305

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10. *Arbitration—Procedure—Section 676 of Civil Procedure Code—Compliance therewith—Scope of terms of reference* 337

See ARBITRATION (2).

11. *Delict—Action against public officer—Substitution of Attorney-General as party defendant—Effect—Civil Procedure Code, ss. 462, 463* .. 364

See DELICTS (2).

12. *Costs—Application for review of taxation—Proper procedure—Civil Procedure Code, s. 214* 406

See COSTS (3).

13. Exceptio rei venditae et traditae—*Seizure of immovable property and registration of notice of it—Sale by judgment-debtor pending the seizure—Subsequent purchase by his nominee from execution purchaser—Validity and effect of such purchase—Civil Procedure Code, ss. 237 (1), 238* .. 440

See VENDOR AND PURCHASER (3).

14. *Action against public officer—Notice of action—Procedure—Malice alleged in plaint—Is notice necessary then?—Civil Procedure Code, s. 461.*

In an action against a public officer in respect of an act purporting to be done by him in his official capacity, the requirements of section 461 of the Civil Procedure Code should be strictly observed and the notice which should be given to the defendant should be in the form prescribed in the Schedule to the Code. A letter of demand written to the defendant by the plaintiff's Proctor does not satisfy the requirements of section 461.

Where malice was alleged against the defendant in an action for defamation instituted against a public officer in respect of a statement purporting to be made by him in his official capacity—

Held, that the allegation of malice in the plaint did not exempt the plaintiff from his duty to give the defendant due notice of the action in conformity with the requirements of section 461 of the Civil Procedure Code.

DE SILVA *v.* ILANGAKOON 457

15. *Abatement of action*—Actio rei vindicatio—*Transfer of subject-matter by plaintiff pending action—Effect of abatement order on separate action instituted by plaintiff's transferee—Civil Procedure Code, ss. 396, 403, 404—Registration of Documents Ordinance, s. 11 (1) and (3)* .. 515

See ABATEMENT OF ACTION.

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

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See also APPEAL ; CIVIL PROCEDURE.

Common Intention—

See COURT OF CRIMINAL APPEAL DECISIONS (13).

Confession—

See EVIDENCE (3), (5), (15).

Consideration—

Evidence Ordinance, s. 92—Deed of sale—Parol evidence to contradict its terms relating to the consideration—Admissibility.

The consideration is an essential term in a contract of sale. Section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction.

THOMAS *v.* FERNANDO 521

Constitutional Law—

See PARLIAMENT.

Construction of Deeds—

Construction of Deeds—Two deeds executed contemporaneously—One single transaction—Kandyan Law Declaration and Amendment Ordinance, No. 3 of 1938—Section 2—" Gift "—Evidence Ordinance, s. 92, proviso 1—Fideicommissum—Revocability.

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Where several deeds form part of one transaction and are contemporaneously executed each deed must speak only as part of the one transaction.

While a conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable, yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer.

By deed P2, A, a Kandyan, conveyed to her father, B, certain property for a consideration in money paid by B. By a separate deed, P3, executed on the same day as deed P2, B purported to make a fidei-commissary gift to A of the identical property which he obtained on deed P2.

Held, that P2 and P3 constituted a single transaction and that, when they were read together, P3 did not fall within the definition of the word " gift " in section 2 of the Kandyan Law Declaration and Amendment Ordinance.

DINGIRI NAIDE *v.* KIRIMENIKE 559

Constructive Trust—

See TRUSTS ORDINANCE.

Contempt of Court—

See PRIVY COUNCIL DECISIONS (1).

Contracts—

1. *Contract—Agreement to sell immovable property—Specific performance—Principles applicable—Covenant to pay liquidated damages.*

Specific performance cannot be claimed in a contract which provides for the substituted obligation of payment of an agreed sum by way of liquidated damages.

In a contract for the sale of certain residential premises, clause 8 provided as follows :—

" 8. In the event of the purchaser being ready and willing to complete the said sale in terms hereof and the vendors failing refusing or neglecting to execute and cause to be executed the said deed of transfer as aforesaid then and in such case the vendors shall repay forthwith the said deposit of rupees twelve thousand five hundred (Rs. 12,500) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the purchaser a sum of rupees fifteen thousand (Rs. 15,000) as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of rupees twelve thousand five hundred (Rs. 12,500). "

Clause 9 provided further that, should the purchaser default for any reason, he would, though liable to pay an agreed sum to the vendors as liquidated damages, be entitled to a refund of his earlier deposit.

Held, that the purchaser was not entitled to claim specific performance of the contract in the event of the vendors failing, refusing or neglecting to execute and cause to be executed a conveyance of the premises.

THAHEER *v.* ABDEEN 1

2. *Interest—Tender of debt due—Liability to pay interest thereafter* .. 21

See INTEREST.

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3. *Contract—Prohibitory statute—Illegality—Construction—Excise Ordinance (Cap. 42)—Sections 17, 24, 43, 45.*

Where an agreement does not expressly contemplate the commission of a breach of any statutory provision, it can be held to be unlawful only if its performance would necessarily involve such a breach or if extrinsic evidence indicates the intention or the need to commit such a breach.

The 1st and 2nd defendants who possessed exclusive and non transferable licences for the sale of arrack entered into an agreement of " partnership " with the plaintiff and the 3rd defendant. The agreement did not envisage that any one but the actual licensees would be responsible for the sale of arrack at taverns, and the object of the partnership was only to contribute capital and to share the profits and losses. When the plaintiff sued for an accounting and to recover his share of the profits, the trial Judge dismissed the action on the preliminary issue that the agreement was illegal and contrary to public policy and could not therefore be enforced.

Held, that the contract did not contravene any relevant provision of the Excise Ordinance and was not illegal.

KANDASAMY *v.* KANDIAH 115

4. *Contract—Sale of goods—Arbitration clause—Arbitration on reference by one party alone—Validity of award—Reciprocal Enforcement of Judgments Ordinance, s. 3.*

In a written contract entered into between a buyer in England and a seller in Ceylon for the sale of 50 tons of rubber, the seller failed to perform his part of the contract. Thereupon the buyer referred the matter to the Rubber Trade Association of London for arbitration in terms of the contract which provided that it was governed by the Rules, Regulations and Bye-laws of the Rubber Trade Association of London. The arbitrators awarded that the seller should pay to the buyer a sum of £ 15,000. As the seller failed to satisfy the award, the buyer obtained an originating summons from the High Court of Justice under section 26 of the Arbitration Act of 1950 and duly served it on the seller in Ceylon.

The seller, having objected to the arbitration, took no part in the arbitration proceedings and did not appear in the High Court of Justice in England.

When the buyer applied under section 3 of the Reciprocal Enforcement of Judgments Ordinance to have the judgment of the English Court registered in the District Court of Colombo, the District Judge refused the application on the basis of the objection taken by the seller that the High Court in England had no jurisdiction over the seller as the seller had not submitted himself to its jurisdiction.

Held, that, under a marginal clause in the contract, disputes between the parties were to be settled by arbitration. According to the law of England which regulated the transaction in question there was nothing which required that the reference to arbitration should be a formal document signed by both parties. In the circumstances the judgment of the English Court was registrable in the District Court of Colombo under section 3 of the Reciprocal Enforcement of Judgments Ordinance.

MARCHANT HEYWORTH & SWIFT, LTD. *v.* USOOF .. 217

5. *Contract—Stipulation in favour of third party—Validity thereof—Roman-Dutch Law.*

Under Roman-Dutch law a stranger to a contract is entitled to claim the benefit of a stipulation made in his favour. This rule is subject only to the qualification that until the benefit stipulated for has been accepted by him he can be deprived of it by agreement between the contracting parties without reference to him.

KODIKARA *v.* FERNANDO 427

6. *Contract—Employer and employee—Provident Fund—Nomination of beneficiary.*

A Provident Fund was kept by an employer Company for the benefit of its employees. One of the Rules relating to it provided that on the

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marriage of an employee the nomination previously made by him would cease to be valid and that a fresh nomination should be made by such employee which "shall be duly registered". No separate register of nominees was ever maintained.

Held, that the failure to enter the second nomination in a separate register could not invalidate such nomination.

BELL *v.* ARNOLDA 527

7. *See also* CONSIDERATION.

Control of Prices Act—

1. *Control of Prices Act, No. 29 of 1950—Section 4—Price Order—Prosecution thereunder—Proof of Minister's approval of the price order not essential—Mode of proof of the price order—Judicial notice—Evidence Ordinance (Cap. 11), ss. 57, 78 (3).*

Where a person is charged with contravening a price order made and signed by the Controller and published in the *Government Gazette* under sub-sections 1, 3 and 4 of section 4 of the Control of Prices Act, it is not obligatory on the prosecution to place before the Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order has duly received the Minister's approval.

The Court may take judicial notice of a price order which is referred to in the *Government Gazette*. Alternatively, the price order, being a public document issued by a department of Her Majesty's Government, may be proved, under Section 78 (3) of the Evidence Ordinance, by a copy or extract of it contained in the *Government Gazette*.

FOOD AND PRICE CONTROL INSPECTOR *v.* PIYASENA .. 310

2. *See also* CRIMINAL PROCEDURE (12).

Co-operative Societies Ordinance—

1. *Co-operative Societies Ordinance—Section 45—Reference of dispute to Registrar—Procedure—Requirement of agreed reference—Award of arbitrator—Appeal therefrom—Parties must be heard—Referability of dispute to arbitration—Crucial date—Validity of Rule 38 (13) made under Section 46 (2) (t).*

In an appeal to the Registrar under section 45 (3) of the Co-operative Societies Ordinance, the appellant should be afforded an opportunity of being heard before a decision is made against him. Failure to observe the rule of *audi alteram partem* would vitiate the decision of the Registrar.

BASNAYAKE, C.J.—(i) The proper way to refer a dispute to the Registrar under section 45 of the Co-operative Societies Ordinance is to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute. An ex parte statement signed by one of the parties alone would not be a proper reference.

(ii) The referability of a dispute to arbitration under section 45 must be determined on the state of the law at the time the dispute arises.

(iii) Rule 38 (13) which provides that an award shall be enforceable as if it were a decree of Court is *ultra vires*.

NEREUS *v.* HALPE KATANA CO-OPERATIVE STORES SOCIETY, LTD. .. 505

Costs—

1. *Costs—Adjournment of hearing of a case—Power of Court to order payment of "incurred costs"—Civil Procedure Code, ss. 143, 214.*

When a Judge, acting under section 143 of the Civil Procedure Code, grants an adjournment of the hearing of a case, he may order the party,

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at whose request the adjournment is granted, to pay "incurred costs". But when he makes such an order he should state his estimate of the "incurred costs" and the grounds on which he bases that estimate.

RAJASEKERAM *v.* RAJARATNAM 46

2. *Issues—Belated application to add certain issues—Award of costs—Civil Procedure Code, s. 146* 305

See CIVIL PROCEDURE (9).

3. *Costs—Application for review of taxation—Proper procedure—Civil Procedure Code, s. 214.*

Where a party, who had been ordered to pay the costs of an inquiry and was dissatisfied with the taxation of costs, submitted a statement of objection to the Secretary of the Court who in turn submitted the document to the District Judge, recommending that the matter should be fixed for inquiry under section 214 of the Civil Procedure Code—

Held, that the procedure was substantially in conformity with the provisions of Section 214 of the Civil Procedure Code.

TUDOR *v.* DASSANAYAKE 406

Court of Criminal Appeal Decisions—

1. *Trial before Supreme Court—Indictment—Power of Judge to quash it—Power of Judge to stop a case—Effect of failure to exercise it—Separate trial of co-accused—Stage at which application for it should be made—Criminal Procedure Code, s. 234 (1).*

An Assize Judge has no power to quash an indictment before the case for the prosecution is closed merely because he anticipates that the evidence would not support the charge.

Although the decision whether or not to stop a case against any particular accused person under section 234 (1) of the Criminal Procedure Code rests primarily with the presiding Judge, an erroneous decision that a *prima facie* case had been made out against an accused person does not constitute an illegality which vitiates the trial of his co-accused.

Where an accused person desires to call, as a witness for the defence, a person jointly indicted with him, the proper course for him to take is to invite the Judge at the outset to order separate trials.

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2. *Evidence—Commission of cognizable offence—Investigation by police officer—Right to continue it after commencement of Magisterial inquiry—Statement of accused to police officer—Right of Crown to use it after close of defence—Mode of proving such statement—Criminal Procedure Code, ss. 153, 155 et seq., 237 (1)—Evidence Ordinance, s. 155.*

The appellant was convicted of murder. At the trial he gave evidence on his own behalf. In the course of the cross-examination he was asked whether he made certain statements to the police officer who investigated the circumstances of the commission of the offence. As he did not admit the statements, the prosecuting Counsel, after the close of the defence, sought to impeach his credit by proving that he made those statements. The statements in question were recorded by the police officer after the Magistrate had commenced his preliminary inquiry at the scene of the offence and after he had made order remanding the accused to Fiscal's custody.

Held (by the majority of the Court), (i) that an investigation by a police officer under Chapter 12 of the Criminal Procedure Code does not automatically come to an end upon the commencement of the Magisterial inquiry under section 153, or Chapter 16, of the Criminal Procedure Code.

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(ii) that the statements made by the accused to the police officer were admissible under section 155 of the Evidence Ordinance to impeach the credit of the accused by proof of former statements inconsistent with his evidence, *R. v. Thuraisamy* (1952) 54 N. L. R. 449, distinguished.

(iii) that the police officer's evidence in the instant case amounted to his giving oral evidence of the contents of the statement made to him and was therefore unobjectionable. *R. v. Jinadasa* (1950) 51 N. L. R. 529, followed.

Held further (by the whole Court), that even if the appellant was under illegal detention at the time his statement was recorded by the police, evidence of the statements made by him could not properly be excluded on the sole ground that he was illegally detained when he made the statements sought to be proved.

M. P. PERERA 35

3. *Conviction for murder—Grounds of appeal—Time limit for stating them—Strict compliance necessary—Court of Criminal Appeal Ordinance, No. 23 of 1938, ss. 4, 5 (1), 8 (1), 16.*

Evidence—Burden of proof—"Reasonable doubt"—Misdirection.

(i) *Held* (by the majority of the Court), that, in the case of a conviction involving sentence of death, fresh grounds of appeal, in addition to those stated in the notice of appeal or application for leave to appeal, will not be entertained by the Court after the expiration of the time limit of fourteen days laid down in section 8 (1) of the Court of Criminal Appeal Ordinance.

(ii) The three prisoners were convicted of murder. The defence of the 1st and 3rd accused was that they were not present at the scene of the offence and took no part in it, while the defence of the 2nd accused was that he killed the deceased in the exercise of the right of private defence. Of the three accused, only the second gave evidence at the trial. He stated that he acted in self-defence and that the 1st and 3rd accused were not present at the scene.

In the summing up, the Judge stressed that if the jury accepted the evidence of the 2nd accused that the 1st and 3rd were not present at the scene they had to acquit the 1st and 3rd accused. He did not, however, direct the jury that if the version of the 2nd accused raised reasonable doubt as to the presence of the 1st and 3rd accused these two had still to be acquitted.

Held, that even if the jury held that the burden resting on the 2nd accused in regard to his own defence had not been discharged because they were left in a state of honest doubt whether or not to accept the material parts of his evidence it was nevertheless possible that he raised a reasonable doubt as to the presence of his co-prisoners. The 1st and 3rd accused were therefore entitled to succeed in appeal on the ground of misdirection.

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4. *Court of Criminal Appeal—Conviction for murder—Appeal therefrom—Grounds of appeal other than those raised in the petition of appeal—Power of Court to consider them.*

Charge of murder—Burden of proof—Misdirection.

(1) Although, in the case of a conviction involving sentence of death, the prisoner cannot claim as of right to make submissions in the Court of Criminal Appeal except on grounds specified in his petition of appeal or application for leave to appeal, the Court itself may set aside the conviction on any other ground which is sufficiently substantial to justify a decision that the verdict should not be allowed to stand.

Per Curiam—"Let it be said in conclusion that it is quite proper (and that it is indeed his duty) for an Advocate (whether he represents the defence or the Crown) to bring to the notice of this Court any substantial matter which, though not formally raised within the prescribed limit of time, nevertheless merits consideration in a pending appeal or application. The assistance which the Court of Criminal Appeal expects in such a situation must, of course, be given with a due sense of responsibility."

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(2) The issues involved in a prosecution for murder were of such nature that the accused could only have been convicted of murder if, at the end of the whole case, the jury were perfectly satisfied that he was the person who had stabbed the deceased, and that he had thereby caused her death with a "murderous intention". In the course of the summing-up, however, the Judge stated that the jury could not acquit the accused unless they were convinced that the story for the prosecution was improbable and that they should consider the whole case by applying the "test of probability".

Held, that the conviction must be quashed for misdirection as to the burden of proof.

GUNAWARDENE 126

5. *Confession—Right of Crown to cross-examine accused on it—Evidence Ordinance, s. 25.*

Penal Code—Section 294—Proviso 1 to Exception 1—Burden of proof—Evidence Ordinance, ss. 103, 105.

(1) It is contrary to the provisions of section 25 of the Evidence Ordinance to cross-examine an accused person on what are, in effect, the contents of a confessional statement made by him to the Police.

In a prosecution for murder the accused gave evidence and sought to bring his case within Exception 1 to section 294 of the Penal Code which provides that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. His story was that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter. He stated that after killing the deceased he went to the Police Station and gave himself up. In cross-examination he answered in the affirmative a question whether he had stated to a single police officer that he was insulted by the deceased. Further, after the close of the defence, the prosecuting Counsel moved to call in rebuttal the police officer to whom the accused alleged he had made the statement, and the trial Judge disallowed the application.

Held, that the question put to the accused in cross-examination coupled with the application made by the prosecuting Counsel, in the presence of the Jury, to lead evidence in rebuttal amounted to a contravention of section 25 of the Evidence Ordinance.

(2) Exception 1 to section 294 of the Penal Code is subject to the proviso :

"That the provocation is not sought or voluntarily provoked as an excuse for killing or doing harm to any person."

Held, that the proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as and no higher than that resting on an accused person who claims the benefit of the Exception to which section 105 of the Evidence Ordinance applies.

Held further, that where the evidence led for the defence requires a direction to the jury that the burden is on the Crown to bring itself within the proviso, the failure so to direct amounts to a misdirection.

BATCHO 100

6. *Provocation—Charge of murder—Mere abuse may amount to grave and sudden provocation—Question of fact for jury—Penal Code, s. 294, Exception 1.*

In a trial for murder the accused gave evidence stating that he stabbed the deceased in self-defence when the latter struck him with a club. At the same time the evidence of two of the prosecution witnesses indicated that the stabbing was immediately preceded by "foul abuse" on the part of the deceased.

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Held, that the jury should have been directed in the course of the summing-up that it was for them to decide, after due consideration of the evidence of the prosecution witnesses and of the accused, whether the deceased man gave the accused provocation and, if he did, whether such provocation was grave enough to reduce his offence to culpable homicide not amounting to murder within the meaning of Exception 1 to section 294 of the Penal Code.

PIYASENA 22

7. *Evidence—Identification of a dead person by his skull—Medical witness—Expert only in medical matters—Evidence Ordinance, s. 45.*

In a trial for murder the Judicial Medical Officer of Colombo expressed the opinion that the skull produced in the case was that of the deceased.

He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the head of the deceased on a photograph of his skull. There was, however, no evidence that the medical witness was an expert on identification by superimposition of photographs.

Held, that it was not established that identification of dead persons by superimposition of photographs was a science or art within the meaning of section 45 of the Evidence Ordinance. The mere reference to the medical witness as " Judicial Medical Officer, Colombo " was insufficient for the purpose of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fell within the functions of a medical officer.

Witness—Right of a party to recall him—Discretion of Court—Evidence Ordinance s. 138 (4)

The Court is not bound to permit a witness to be recalled whenever an application is made in that behalf under section 138 (4) of the Evidence Ordinance, unless the party making the application gives satisfactory reasons.

Jury—Communication between juror and witness—Duty of Court to discharge jury—Oath of separation—Effect thereof.

A Judge would not be justified in discharging the Jury merely because a witness was seen conversing with a Juror, unless the conversation was improper and it is necessary in the interests of justice to discharge the Jury.

On the third day of trial it was alleged by the accused person's pleader that the medical witness was seen talking to a Juror during the luncheon adjournment on the previous day. The allegation was made in the Judge's Chambers without any application for a retrial after investigation. At the time of the alleged conversation the witness had finished his evidence. On the sixth date of trial application was made to discharge the Jury.

Held, that there was no valid ground for discharging the Jury.

Evidence—Opinions of experts expressed in text books—When Counsel may read them during address to the Jury or cross-examine an expert witness on them—Evidence Ordinance, ss. 46, 57, 60.

The proviso to section 60 of the Evidence Ordinance does not enable Counsel to read to the Jury extracts from treatises on medical jurisprudence which were not properly admitted in evidence in the course of the trial and before Counsel's address. Counsel is not entitled to read to the Jury the opinion of an expert expressed in any treatise commonly offered for sale unless, where the expert himself is dead or cannot be called as a witness, such opinion has been proved by the production of the treatise. *R. v. Baba* (6 N. L. R. 35), followed. *Quaere*, whether the Court could be called upon to take judicial notice of such opinion on application made under section 57 of the Evidence Ordinance.

Although, under section 46 of the Evidence Ordinance, Counsel may cross-examine an expert witness by reading to him extracts from a treatise written by an expert, the witness may be asked only questions which he is competent and qualified to answer.

PINHAMY 169

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8. *Causing death of woman by act done to cause miscarriage—Elements of the offence—Burden of proof—Right of accused to plead consent of deceased—Evidence of similar acts—Relevancy—Evidence Ordinance, s. 15—Penal Code, ss. 81, 303, 304, 305.*

Summing-up—" Reasonable doubt "—Quantum of direction.

(1) In a prosecution under section 305 of the Penal Code for causing the death of a woman by an act done with intent to cause miscarriage, it is not necessary that the Crown should prove that the accused did not cause the miscarriage in good faith for the purpose of saving the life of the woman. The accused, however, is entitled to the benefit of any general exception within the ambit of which he could bring himself.

If the accused relies on the exception in section 81 of the Penal Code the burden is on him to show that the deceased expressly or impliedly gave her consent to suffer, or take the risk of, no less harm than death.

(2) In a prosecution under section 305 of the Penal Code the prosecution may, under section 15 of the Evidence Ordinance, lead evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal.

A nurse who was employed under the accused gave evidence for the prosecution stating that during the ten months of her service under the accused there were 150 to 175 cases in which the accused had caused miscarriage and that in each of those cases the accused used the same instruments and resorted to the same procedure.

Held, that the names of the persons on whom the operations were performed were not necessary to make the evidence relevant.

(3) Once the jury are directed in unmistakable terms as to the burden of proof which lies on the prosecution, the Judge is under no duty to keep on repeating that the accused should be given the benefit of any reasonable doubt.

WAIDYASEKERA 202

9. *Evidence—Witness—Conflict between evidence on oath and an earlier statement—Verdict should then be found on the rest of the evidence—Summing-up—Misdirection—Power of Judge to interrogate witnesses.*

(i) If the evidence of a witness on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point, his evidence is worthless and cannot properly be taken into account at all for the purpose of deciding that issue. It is illogical to conclude in addition (1) that, because his evidence cannot be acted upon, the opposite of what he said represented the truth, and (2) that as the opposite of what he said at the trial happens to coincide with the version given by another witness, the veracity of that other witness is thereby confirmed.

(ii) Although a presiding Judge is entitled to interrogate a witness for the prosecution, it is generally far more satisfactory to leave the conduct of the case on any vital point of controversy in the hands of the prosecuting Counsel, who must make his own decision whether or not to apply to the Judge for permission to cross-examine as an adverse witness a man whom he has advisedly called.

HETHUHAMY 255

10. *Court of Criminal Appeal—Insanity of prisoner subsequent to conviction—Adjournment.*

Hearing adjourned in view of a report from the Prison Medical Officer according to which the appellant, since his admission to prison after conviction, was showing symptoms of mental derangement.

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11. *Evidence—Accused person's statement to police—Admissibility—Exculpatory statement—Admission—Previous or subsequent conduct—Evidence in rebuttal—When permissible—Evidence Ordinance, ss. 8 (2), 17 (1), 21, 25.*

The 1st and 2nd accused were charged with robbery, and the 3rd accused was charged with abetment of that offence. The robbery was said to have been committed during the afternoon of the 7th September, 1951. When the 3rd accused was taken into custody he made two statements to the officer in charge of the police station. Evidence of the contents of both these statements was adduced by the prosecution at the trial. According to the police officer's version of the first statement, the 3rd accused gave the police an account of how he spent the afternoon of the 7th September, 1951. The police officer's version of the second statement was that the 3rd accused had refused an invitation on the 31st August to join in a conspiracy with the 1st and 2nd accused to commit the robbery on the 7th September. If the jury believed that the 3rd accused had been invited on the 31st August to join in a conspiracy with the 1st and 2nd accused and that after the robbery he gave the police a false account of how he spent the afternoon of the 7th September, they might well have found in those facts a ground for accepting the evidence of two accomplices implicating the 3rd accused, which they might otherwise have rejected.

It was contended that the statements to the police were inadmissible on the grounds that the one relating to the events of the 7th September was not relevant and that the other was a confession to a police officer and therefore barred by section 25 of the Evidence Ordinance.

Held (by the majority of the Court), that the first statement was relevant under section 8 (2) of the Evidence Ordinance, and that the second statement was an exculpatory statement and not a confession, although is was a statement which suggested an inference as to a relevant fact and was therefore an admission as defined in section 17 (1). Being an admission the second statement was admissible in evidence under section 21, to prove as against the 3rd accused that a week before the robbery he had been invited to join the other two accused in a conspiracy to commit that offence.

Held further, that evidence in rebuttal should not be permitted except in a case where a matter has arisen *ex improviso* or the evidence was not admissible before the prosecution was closed.

M. S. PERERA 274

12. *Criminal Procedure Code—Section 233—Meaning of words " all statements "—Non-summary inquiry—Election of accused to give evidence—Is his evidence a " statement "?—Liability of accused to cross-examination—Admissibility, at the trial, of accused's deposition—Sections 134, 157 (1), 160, 161 (2), 164, 233, 286 (1), 302 (1)—Evidence Ordinance, ss. 9, 17, 21, 157.*

By section 233 of the Criminal Procedure Code, " All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ".

Held, that the evidence given by an accused person under section 161 (2) of the Criminal Procedure Code in the course of a non-summary inquiry is not a statement within the contemplation of the words " all statements " in section 233. Therefore, the prosecution is not bound to put in and read such evidence before closing its case at the trial of the accused.

The Queen v. Sathasivam (1953) 54 N. L. R. 541, overruled.

Held further, that, when the Clerk of Assize is called to prove certain statements which were put to witnesses in cross-examination, the deposition made by the accused under section 161 (2) of the Criminal Procedure Code is not admissible under sections 9 and 21 of the Evidence Ordinance in order to prove the fact that a statement, which had been made by the accused before a Magistrate under section 134 of the Criminal Procedure Code and which the prosecution has already put in as a confession of the accused, had been retracted by the accused in his evidence at the non-summary inquiry. It is, however, open to the accused to give evidence at the trial and rely on the deposition as corroborating his evidence under section 157 of the Evidence Ordinance.

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Obiter : When an accused elects to give evidence on his own behalf at a non-summary inquiry, he is liable to be cross-examined under the provisions of Chapter XII of the Evidence Ordinance subject, however, to the provisions of section 54 thereof.

Joint trial—Principal and abettor—Confession by abettor—Separation of trials—Factors for consideration—Discretion of Court—Criminal Procedure Code, s. 184.

A confession made by a co-accused and admitted in evidence at the trial does not necessarily vitiate the joint trial of several accused if sufficient warning is given to the Jury that the confession is not evidence against the other accused.

Where several persons concerned in committing an offence are charged together, the question whether a separate trial should be ordered or not is a matter entirely at the discretion of the trial Judge and is governed by section 184 of the Criminal Procedure Code. Once that discretion has been judicially exercised, the Court of Criminal Appeal will not interfere, except when it appears to it that a miscarriage of justice has resulted from the prisoners being tried together. In considering the question of separation of trials it would be wrong to look at the matter exclusively from the point of view of the accused. The interests of justice demand that the Crown should not be unduly hampered in its presentation of the case.

Inspection of scene of offence—Propriety of conducting experiments during such inspection—Criminal Procedure Code, s. 238.

In the course of the trial, the Judge, Jurors and Counsel visited the scene of the offence. The 1st accused did not desire to join in the visit, but his Counsel was present on his behalf. During the inspection a police officer stood at a window and, introducing his hand through the grill, demonstrated that a person of the 1st accused's height could have shot the deceased from outside the window from which the deceased was alleged to have been shot. When the Court re-assembled after the inspection, the police officer gave evidence under oath explaining the demonstration.

Held, that the demonstration of the police officer at the scene of the offence was not obnoxious to the provisions of section 238 of the Criminal Procedure Code.

Confession—Voluntarily made before Magistrate—Subsequent allegation by accused that the statement was not voluntary—Admissibility—Criminal Procedure Code, s. 134—Evidence Ordinance, ss. 24, 80.

At an inquiry held by the trial Judge in the absence of the Jury the 2nd accused, who had made a confessional statement before a Magistrate, gave evidence that he was virtually in the custody of the Police at the time the statement was recorded under section 134 of the Criminal Procedure Code. The Judge, however, found that the statement was made by the accused voluntarily.

Held, that the evidence was admissible in evidence against the 2nd accused.

D. M. A. PERERA 313

13. Mens rea—*Joint indictment—Several accused—Common intention—Guilty knowledge—Misdirection—Penal Code, ss. 32, 146, 294, 317.*

By Section 32 of the Penal Code—

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Held (by the majority of the Court), that the Section has only a limited scope in relation to offences in which guilty knowledge is an element. It does not constructively impute to one *socius criminis* the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts, has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence.

SOMAPALA 350

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14. *Charge of murder—Circumstantial evidence—No evidence of use of lethal weapon—Inference of intention requisite to constitute offence of murder.*

The accused was convicted of murder. The verdict of the jury implied that the death of the deceased was caused by the accused. According to the evidence, however, which was purely circumstantial, there were no signs of the use of a lethal weapon.

Held, that in the circumstances the verdict should be altered to one of voluntarily causing grievous hurt.

DHARMADASA BANDARA 524

Courts Ordinance—

Section 45 568
Section 75 166

Criminal Law—

1. *Penal Code—Unlawful assembly—Sections 138, 140.*

A person cannot be convicted of the offence of being a member of an unlawful assembly except in association with four others.

THE QUEEN *v.* THIAGARAJAH 58

2. *Penal Code—Section 294—Proviso 1 to Exception 1—Burden of proof—Evidence Ordinance, ss. 103, 105* 100

See COURT OF CRIMINAL APPEAL DECISIONS (5).

3. *Causing death of woman by act done to cause miscarriage—Elements of the offence—Burden of proof—Light of accused to plead consent of deceased—Evidence of similar acts—Relevancy—Evidence Ordinance, s. 15—Penal Code, ss. 81, 303, 304, 305* 202

See COURT OF CRIMINAL APPEAL DECISIONS (8).

4. Mens rea—*Joint indictment—Several accused—Common intention—Guilty knowledge—Penal Code, ss. 32, 146, 294, 317* 350

See COURT OF CRIMINAL APPEAL DECISIONS (13).

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

Criminal Procedure—

1. *Trial before Supreme Court—Indictment—Power of Judge to quash it—Power of Judge to stop a case—Effect of failure to exercise it—Separate trial of co-accused—Stage at which application for it should be made—Criminal Procedure Code, s. 234 (1)* 7

See COURT OF CRIMINAL APPEAL DECISIONS (1).

2. *Bribery Act, No. 11 of 1954—Indictment—Requirement of signature of Attorney-General—Sections 3 (2), 5, 6 (1), 8, 9 (1), 19 (b), 25, 78 (1)—Criminal Procedure Code, ss. 148 (e), 165 F, 186, 393* .. 9

See BRIBERY ACT.

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3. *Evidence—Commission of cognizable offence—Investigation by police officer—Right to continue it after commencement of Magisterial inquiry—Statement of accused to police officer—Right of Crown to use it after close of defence—Mode of proving such statement—Criminal Procedure Code, ss. 153, 155 et seq., 237 (1)—Evidence Ordinance, s. 155* 35

See COURT OF CRIMINAL APPEAL DECISIONS (2).

4. *Indictment—Charges contained therein—Must not be different from those inquired into by Magistrate—Scope of Attorney-General's power to re-open Magisterial inquiry—Criminal Procedure Code, ss. 156, 159, 160, 161, 162 (1), 163, 389, 390 (2), 391, 393* 58

See INDICTMENT (3).

5. *Information Book—Statement of a complainant recorded therein—Right of accused to obtain certified copy of it—" Public document "—" Right of inspection "—Evidence Ordinance, ss. 74, 76, 123, 124, 125—Criminal Procedure Code, ss. 121 (1), 122—Proof of Public Documents Ordinance, ss. 2, 3* 289

See EVIDENCE (11).

6. *Criminal Procedure Code—Section 233—Meaning of words " all statements "—Non-summary inquiry—Election of accused to give evidence—Is his evidence a " statement " ?—Liability of accused to cross-examination—Admissibility, at the trial, of accused's deposition—Sections 134, 157 (1), 160, 161 (2), 164, 233, 286 (1), 302 (1)—Evidence Ordinance, ss. 9, 17, 21, 157* 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

7. *Joint trial—Principal and abettor—Confession by abettor—Separation of trials—Factors for consideration—Discretion of Court—Criminal Procedure Code, s. 184* 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

8. *Inspection of scene of offence—Propriety of conducting experiments during such inspection—Criminal Procedure Code, s. 238* .. 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

9. *Confession—Voluntarily made before Magistrate—Subsequent allegation by accused that the statement was not voluntary—Admissibility—Criminal Procedure Code, s. 134—Evidence Ordinance, ss. 24, 80* .. 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

10. *Charge—Alternative charge—Duplicity—Particulars of offence—Motor Traffic Act, No. 14 of 1951, ss. 153 (2), 153 (3), 219 (1), 219 (2)—Criminal Procedure Code s. 169* 355

See INDICTMENT (4).

11. *Summary trial of non-summary offence—Appeal preferred by accused—Right of Crown to object to summary proceedings on ground of gravity of offence—Criminal Procedure Code, ss. 152 (3), 338 (2)—Penal Code, s. 457.*

In a prosecution for forgery punishable under section 457 of the Penal Code the accused-appellant was tried summarily under the provisions of section 152 of the Criminal Procedure Code. The appellant had no objection to his having been tried summarily, and the Crown had no objection either until after the appellant had demonstrated that he was entitled to have his conviction set aside on the merits.

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Held, that in the circumstances the gravity of the offence with which the accused was charged was not by itself a sufficient ground for remitting the case for a non-summary investigation.

PERERA *v.* THEDIAS 358

12. " *Acquittal* "—" *Discharge* "—*Right of appeal—Criminal Procedure Code, ss. 2, 190, 191, 330, 336—Control of Prices Act, No. 29 of 1950, s. 8 (1).*

The inadvertent use by a Magistrate of the word " discharge " in describing an acquittal cannot deprive the accused person of the protection of sections 330 and 336 of the Criminal Procedure Code.

A Magistrate may in certain situations enter a verdict of acquittal under section 190 of the Criminal Procedure Code even before the case for the prosecution has been closed—provided that the Magistrate is satisfied that any further evidence which the complainant proposes to lead would not suffice to establish a *prima facie* case of guilt against the accused.

The accused was charged with contravening a price order made under the Control of Prices Act. The Magistrate, without calling for a defence and when the case for the prosecution had been virtually closed, upheld wrongly (but within the scope of his jurisdiction) an objection raised by the defence that the price order was bad in law as it had not received the necessary Ministerial approval. Accordingly, he made order " discharging " the accused.

Held, that the Magistrate recorded in fact a verdict of acquittal on the merits. No appeal could therefore be entertained except upon compliance with the requirements of section 336 of the Criminal Procedure Code.

Held further, that if a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

WANIGASEKERA *v.* SIMON 377

13. *Contempt of Court—Perjury—Exercise of summary powers of punishment—Principles applicable—Criminal Procedure Code, s. 440* .. 409

See PRIVY COUNCIL DECISIONS (1).

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

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See also COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL PROCEDURE.

Damages—

See CONTRACTS (1) ; DELICTS.

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See INTEREST.

Declaratory Decrees—

Remedy of declaratory decree—Jurisdiction of Court to grant it .. 481

See QUIA TIMET ACTIONS.

Decree—

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See CIVIL PROCEDURE (3).

Deeds—

See CONSTRUCTION OF DEEDS.

Delicts—

1. *Delict—Malicious abuse of process—Necessary elements—Trespass—* Injuria*—Exemplary damages—Civil Procedure Code, ss. 287, 288.*

Wrongful entry into premises made in purported pursuance of a writ improperly obtained and the attempt to oust the occupants even without force constitutes trespass amounting to an *injuria*. In such a case the award of exemplary damages is justified.

COOREY *v.* JAYAWICKREMA 300

2. *Delict—Action against public officer—Substitution of Attorney-General as party defendant—Effect—Civil Procedure Code, ss. 462, 463.*

If in an action in tort against a public officer the Attorney-General is substituted under section 463 of the Civil Procedure Code in the place of

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the party defendant, the same issues arise as would have arisen in the action against the public officer himself; if the plaintiff's cause of action against the public officer is established the decree is entered against the Attorney-General and will be satisfied in the same way as any other decree awarding relief against the Crown.

THE ATTORNEY-GENERAL *v.* RUSSEL 364

3. *Negligence—Accident—Application of maxim* res ipsa loquitur*—Onus of proof—Nature of burden on defence.*

In a case where the doctrine of *res ipsa loquitur* is applicable, the burden on the defendant is not only to give a reasonable explanation of the accident in question but also to show that the specific cause of the accident does not connote negligence on his part.

A motor truck belonging to the defendant ran off the road into the plaintiff's house, which was about six feet away from the edge of the road and stood at a bend in the road. Defendant pleaded inevitable accident. He sought to rebut the presumption arising from the maxim *res ipsa loquitur* by merely stating that the immediate cause of the accident was that the steering-rod got out of its place at the crucial moment. He did not, however, adduce any evidence as to how and why the steering-rod came out of its place. There was no evidence whatsoever that the vehicle was regularly serviced or serviced at all. Even the Motor Car Examiner who examined the vehicle soon after the accident had not been summoned by the defendant to give evidence.

Held, that the fact that the steering-rod went out of control was no answer unless the defendant proved—and the legal burden was on him to prove—that it was no fault of his that the steering-rod failed. The defendant did not discharge, or even attempt to discharge, the burden that lay on him and was therefore liable to pay damages.

Wije Bus Co., Ltd. v. Soysa (1948) 50 N. L. R. 350, not followed.

CABRAL *v.* ALBERATNE 368

4. *Master and servant—Negligent driving of motor car—Retention of control by person other than driver—Responsibility for damage* .. 433

See PRIVY COUNCIL DECISIONS (2).

5. *Delict—Landlord and tenant—Wrongful dispossession of tenant by landlord—*Injuria*—Landlord's liability to pay damages.*

A landlord is not entitled to take possession of the rented premises unless the tenant has vacated them or surrendered possession of them. The fact that the tenant agreed to quit the premises is not material if the landlord knows that, in spite of the agreement, the tenant intends to remain in occupation of the premises.

Wrongful dispossession of the tenant by the landlord constitutes an *injuria* involving *contumelia*.

ABEYEWARDENA *v.* SIRI NIVASA 531

Discharge—

"*Acquittal*"—"*Discharge*" 377

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Divorce—

See HUSBAND AND WIFE.

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Donations—

1. *Donation—Gift made by way of dowry—Right of donor to recover it if marriage does not take place.*

Where a man makes a gift of land to his prospective bride in contemplation of marriage, the gift must be returned if the marriage does not take place even through the fault of the donor.

HEEN BANDA *v.* SINNIAH 134

2. *Donation—Minor as donee—Acceptance by donee's elder brother—Validity.*

Where a donation executed by a father in favour of his minor son was accepted by the donee's elder brother on behalf of the minor donee—

Held, that there was no valid acceptance on behalf of the minor donee.

PACKIRMUHAIYADEEN *v.* ASIAUMMA 449

3. *See also* FIDEICOMMISSA.

Dowry—

See DONATIONS.

Estate Duty—

Estate Duty Ordinance (Cap. 187)—Section 6 (d)—"Property passing on death"—Transfer of property by A to C—Consideration furnished by B—Death of B—"Disposition purporting to operate as gift inter vivos *".*

A contracted with B to sell to B or to B's nominee or nominees the entirety of a property for a consideration of Rs. 505,000. B thereafter called upon A to convey the property to himself and to certain members of his family (including C) in certain agreed shares. Accordingly A transferred an undivided one-fifth share to C in exchange for the consideration of Rs. 101,000 which was furnished by B. Within three years of the date of the execution of the conveyance B died. The value of the share at the time of B's death was higher than it had been at the time of the transfer.

Held, that the conveyance executed by A in favour of C was a disposition by B by way of gift within the meaning of section 6 (*d*) of the Estate Duty Ordinance and that the subject-matter of the gift was the share which C received and not the sum of Rs. 101,000 provided by B as purchase price.

FERNANDO *v.* ATTORNEY-GENERAL 42

Estoppel—

See EVIDENCE (19).

Evidence—

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

In a claim against the estate of a dead man the plaintiff based his claim on a witness's version of a conversation which allegedly took place between the witness and the deceased over 20 years before the trial commenced.

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Held, that in a claim against a dead man's estate, though there is no rule of law that judgment cannot be obtained on the uncorroborated evidence of the claimant, it is the duty of the Court to scrutinise the plaintiff's case with " great jealousy ".

MUTHTHAL ACHY *v.* MURUGAPPA CHETTIAR 27

2. *Evidence—Commission of cognizable offence—Investigation by police officer—Right to continue it after commencement of Magisterial inquiry—Statement of accused to police officer—Right of Crown to use it after close of defence—Mode of proving such statement—Criminal Procedure Code, ss. 153, 155 et seq., 237 (1)—Evidence Ordinance, s. 155* .. 35

See COURT OF CRIMINAL APPEAL DECISIONS (2).

3. *Confession—Right of Crown to cross-examine accused on it—Evidence Ordinance, s. 25* 100

See COURT OF CRIMINAL APPEAL DECISIONS (5).

4. *Penal Code—Section 294—Proviso 1 to Exception 1—Burden of proof—Evidence Ordinance, ss. 103, 105* 100

See COURT OF CRIMINAL APPEAL DECISIONS (5).

5. *Evidence Ordinance—Section 24—Confession caused by inducement or threat—Burden of proof.*

When the question whether a confession had been caused in the circumstances of any inducement, threat or promise referred to in Section 24 of the Evidence Ordinance arises, the Court would have to decide that question on the basis that the burden is on the prosecution to satisfy Court that it was not so caused.

If objection is taken to the admission of a confessional statement it is the duty of the party who takes the objection to formulate the grounds of objection so that the Court may consider the grounds and adjudicate on them.

PERERA *v.* INSPECTOR OF POLICE, GALAGEDERA 132

6. *Evidence—Identification of a dead person by his skull—Medical witness—Expert only in medical matters—Evidence Ordinance, s. 45* .. 169

See COURT OF CRIMINAL APPEAL DECISIONS (7).

7. *Witness—Right of a party to recall him—Discretion of Court—Evidence Ordinance s. 138 (4)* 169

See COURT OF CRIMINAL APPEAL DECISIONS (7).

8. *Evidence—Opinions of experts expressed in text books—When Counsel may read them during address to the Jury or cross-examine on expert witness on them—Evidence Ordinance, ss. 46, 57, 60* 169

See COURT OF CRIMINAL APPEAL DECISIONS (7).

9. *Evidence of similar acts—Relevancy—Evidence Ordinance, s. 15* .. 202

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10. *Evidence—Witness—Conflict between evidence on oath and an earlier statement—Verdict should then be found on the rest of the evidence—Summing up—Misdirection—Power of Judge to interrogate witnesses* .. 255

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11. *Information Book—Statement of a complainant recorded therein—Right of accused to obtain certified copy of it—" Public document "—" Right of inspection "—Evidence Ordinance, ss. 74, 76, 123, 124, 125—Criminal Procedure Code, ss. 121 (1), 122—Proof of Public Documents Ordinance, ss. 2, 3.*

An accused person is entitled to obtain a certified copy of a first complaint recorded by the Police under the provisions of section 121 (1) of the Criminal Procedure Code. The entry in the Information Book relating to the first complaint is a public document, which the accused has a right to inspect; subject, therefore, to any claim of privilege under sections 123, 124 and 125 of the Evidence Ordinance, the accused is entitled to obtain a certified copy of such entry under sections 74 and 76 of the Evidence Ordinance.

Quaere, (i) whether the accused is entitled to the same right under sections 2 and 3 of the Proof of Public Documents Ordinance.

(ii) whether a Magistrate has jurisdiction to order the Police to issue a certified copy.

ATTORNEY-GENERAL *v.* GEETIN SINGHO 289

12. *Control of Prices Act, No. 29 of 1950—Section 4—Price Order—Prosecution thereunder—Proof of Minister's approval of the price order not essential—Mode of proof of the price order—Judicial notice—Evidence Ordinance (Cap. 11), ss. 57, 78 (3).*

Where a person is charged with contravening a price order made and signed by the Controller and published in the *Government Gazette* under sub-sections 1, 3 and 4 of section 4 of the Control of Prices Act, it is not obligatory on the prosecution to place before the Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order has duly received the Minister's approval.

The Court may take judicial notice of a price order which is referred to in the *Government Gazette*. Alternatively, the price order, being a public document issued by a department of Her Majesty's Government, may be proved, under Section 78 (3) of the Evidence Ordinance, by a copy or extract of it contained in the *Government Gazette*.

FOOD AND PRICE CONTROL INSPECTOR *v.* PIYASENA .. 310

13. *Evidence—Accused person's statement to police—Admissibility—Exculpatory statement—Admission—Previous or subsequent conduct—Evidence in rebuttal—When permissible—Evidence Ordinance, ss. 8 (2), 17 (1), 21, 25* 274

See COURT OF CRIMINAL APPEAL DECISIONS (11).

14. *Non-summary inquiry—Election of accused to give evidence—Liability to cross-examination—Admisibility, at the trial, of accused's deposition—Criminal Procedure Code, ss. 134, 157 (1), 160, 161 (2), 164, 233, 286 (1), 302 (1)—Evidence Ordinance, ss. 9, 17, 21, 157* .. 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

15. *Confession—Voluntarily made before Magistrate—Subsequent allegation by accused that statement was not voluntary—Admissibility—Criminal Procedure Code, s. 134—Evidence Ordinance, ss. 24, 80* .. 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

16. *Betting on Horse-racing Ordinance (Cap. 36), as amended by Ordinance No. 55 of 1943—Prosecution thereunder—Quantum of evidence—" Instruments of unlawful betting "—Sections 2, 3 (3), 10, 17—Newspapers—Evidentiary value of their contents—Evidence Ordinance, s. 81* 382

See BETTING ON HORSE-RACING ORDINANCE (3).

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17. *Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy—" Access ".*

The word " access " in section 112 of the Evidence Ordinance means " opportunity of intercourse " and not " actual intercourse ". The judgment of the Full Bench in *Jane Nona v. Don Leo* (1923) 25 N. L. R. 241 is no longer law.

FONSEKA *v.* PERERA 498

18. *Evidence Ordinance, s. 92—Deed of sale—Parol evidence to contradict its terms relating to the consideration—Admissibility.*

The consideration is an essential term in a contract of sale. Section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction.

THOMAS *v.* FERNANDO 521

19. *Estoppel—Recital in a deed—Right of a person to act on the faith of that representation—Evidence Ordinance, s. 115.*

Where A holds B out as owner of A's property and a third person C purchases it for value from the apparent owner B in the belief that B is the real owner, neither A nor any person who subsequently purchases that property from A will be entitled to dispute C's claim to be its owner.

THASSIM *v.* SULEIMAN 541

20. *Privy Council Decision—Maintenance—Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy—" No access."*

Non-access within the meaning of section 112 of the Evidence Ordinance can be established by proof of the absence of such personal contact between husband and wife as would give rise to the presumption of sexual intercourse. " The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived."

In an application for maintenance in respect of an illegitimate child born on 24th May, 1950, the following facts were established :—The applicant was married about nine years before the hearing to one M. M left her after a few years—whether 2 or 4 is not clear—and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the applicant was living at all material times. For 5 or 7 years before the hearing the applicant and her husband had been living apart and during the time three children were born to M's mistress. In August, 1949, the applicant was living at Kallar where she had sexual intercourse with the defendant in his house in which she was residing with him and his wife and daughter. At this time, M was living with his mistress at Annamalai some 3 or 4 miles distant, but the applicant had never seen him from the time he left her.

Held, that the facts warranted a finding of no access within the meaning of section 112 of the Evidence Ordinance.

KANAPATHIPILLAI *v.* PARPATHY 553

21. *See also* EVIDENCE ORDINANCE.

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See also EVIDENCE.

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See VENDOR AND PURCHASER (3).

Excise Ordinance—

1. *Excise Ordinance—Section 44—Unlawfully manufactured liquor—Evidentiary value of Government Analyst's report.*

In a prosecution under section 44 of the Excise Ordinance for possession of unlawfully manufactured liquor the report of the Government Analyst is evidence, even though he is not called to testify in person.

FERNANDO *v.* GOONEWARDENE 17

2. *Excise Ordinance—Sections 12 and 16—Unlawful transport or possession of Government arrack—Proof of quality of arrack.*

In a prosecution for unlawful transport or possession of Government arrack it is sufficient for the complainant to make out a prima facie case that the contents of the bottles in question were Government arrack.

SIMON *v.* CHIEF PREVENTIVE OFFICER, EXCISE FORCE .. 114

3. *Contract—Prohibitory statute—Illegality—Construction—Excise Ordinance (Cap. 42), ss. 17, 24, 43, 45* 115

See CONTRACTS (3).

Execution of Decrees—

1. *Execution—Decree for possession of immovable property—Issue of writ of possession—Obstruction by a transferee* pendente lite*—Application for re-issue of writ—Power of Court to grant it—Civil Procedure Code, ss. 324 to 328.*

In an action for declaration of title to a certain land the plaintiff obtained decree against the defendant. Writ of possession in favour of

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the plaintiff was issued, but was later returned unexecuted by the Fiscal for the reason that a person who was not a party to the action claimed the land under a deed which was executed in his favour by the judgment-debtor during the pendency of the action and after the *lis pendens* had already been registered.

Held, that the claimant, being a transferee *pendente lite*, was a person bound by the decree and liable to be removed by re-issue of writ under section 324 of the Civil Procedure Code. Section 327A of the Civil Procedure Code is not applicable in such a case.

ISMAIL *v.* MARIKAIR 94

2. *Execution—Decree to pay money—" Subsequent order directing the payment of money to be made at a specified date "—Civil Procedure Code, s. 337 (1) (b).*

Judgment was entered in 1939 for the payment of a sum of Rs. 696. In 1940 an application for execution was made and, on writ being issued, a sum of Rs. 80 only was recovered. In 1943 a subsequent application for execution was made and on February 7, 1944, the Court allowed the defendant to pay the decreed amount in monthly instalments of Rs. 20 and ordered that in case of default the writ could be re-issued. Plaintiff applied for execution several times thereafter but nothing was recovered from the defendant. On July 17, 1953, a similar application was made by the plaintiff and, on being noticed, the defendant objected to the re-issue of the writ on the ground that over 10 years had expired since the date of the decree.

Held, that the order of February 7, 1944, was not a " subsequent order directing the payment of money to be made at a specified date " within the meaning of section 337 (1) (*b*) of the Civil Procedure Code. At most it amounted to a concession granted to the defendant as to the manner of settling the amount he had been decreed to pay. The application of July 17, 1953, was therefore time-barred and should be refused.

Muthu Ramen Chetty v. Mohammadu (1919) 21 N.L.R. 97, followed.

Meenatchi Atchy v. Palaniappa Chettiar (1941) 42 N. L. R. 333, distinguished.

PIYARATNE THERO *v.* RAHIM 140

3. *Execution—Concurrence of decree holders—Civil Procedure Code, ss. 232, 350, 352—Mortgage—Scope of rule that mortgagee should first discuss the property mortgaged.*

After the claim of two primary mortgagees was satisfied from the proceeds of a hypothecary sale, the balance of the proceeds lying in Court to the credit of the mortgagor was seized under section 232 of the Civil Procedure Code by three classes of judgment creditors, viz., unsecured creditors holding money decrees of the same Court, unsecured creditors holding money decrees of another Court, and secondary and tertiary mortgagees of the land sold under the hypothecary decree, who had obtained hypothecary decrees prior to the sale but subsequent to the entering of the decree upon the primary mortgage.

Held, that there was nothing in either section 350 or section 352 of the Civil Procedure Code to prevent all the seizing creditors, including the secondary and tertiary mortgagees, from being equally entitled to claim concurrence and share rateably, so long as the money lying in the custody Court had not been appropriated to a particular decree holder or holders by an order of that Court.

Held further, that the claim for concurrence by the secondary and tertiary mortgagees was not prejudiced by the fact that, apart from the land sold at the instance of the primary mortgagees, other lands had also been hypothecated under their bonds.

THAMBIPILLAI *v.* CANAGARATNE 252

Executors and Administrators—

See ADMINISTRATION OF ESTATES.

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Fideicommissa—

1. Fideicommissum—" *Warga paramparawe* "—*Express fideicommissum—Alienation permitted between original donees—Effect.*

A deed of gift contained the following condition :—

" This property shall be held and possessed by my sons S—and H—or their descending heirs children and grandchildren unto *warga paramparawe ;* they shall have the right to dispose of same among the brothers only, but shall not offer as security mortgage or sell in any manner whatsoever to anyone outside. "

Held, that the first part of the condition constituted a gift over in favour of the lineal descendants of the original donees and was sufficient to create an express *fideicommissum ;* the subsequent reference to alienation was merely a qualification of what would otherwise have been an implied total restraint.

BABEE *v.* NAIDA 376

2. *Fideicommissum—No acceptance by fideicommissaries—Validity.*

Where a fideicommissary deed of gift makes a settlement in favour of a family as a class, acceptance by the immediate donee enures to the benefit of all the fideicommissaries. But if the fideicommissaries are particular members of a family (e.g., the brothers of the donee), their failure to accept the donation on their own behalf renders the deed invalid so far as they are concerned.

PACKIRMUHAIYADEEN *v.* ASIAUMMA 449

3. *Fideicommissum—Designation of fideicommissaries—Use of word " or "—Does not always bear substitutionary meaning.*

A father gifted a ½ share of a land to his son B. S. subject to a fideicommissum in favour of B. S's children. On the same day he executed three other deeds gifting a ⅙th share of the land respectively to each of his three daughters ; each deed was subject to the following conditions :

" I the said donor do hereby reserve to myself the right of enjoying the rent, issues and profits of all the premises described in the schedule hereunto during my life ; and also subject to the conditions that the said donee shall not sell, mortgage or otherwise alienate the said premises but after her death the same should devolve on B. S. *or her* lawful heirs." (B. S. was the aforementioned son of the donor).

Held, that none of the deeds in favour of the daughters created a fideicommissum inasmuch as the fideicommissaries were not sufficiently clearly designated. The word " or " could not, in the context in which it was used, be given the usual meaning " whom failing ".

KIDA SILVA *v.* BUILIS SILVA 486

4. *See also* DONATIONS.

Forest Ordinance—

Forest Ordinance—Section 20—Prosecution for unlawfully clearing Crown land—Quantum of evidence.

The appellant was charged with unlawfully clearing about two acres of Crown land described as " Lot 18 in Village Plan 758 ", in breach of section 20 of the Forest Ordinance and the rules framed thereunder. It appeared from the evidence that the two acres in question were surrounded on all sides by land not occupied by the Crown. The only evidence alleging that the land in question was Lot 18 and Crown Forest was the bare statement of the Village Headman. The Plan itself was not produced with technical evidence to show that the two acres in question constituted Lot 18 in the Plan.

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Held, that the evidence was insufficient to establish that the land in question was Crown land.

DAVID SILVA *v.* D. R. O., KOLONNA KORALE 167

Gifts—

See DONATIONS.

Habeas Corpus—

Habeas corpus—*Courts Ordinance, s. 45*—" *According to law* "—*Custody of children—Contest between father and mother—Preferential right of father—Applicability of Roman-Dutch Law.*

An ultimate order granting or refusing a writ of *habeas corpus* is determined by *the law of Ceylon.*

Where a mother sought, as against the father, the custody of two minor children, who were girls of the ages of thirteen and nine—

Held, that, under the Roman-Dutch Law, where there has been no legal dissolution of the common home, the father's right to the custody of his minor children remains unaffected by the fact of the separation of the spouses, and can only be interfered with on special grounds, such, for example, as danger to the life, health or morals of the children.

IVALDY *v.* IVALDY 568

Horse-racing—

See BETTING ON HORSE-RACING ORDINANCE.

Husband and Wife—

1. *Husband and wife—Judicial separation—Cruelty—Proof—Right of plaintiff to choose between separation and divorce.*

Cruelty, as a ground for a decree of judicial separation, need not be physical; moral cruelty will suffice. To entitle a wife to a decree on this ground it is sufficient for her to show that her husband has been guilty of conduct which has impaired her health and made it intolerable for her to continue to live with him.

Decree for judicial separation may be entered although the party seeking it is entitled on the evidence to ask for the greater relief of a divorce.

WIJESINGHE *v.* WIJESINGHE 489

2. *Husband and wife—Decree of separation—Permanent alimony—Scope of ss. 614 and 615 of Civil Procedure Code—Distinction between the words* " *secure* " *and* " *pay* ".

The Court, when granting a decree of separation in favour of a wife, ordered the husband to pay an annual sum of Rs. 20,400 in monthly instalments of Rs. 1,700. With a view to securing for the wife the payment of the annual sum of Rs. 20,400 the husband was ordered to hypothecate certain immovable property specified in the decree.

Held, (i) that the order for hypothecation of immovable property did not fall within the ambit of either sub-section 1 or sub-section 2 of section 615 of the Civil Procedure Code and could not therefore stand.

(ii) that the order for paying the annual sum of Rs. 20,400 in monthly instalments did not come within the ambit of sub-section 1 of Section 615 of the Civil Procedure Code but could be treated as an order falling within the ambit of sub-section 2.

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Held further, that in deciding the amount of permanent alimony no fetter was imposed by section 615 of the Civil Procedure Code on the discretion of the Judge. Nor was the Judge bound by the amount awarded as alimony *pendente lite*.

MATHEW *v.* MATHEW 511

Income Tax Ordinance—

1. *Income Tax Ordinance (Cap. 188)—Appeal against assessment—Notice of objection—Conditions which such notice must satisfy—Failure to furnish return of income—Requirements necessary then—Section 64 (3), 69 (1) (2) (3), 80 (1) (3).*

Where an assessee fails to state precisely his grounds of objection against the assessment and merely lodges " an emphatic protest ", such protest is not a notice of objection within the meaning of section 69 (1) of the Income Tax Ordinance. Nor is it within the power of the Commissioner to waive the requirements which are set out in section 69 (1) in regard to notice of objection.

Further, under the second proviso to section 69 (1) of the Income Tax Ordinance, if the assessment appealed against was made in the absence of a return of income, the return of income must be tendered within the period allowed for filing the notice of objection. Failure to tender the return of income would render the notice of objection invalid.

BAHARAN *v.* OBEYSEKERA 136

2. *Income Tax Ordinance—Proceedings for recovery of tax—Section 80 (1)—Applicability to an insolvent assessee.*

An assessee who is insolvent and has been adjudicated accordingly is not entitled to claim that no proceedings can be taken against him for recovery of tax under section 80 (1) of the Income Tax Ordinance.

KUMATHERIS APPUHAMY *v.* COMMISSIONER OF INCOME TAX .. 164

3. *Income Tax Ordinance (Cap. 188)—Proceedings under s. 80 (1)—Omission of Magistrate to order imprisonment in default of payment of tax—Effect thereof—Insolvency of assessee—Sections 78 (2), 81—Criminal Procedure Code, s. 312 (1) (b)—Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938, s. 12 (2).*

In proceedings under Section 80 (1) of the Income Tax Ordinance, where the defaulter appears in Court in answer to the summons and has no cause to show why further proceedings for the recovery of the tax should not be taken against him, but the Magistrate makes no direction at the time that the defaulter should suffer a term of imprisonment in default of payment of the tax due, it is not open to the Magistrate to make such a direction subsequently.

DE JONG *v.* COMMISSIONER OF INCOME TAX 279

Indian and Pakistani Residents (Citizenship) Act—

See CITIZENSHIP.

Indictment—

1. *Trial before Supreme Court—Indictment—Power of Judge to quash it* .. 7

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2. *Bribery Act—Indictment—Requirement of signature of Attorney-General.* 9

See BRIBERY ACT.

3. *Indictment—Charges contained therein—Must not be different from those inquired into by Magistrate—Scope of Attorney-General's power to re-open Magisterial inquiry—Criminal Procedure Code, ss. 156, 159, 160, 161, 162 (1), 163, 389, 390 (2), 391, 393.*

An accused person can in no circumstances be committed for trial or tried upon indictment under Chapter 16 of the Criminal Procedure Code except upon the basis of the charges which had been read out to him under section 156 and to which he was later called upon to answer in terms of sections 159 and 160. The power of a Magistrate to commit under section 163 and the powers of the Attorney-General to direct a committal under section 391 are both determined by the scope of the particular charges which formed the subject matter of the Magisterial inquiry ; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

If the Attorney-General takes the view that an accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed) he may instruct the Magistrate under section 390 (2) to reopen the proceedings by formulating an amended charge under section 156, and thereafter to take all the steps prescribed by Chapter 16. It is not permissible to give a direction that the accused person should be committed for trial upon an amended charge after complying only with the requirements of sections 159, 160 and 161.

THE QUEEN *v.* THIAGARAJAH 58

4. *Charge—Alternative charge—Duplicity—Particulars of offence—Motor Traffic Act No. 14 of 1951, ss., 153 (2), 153 (3), 219 (1), 219 (2)—Criminal Procedure Code, s. 169.*

The accused was charged and convicted on two counts, viz., (1) with having driven a motor car recklessly or in a dangerous manner or at a dangerous speed, in breach of section 153 (2) of the Motor Traffic Act, (2) with having driven the same bus negligently or without reasonable consideration for other persons using the highway, in breach of section 153 (3) of the Motor Traffic Act.

Held, that the charges framed in the alternative were bad for duplicity.

SANSONI, J.—" I think the matter goes beyond the question of the accused being prejudiced by having to face a count which involves many different offences framed in the alternative : the more important consideration is that it is not clear, upon a conviction or an acquittal, of what offence he has been found guilty or acquitted. "

Held further, that, under section 169 of the Criminal Procedure Code, particulars setting out the details of each offence should have been mentioned in the charge.

EDWIN SINGHO *v.* S. I. POLICE, KADAWATTA 355

Infants—

See MINORS.

Information Book—

See EVIDENCE (11).

Inheritance—

See MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE.

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Inspection—

Inspection of scene of offence—Propriety of conducting experiments during such inspection—Criminal Procedure Code, s. 238 313

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Insurance—

Insurance—Contract of life insurance—Repudiation of liability by insurer—Vagueness of allegations against deceased insured—Framing of issues—Duty of Court to clarify issues—Civil Procedure Code, ss. 77, 146—Proposal Form—Questions appearing therein—Truth of answers—Tests to ascertain it.

(i) The insurer in a contract of life insurance, on being sued for the recovery of Rs. 30,000 due under the policy of insurance, filed answer repudiating liability in general terms alleging that the insured had withheld material information concerning the state of his health. Although the answer was defective for want of precise information as to the grounds on which liability was repudiated, it was not returned for amendment under Section 77 of the Civil Procedure Code. At the same time, the plaintiff, who was the administratrix of the estate of the deceased insured, failed to serve interrogatories on the insurer for the purpose of obtaining clarification of the allegations made against the deceased.

Held, that in the circumstances Section 146 of the Civil Procedure Code imposed a special duty on the Judge himself to order the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself "the propositions of fact or of law" upon which the parties were at variance.

(ii) In the absence of provision to the contrary expressed in the clearest possible terms a person making a proposal for life insurance is entitled to assume that insurance Companies do not require information frivolously or through pure inquisitiveness on matters which have no conceivable relevancy to the risk which they are invited to undertake. Therefore, in a country like Ceylon where perfectly healthy persons occasionally "suffer" from slight indispositions of brief duration, loosely described as "influenza", an applicant for insurance cannot be deemed to have given untrue or incorrect information if, although he had once had a mild attack of "influenza" which was speedily cured by a few doses of mixture, he answered in the negative the following questions addressed to him in the proposal form :—

"1. Have you ever suffered from any of the following ailments—typhoid, *influenza*, filariasis, elephantiasis of leg or scrotum, kala-azar, blackwater or any other fever ?

2. Have you within the past five years *consulted* any medical man for any ailment, not necessarily confining you to your house ? If so, give details and state names and addresses of medical men consulted."

If the words of a question appearing in the proposal form are ambiguous, they must be construed *contra proferentes* and in favour of the assured.

(iii) One ground on which the insurance Company repudiated liability on the policy was that the insured had given untrue and incorrect answers to the printed questions in the proposal form when those answers would form the "basis of the contract". The printed questions were, however, addressed to the deceased in the English language which he could not understand. They were interpreted by the Company's agent in Malayalam, and the answers given in Malayalam were then translated into English by the Company's agent.

Held, that in the circumstances the Company could not succeed without proof that the questions and the impugned answers were correctly interpreted and recorded by the Company's agent.

MARIYA UMMA *v.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. 145

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Interest—

1. *Interest—Tender of debt due—Liability to pay interest thereafter—Minor—Debt due to him—Mode of payment.*

A debtor is not liable to pay interest after he makes tender of the money due to his creditor. Where the creditor is a minor, the offer to pay may be made to the natural guardian of the minor, especially if the minor is of a very tender age. If the natural guardian is not the duly appointed curator it is for him or her to take the necessary steps to have the appointment made.

ARUNASALAM CHETTIAR *v.* MURUGAPPA CHETTIAR .. 21

2. *Interest—Mutual agreement necessary.*

Plaintiff sued defendant for the recovery of a certain sum for services rendered to the defendant. He also claimed interest at 12 per cent. per annum on the strength of the following legend on his invoices : " Interest at 12 per cent. will be charged on all overdue accounts."

Held, that interest was not recoverable in the absence of an agreement in that behalf. The intimation on the bill heads did not constitute an agreement to pay interest.

JINASENA *v.* THE MINNERIYA AGRICULTURAL PRODUCE CO-OPERATIVE MARKETING SOCIETY, LTD. 394

Interpretation Ordinance—

Interpretation Ordinance (Cap. 2)—Section 6 (3) (b)—Offence falling under repealed statute—Charge in respect of it under repealing statute—Legality.

When a penal statute is superseded by another statute a person cannot be prosecuted under the repealing statute for an offence which was committed when the repealed statute was in force. It is, however, open to the prosecution, by virtue of section 6 (3) (*b*) of the Interpretation Ordinance, to charge the offender under the relevant provisions of the earlier statute notwithstanding its subsequent repeal.

PETER FERNANDO *v.* ABEYSINGHE 262

Irrigation Ordinance—

Irrigation Ordinance No. 32 of 1946—Sections 87 and 88—Non-payment of rates—" Defaulter "—Cancellation of certificate of sale—Person in whom title re-vests—Irrigation Ordinance (Cap. 312), ss. 61, 66.

For the purpose of irrigation rates payable in respect of an Irrigation Scheme the person whose name is on the register of proprietors is the one who is liable to pay the rates and if he does not pay the rates at the due time he is the defaulter.

Where land which is liable to the payment of irrigation rates is sold to the Crown for non-payment of irrigation rates, the title to it re-vests in the defaulter whose name was on the register at the time of the sale, if he subsequently obtains, under section 88 of the Irrigation Ordinance No. 32 of 1946, a cancellation of the certificate of sale on payment of the amount due.

Obiter : Section 88 of the Irrigation Ordinance No. 32 of 1946 does not apply to sales under the repealed Ordinance (Cap. 312).

MOHAMADU *v.* MOHAMADUTHAMBY 501

Issues—

See CIVIL PROCEDURE (6), (9).

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Joinder of accused and charges—

1. *Joint trial—Principal and abettor—Confession by abettor—Separation of trials—Factors for consideration—Discretion of Court—Criminal Procedure Code, s. 184* 313

See COURT OF CRIMINAL APPEAL DECISIONS (12).

2. Mens rea—*Joint indictment—Several accused—Common intention—Guilty knowledge—Misdirection—Penal Code, ss. 32, 146, 294, 317* .. 350

See COURT OF CRIMINAL APPEAL DECISIONS (13).

Jurisdiction—

1. *Jurisdiction—Action for damages and ejectment—Defendant's false plea of tenancy—Determination of value of subject-matter of action—Power of Court to examine not only plaintiff's claim but also defendant's answer.*

In order to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court it may be necessary to examine not only the plaintiff's claim but also the defendant's answer to it.

Plaintiff instituted action in the Court of Requests praying for damages and an order of ejectment against the defendant in respect of certain premises which were of the value of over Rs. 300. The defendant pleaded that he was tenant under the plaintiff and, in the alternative, that the court had no jurisdiction to try the action as the value of the subject-matter of the action exceeded Rs. 300. The Commissioner rejected the defence of tenancy as false and gave judgment for the plaintiff.

Held, that as the substance of the dispute was whether the defendant was a tenant under the plaintiff or a bare licensee the Court of Requests had jurisdiction to try the action.

DEVASAGAYAM *v.* AZEEZ 19

2. *Jurisdiction—Muslim Law*—Kaikuli—*Action for repayment of it—Court where the action may be instituted—Civil Procedure Code, s. 9.*

A Muslim husband's obligation to return the *kaikuli* to his wife on demand is first undertaken by him at the place where he marries her.

A Muslim husband who had deserted his wife was sued by the wife for the recovery of Rs. 1,500 that had been paid to him as *kaikuli* at Galle a few days before they were married. The marriage was celebrated at Matara. The plaintiff resided at Matara, and the defendant at Galle, when the action commenced.

Held, that the District Court of Matara had jurisdiction to hear the case.

Scope of the rule that "the creditor must seek out the debtor" examined.

SOWDOONA *v.* ABDUL MUEES 75

3. *Jurisdiction—Action for redemption of otty mortgage—Court where such action may be instituted—Courts Ordinance (Cap. 6), s. 75—Civil Procedure Code, s. 9 (b).*

An action for the redemption of an otty mortgage and for the release of the mortgaged land from the mortgage is a dispute affecting an interest in land and can, therefore, be brought in the court within the local limits of whose jurisdiction the land in question is situate.

NALLATHAMBY *v.* SOMASUNDERAM-KURUKKAL 166

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Jury—

Jury—Communication between juror and witness—Duty of Court to discharge jury—Oath of separation—Effect thereof 169

See COURT OF CRIMINAL APPEAL DECISIONS (7).

Kandyan Law—

1. *Kandyan Law*—Diga *marriage—Death of wife intestate—Husband's rights in respect of wife's acquired property—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 15, 18.*

The law as laid down in *Tikiri Banda v. Appuhamy* (1914) 18 N. L. R. 105 that the surviving husband of a *diga* marriage has a life interest in the acquired property of his deceased wife has not been altered by section 18 of the Kandyan Law Declaration and Amendment Ordinance. The husband's right is unaffected by the fact that there are children by a former marriage of the deceased spouse.

WIMALAWATHIE *v.* PUNCHI BANDA 73

2. *Kandyan Law—Death of person intestate and issueless—Inheritance—"Acquired property"—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, proviso to s. 10 (1).*

The proviso to section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance confirmed the earlier law when it declared :

". . . . if the deceased shall not have left surviving him any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased."

SONNANDARA *v.* DINGIRI ETANA 333

3. *Kandyan Law—Illegitimate daughter married in* diga*—Forfeiture of right to inherit father's acquired property—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 13, 15 (c).*

Section 15 (*c*) of the Kandyan Law Declaration and Amendment Ordinance does not enable a *diga* married illegitimate daughter to have a right of inheritance to her father's acquired property.

Where a Kandyan died intestate leaving legitimate children and also an illegitimate daughter who was married in *diga*—

Held, that the illegitimate daughter had no right of inheritance to her father's acquired property.

RAN MENIKA *v.* NANDOHAMY 453

4. *Construction of Deeds—Two deeds executed contemporaneously—One single transaction—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938—Section 2—"Gift"—Evidence Ordinance, s. 92, proviso 1—Fideicommissum—Revocability.*

Where several deeds form part of one transaction and are contemporaneously executed each deed must speak only as part of the one transaction.

While a conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable, yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer.

By deed P2, A, a Kandyan, conveyed to her father, B, certain property for a consideration in money paid by B. By a separate deed, P3, executed on the same day as deed P2, B purported to make a fideicommissary gift to A of the identical property which he obtained on deed P2.

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Held, that P2 and P3 constituted a single transaction and that, when they were read together, P3 did not fall within the definition of the word "gift" in section 2 of the Kandyan Law Declaration and Amendment Ordinance.

DINGIRI NAIDE *v.* KIRIMENIKE 559

Land Acquisition Act—

Mandamus—*Availability against a servant of the Crown—Land Acquisition Act—Sections 16 and 27—Award of compensation—Mode of enforcing payment of it* 286

See WRIT OF MANDAMUS (2).

Landlord and Tenant—

1. *Jurisdiction—Action for damages and ejectment—Defendant's false plea of tenancy—Determination of value of subject-matter of action—Power of Court to examine not only plaintiff's claim but also defendant's answer* .. 19

See JURISDICTION.

2. *Rent Restriction Act, No. 29 of 1948—Sections 13 (1) (a) and 15—Overpaid rents—Set-off against rent in arrear—Appropriation of the overpayments—Prescription Ordinance (Cap. 55), s. 10.*

Under section 15 of the Rent Restriction Act any rent paid in excess of the authorised rent must be appropriated by the landlord in the way which is most favourable to the tenant for the purposes of prescription.

Therefore, if overpayments of rent were made by the tenant during a period of three years immediately preceding the date when he fails to pay rent for a particular month, the sum due as rent for such month should be deducted from the earliest overpayment in the hands of the landlord.

MUNIDASA *v.* RICHARD APPUHAMY 108

3. *Landlord and tenant—Decree for ejectment—Subsequent acquisition of title by tenant—Right of tenant to resist execution of decree.*

Where a landlord obtains a decree to eject his tenant, it would not be open to the tenant to resist the execution of the decree on the ground that he subsequently acquired title to a portion of the leased premises from a person other than the landlord.

NABISA UMMA *v.* FUARD 200

4. *Landlord and tenant—Requirement of premises for purposes of business of the landlord—Rent Restriction Act, No. 29 of 1948, s. 13 (c).*

A landlord cannot avail himself of section 13 (c) of the Rent Restriction Act to eject a tenant merely because he thinks it convenient that employees in a business carried on by him at a place not far from the rented premises should reside in the rented premises. The matter of the place where the employees in a business reside is generally unrelated to the efficient carrying on of the business itself.

KUTTAJEE *v.* KANAPATHY CHETTY 306

5. *Landlord and tenant—Sale of rented premises—Right of purchaser to recover rent from tenant—Attornment.*

A purchaser from a landlord of the property leased is entitled to recover the rent from the tenant if he takes over possession of the property along with the vendor's tenant on it.

Zackariya v. Benedict (1950) 53 N. L. R. 311, not followed.

CHARLES PERERA *v.* DE COSTA 283

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6. *Rent Restriction Act, No. 29 of 1948—Sections 13 and 27—Letting of co-owned premises—Partition sale thereafter—Does not terminate statutory tenancy—Partition Ordinance (Cap. 56), ss. 4, 8.*

The statutory protection of a tenant under the Rent Restriction Act is not automatically extinguished if the leased premises are purchased (either by a co-owner or by a third party) in terms of a decree for sale under the Partition Ordinance.

BRITTO *v.* HEENATIGALA 327

7. *Delict—Landlord and tenant—Wrongful dispossession of tenant by landlord*—Injuria—*Landlord's liability to pay damages.*

A landlord is not entitled to take possession of the rented premises unless the tenant has vacated them or surrendered possession of them. The fact that the tenant agreed to quit the premises is not material if the landlord knows that, in spite of the agreement, the tenant intends to remain in occupation of the premises.

Wrongful dispossession of the tenant by the landlord constitutes an *injuria* involving *contumelia.*

ABEYEWARDENA *v.* SIRI NIVASA 531

8. *Landlord and tenant—Payment of rent—Agreement by landlord to accept cheques sent by post—Computation of date of payment—Rent Restriction Act, No. 13 of 1948, s. 13 (1) (a).*

Where a landlord had expressly agreed that payment of rent should be made monthly by means of a cheque posted to his address—

Held, that the posting of the cheque by the tenant on a particular date operated as payment of the rent on that date, for the purpose of ascertaining whether the tenant was in arrear of rent.

SENEVIRATNE *v.* SENEVIRATNE 557

Land Redemption Ordinance—

Certiorari—"*Judicial act*"—*Excess of jurisdiction—Burden of proof—Land Redemption Ordinance, No. 61 of 1942 (as amended by Ordinance No. 62 of 1947)—Sections 3 (1) and (4), 8*—"*If the Land Commissioner is satisfied*"—"*Agricultural land*" 178

See WRIT OF CERTIORARI (2).

Limitation of Actions—

See PRESCRIPTION.

Local Authorities—

1. *Village Communities Ordinance—Section 62—Removal of Chairman of a Village Committee from office—Executive function of Minister*—Certiorari.

When the Minister of Local Government, by virtue of the power vested in him by section 61 of the Village Communities Ordinance, removes the Chairman of a Village Committee from office on being satisfied "that there is sufficient proof of" misconduct in the performance of his duties, he performs an executive and not a judicial act. Such act cannot be the subject of a writ of *certiorari.*

GUNAPALA *v.* KANNANGARA 69

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2. *Urban Councils Ordinance, No. 61 of 1939—Sections 193, 194 (1), 195—Recovery of surcharges—"Any person accounting"—"Negligence or misconduct"—Local Government Service Ordinance, No. 43 of 1945, s. 51, as amended by Act No. 8 of 1949, s. 19.*

The two appellants, who were members of an Urban Council, were opposed to a decision of the Local Government Service Commission that full pension should be paid to a retired officer of the Council. In an application made by the Commission for a writ of *mandamus* to compel the Council to fulfil its statutory obligation to pay the full pension, the Supreme Court decided that the Council must pay the costs which were taxed at Rs. 3,899. Thereafter the Auditor-General sought to charge against the appellants, as members of the Council, the loss which the Council incurred by payment of the costs.

Held, that under section 194 (1) of the Urban Councils Ordinance it was necessary to prove negligence or misconduct on the part of the appellants before the Auditor-General could call upon them to make good any deficiency or loss which was not tainted by illegality.

MENDIS *v.* COMMISSIONER OF LOCAL GOVERNMENT 248

3. *Offensive trade or business—Requirement of licence—Meaning of "trade or business"—By-law—Municipal Councils Ordinance, No. 29 of 1947, ss. 148 (1), 267.*

By a by-law made under sections 148 and 267 of the Municipal Councils Ordinance, "storing grain, for purposes other than as forage, in quantity exceeding 5 cwt." was one among a number of trades or businesses which were declared to be offensive trades or businesses for the carrying on of any of which it was necessary to obtain a licence.

Held, that unless the trade or business declared to be offensive was carried on for the sake of earning profits there would be no infraction of the by-law. Storage, therefore, of grain by a co-operative society as an incident of the trade of retailing rice could not fall within the ambit of the by-law.

DE SILVA *v.* KURUNEGALA CO-OPERATIVE STORES, LTD. .. 430

4. *Urban Council—Recovery of rates—Seizure of property—Purchase of the property by Council in 1938—Prior sanction of Local Government Board not necessary—Transfer of the property by Council in 1942—Approval of Executive Committee not necessary—Municipal Councils Ordinance (Cap. 193), ss. 143, 145, 146 (1)—Local Government Ordinance (Cap. 195), ss. 46, 47 (c), 182—Urban Councils Ordinance, No. 61 of 1939, ss. 48 (e) (1), 183 (1).*

Where property seized by an Urban Council for the recovery of rates was purchased by the Council in the year 1938 in terms of section 182 of the Local Government Ordinance (Cap. 195), read with section 143 of the Municipal Councils Ordinance (Cap. 193)—

Held, that the prior sanction of the Local Government Board was not necessary. The provisions of section 47 (*c*) of the Local Government Ordinance were not applicable to such purchase.

Held further, that section 48 (*e*) (1) of the Urban Councils Ordinance, No. 61 of 1939, does not impose on an Urban Council any duty to obtain the prior approval of the Executive Committee in order to sell property purchased by it in the course of recovering rates and taxes.

URBAN COUNCIL OF DEHIWELA-MOUNT LAVINIA *v.* ANDY SILVA .. 562

Local Government—

See LOCAL AUTHORITIES.

Lorry—

See MOTOR VEHICLES.

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Maintenance—

1. *Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy—" Access ".*

The word " access " in section 112 of the Evidence Ordinance means " opportunity of intercourse " and not " actual intercourse ". The judgment of the Full Bench in *Jane Nona v. Don Leo* (1923) 25 N. L. R. 241 is no longer law.

FONSEKA *v.* PERERA 498

2. *Privy Council Decision—Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy—" No access "* .. 553

See PRIVY COUNCIL DECISIONS (3).

Mandamus—

See WRIT OF MANDAMUS.

Master and Servant—

See PRIVY COUNCIL DECISIONS (2).

Matrimonial Rights and Inheritance Ordinance—

Inheritance—Child of " putative marriage "—Right to inherit property of his father—Matrimonial Rights and Inheritance Ordinance (Cap. 47), ss. 23, 24, 33, 36.

In view of the express provisions of Sections 23, 24 and 33 of the Matrimonial Rights and Inheritance Ordinance, Section 36 cannot enable an illegitimate child to be recognised as enjoying the status of a legitimate child in accordance with a doctrine of Roman-Dutch Law relating to " putative marriages ".

HERMAN SILVA *v.* KAINERISHAMY 567

Maxims—

See WORDS, PHRASES AND MAXIMS.

Mens Rea—

See COURT OF CRIMINAL APPEAL DECISIONS (13).

Minors—

1. *Interest—Tender of debt due—Liability to pay interest thereafter—Minor—Debt due to him—Mode of payment.*

A debtor is not liable to pay interest after he makes tender of the money due to his creditor. Where the creditor is a minor, the offer to pay may be made to the natural guardian of the minor, especially if the minor is of a very tender age. If the natural guardian is not the duly appointed curator it is for him or her to take the necessary steps to have the appointment made.

ARUNASALAM CHETTIAR *v.* MURUGAPPA CHETTIAR .. 21

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2. *Constructive trust—Minor—Person in fiduciary relation entering upon and possessing minor's estate—His liability as trustee* 228

See TRUSTS ORDINANCE.

3. *Donation—Minor as donee—Acceptance by donee's elder brother—Validity.* 449

See DONATIONS (2).

Money Lending Ordinance—

" *Account stated* "—*Money Lending Ordinance (Cap. 67)—Sections 2, 3, 8, 10—Promissory note given partly as security for a renewed loan and partly for repayment of money due on a non-loan transaction—" Capital sum actually borrowed "—" Inadvertence "—" Regular account of each loan* ".

Plaintiffs were professional money-lenders and general merchants. The defendant carried on a business of his own, and borrowed money from time to time from the plaintiffs on the security of promissory notes. In addition, he purchased textiles from them. He in turn would deposit monies with them and transport their rice in lorries for hire. Details of all these transactions were faithfully recorded in books of account maintained by the plaintiffs. On 13th January, 1952, the plaintiffs and the defendant met for the express purpose of looking into the accounts. They mutually agreed as to the correctness of the cross items of account appearing in the plaintiffs' books of account and, after treating the items so agreed on one side as discharging the items on the other side, went on to agree that the balance only was payable. Four earlier promissory notes given by the defendant as security for loans for sums totalling Rs. 5,000 were discharged and returned to the defendant who in exchange granted in favour of the plaintiffs a fresh promissory note for Rs. 7,000 representing the total amount of his agreed liability after deducting his claims for lorry hire and sums deposited on general account as well as his various payments in settlement or reduction of liability on contracts of loan.

The present action was instituted by the plaintiffs for the recovery of Rs. 7,000 and interest due upon the promissory note dated 13th January, 1952. It was contended on behalf of the defendant that the action was not maintainable on the ground of non-compliance with the requirements of sections 10 and 8 of the Money Lending Ordinance. The defendant also asked that the transactions between himself and the plaintiffs be reopened, and an account taken, under section 2. It was submitted that inasmuch as the promissory note was given partly to secure four " renewed " loans amounting to Rs. 5,000 it could not be enforced unless there was entered on the face of the document a statement as to " the capital sum actually borrowed " under the loan transaction ; in other words, the promissory note for Rs. 7,000 ought clearly to have indicated that it was partly given to secure four " renewed " loans amounting to Rs. 5,000.

Held, that what took place between the plaintiffs and the defendant on 13th January, 1952, immediately before the promissory note for Rs. 7,000 was signed, represented an " account stated " (as opposed to " a mere acknowledgment of a debt "). Therefore, the promissory note was not given, either wholly or in part, " as security for a loan " within the meaning of section 10 of the Money Lending Ordinance. But, although the earlier debts were extinguished by reason of " the account stated ", the statutory right to have the loan transactions reopened under section 2 of the Money Lending Ordinance was kept alive for six years commencing from 13th January, 1952.

Held further, (i) that, assuming that the transaction of 13th January, 1952 could not be regarded in law as an " account stated " and that the promissory note for Rs. 7,000 contravened the requirements of section 10 of the Money Lending Ordinance, the omission to insert the capital sum borrowed in regard to the renewed loans amounting to Rs. 5,000 was due to inadvertence within the meaning of section 10 of the Money Lending Ordinance. " Inadvertence " is wide enough to cover errors of non-compliance made in good faith through a mistaken interpretation of the law.

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(ii) that a money lender who enters in his books loan transactions as well as non-loan transactions in such a manner that the transactions are separable from one another keeps " a regular account of each loan " within the meaning of section 8 of the Money Lending Ordinance.

RASU CHETTIAR *v.* PONWANDU 269

Mortgage—

Scope of rule that mortgagee should first discuss the property mortgaged .. 252

See EXECUTION OF DECREES (3).

Motor Car—

See MOTOR VEHICLES.

Motor Vehicles—

1. *Motor Traffic Act, No. 14 of 1951—Refusal of public carrier's permit—Discretion of Commissioner—Right of appeal to Supreme Court—" Question of law "—Sections 90 and 212.*

The Commissioner of Motor Traffic, acting on the report of the Divisional Road Transport Officer, refused an application for a public carrier's permit on the ground that the area in question was well served. The Transport Appeals Tribunal dismissed the applicant's appeal for the same reason. The applicant thereupon appealed to the Supreme Court on the ground that the Commissioner acted contrary to the principles of natural justice in acting on the report of the Divisional Road Transport Officer without affording the applicant an opportunity of disproving the statements in the report.

Held, that the ground of appeal was not a question of law within the meaning of section 212 of the Motor Traffic Act.

HEENBANDA *v.* COMMISSIONER OF MOTOR TRAFFIC .. 23

2. *Motor Car Ordinance, No. 45 of 1938—Motor Traffic Act, No. 14 of 1951, ss. 2 (1), 14 (1), 244.*

Section 244 of the Motor Traffic Act, No. 14 of 1951, does not enable a prosecution under that Act for failure to register a car in breach of the repealed Motor Car Ordinance, No. 45 of 1938.

PETER FERNANDO *v.* ABEYSINGHE 262

3. *Driving when drunk—First or second offence—Suspension of offender's driving licence—Motor Traffic Act, No. 14 of 1951, ss. 138, 153, 218.*

Under section 138 of the Motor Traffic Act a first offender's driving licence may be suspended for a period not normally exceeding six months for driving a motor vehicle when drunk, an offence punishable under section 218.

MUTHIAH *v.* PERERA 335

4. *Charge—Alternative charge—Duplicity—Particulars of offence—Motor Traffic Act, No. 14 of 1951, ss. 153 (2), 153 (3), 219 (1), 219 (2)—Criminal Procedure Code, s. 169.*

The accused was charged and convicted on two counts, viz., (1) with having driven a motor car recklessly or in a dangerous manner or at a dangerous speed, in breach of section 153 (2) of the Motor Traffic Act

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(2) with having driven the same bus negligently or without reasonable consideration for other persons using the highway, in breach of section 153 (3) of the Motor Traffic Act.

Held, that the charges framed in the alternative were bad for duplicity.

SANSONI, J.—"I think the matter goes beyond the question of the accused being prejudiced by having to face a count which involves many different offences framed in the alternative: the more important consideration is that it is not clear, upon a conviction or an acquittal, of what offence he has been found guilty or acquitted."

Held further, that, under section 169 of the Criminal Procedure Code, particulars setting out the details of each offence should have been mentioned in the charge.

EDWIN SINGHO *v.* S. I. POLICE, KADAWATTA 355

5. *Lorry—Carriage of goods in excess of maximum load—Weigh-bridge—Is evidence of its accuracy necessary?—Motor Traffic Act, No. 14 of 1951, ss. 190, 216 (1) (a).*

The accused was charged with having carried on a lorry goods in excess of the permitted maximum load, in breach of Section 190 read with Section 216 (1) (*a*) of the Motor Traffic Act. The prosecution witnesses stated that an excess weight of 2 tons and 7 lbs. was ascertained by means of a weigh-bridge. No evidence was called for the defence.

Held, that it was open to the Court to hold that the load in the lorry was 2 tons and 7 lbs. in excess, even though the weigh-bridge had not been tested for over four weeks prior to the day when the lorry with its load was weighed on it.

ALFRED APPUHAMY *v.* DE SILVA 404

6. *Lorry—Transfer of ownership—New owner's liability for possession without revenue licence—Motor Traffic Act, No. 14 of 1951, ss. 12 (3), 14 (3), 25 (1) (2) (9), 28 (3), 32, 216 (1), 226.*

When a lorry is transferred by its registered owner to another person, the benefit of the licence already issued to the transferor cannot be claimed for the transferee. Under section 25 (9) of the Motor Traffic Act the new owner can avoid a prosecution for possessing the lorry without a revenue licence, in contravention of section 25 (1) of the Motor Traffic Act, only (*a*) if he has applied for a new licence, but has not yet had a decision made on such application, or (*b*) if he has given notice of non-user. Whatever benefit he can derive from section 32 of the Act is taken away by the provisions of section 25 (9).

GUNAWARDENA *v.* REGISTRAR OF MOTOR VEHICLES .. 461

7. *Motor vehicle—Omission to provide an efficient braking system—Elements of offence—Motor Traffic Act, No. 14 of 1951, ss. 192, 216, 239.*

Failure to maintain the braking system of a motor vehicle in a state of efficiency in breach of Regulation 4 of the Motor Traffic (Use of Vehicles) Regulations is an offence which is separate and distinct from the offence of omitting to provide the vehicle with an efficient braking system in breach of Regulation 6 of the Motor Traffic (Construction of Vehicles) Regulations.

Comments on *Thomas Singho v. S. I. Police, Gampaha* (1954) 55 N. L. R. 395.

FERNANDO *v.* AMARASEKERA 503

8. *Lorry—Public carrier's permit—One ground for granting it—Motor Traffic Act, No. 14 of 1951, ss. 89 (1) (b), 90 (3) (b).*

Any person, who held a licence of the requisite character immediately before the specified date, is duly qualified under section 89 (1) (*b*) of the Motor Traffic Act to apply for a permit authorising "long distance

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carriage" of goods by lorry. Failure to satisfy the Commissioner that he regularly (if at all) made use of that licence during the relevant period does not divest him of his statutory qualifications to receive a permit.

D. S. ATTYGALLE AND COMPANY, LTD. *v.* THE COMMISSIONER OF MOTOR TRAFFIC 549

Muhammadan Law—

See MUSLIM LAW.

Municipal Councils—

See LOCAL AUTHORITIES.

Murder—

See COURT OF CRIMINAL APPEAL DECISIONS.

Muslim Law—

1. *Jurisdiction—Muslim Law*—Kaikuli—*Action for repayment of it—Court where the action may be instituted—Civil Procedure Code, s. 9.*

A Muslim husband's obligation to return the *kaikuli* to his wife on demand is first undertaken by him at the place where he marries her.

A Muslim husband who had deserted his wife was sued by the wife for the recovery of Rs. 1,500 that had been paid to him as *kaikuli* at Galle a few days before they were married. The marriage was celebrated at Matara. The plaintiff resided at Matara, and the defendant at Galle, when the action commenced.

Held, that the District Court of Matara had jurisdiction to hear the case.

Scope of the rule that "the creditor must seek out the debtor" examined.

SOWDOONA *v.* ABDUL MUEES 75

2. *Muslim Law—Claim for* kaikuli—*Prescription.*

No cause of action for the recovery of *kaikuli* can be said to be complete until there has been a clear and unambiguous demand by the person entitled to claim it.

Where a Muslim wife sued her husband for the recovery of *kaikuli* more than three years after the date of the dissolution of the marriage but had made no demand for it until very shortly before the action commenced—

Held, that the claim was not prescribed. The prescriptive period for the recovery of the *kaikuli* commenced on the date of the demand and not on the date of the dissolution of the marriage.

HASEENA UMMA *v.* HASHIM 239

3. *Muslim Law—Donation by grandmother—Revocability—Muslim Intestate Succession and Wakfs Ordinance (Cap. 50), s. 3.*

Under the proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance a gift of immovable property by a Muslim grandmother to her grandchildren is revocable unless there are words in the deed from which a renunciation of her right of revocation appears either expressly or by necessary implication.

SINNA MARIKAIR *v.* THANGARATNAM 260

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Negligence—

See DELICTS (3), (4).

Negotiable Instruments—

1. *Cheque—Crossed generally—Theft of cheque—Payment by drawee otherwise than to a banker—Drawee's liability to drawer—Bills of Exchange Ordinance, ss. 8 (3), 79 (2).*

Where a cheque crossed generally by the drawer is paid by the drawee otherwise than to a banker, the drawee's liability to the drawer is not automatic ; it arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee. Therefore, where such a cheque is stolen after the payee indorses it in blank and is subsequently paid across the counter to a holder, the drawer cannot avail himself of the provisions of section 79 (2) of the Bills of Exchange Ordinance to institute action for a declaration that the drawee is not entitled to debit his account with the amount of the cheque.

MERCANTILE BANK OF INDIA LTD. *v.* RATNAM 193

2. *Landlord and tenant—Payment of rent by cheque—Computation of date of payment* 57

See PAYMENT.

3. *See also* MONEY LENDING ORDINANCE.

Offensive Trade or Business—

See LOCAL AUTHORITIES (3).

Omnibus—

See MOTOR VEHICLES.

Parliament—

Parliament—Offence of breach of privilege—Disrespectful conduct in the precincts of the House—Immunity of Members—Meaning and scope of expression "Proceedings in Parliament"—Jurisdiction of Supreme Court—Suspension of sitting of House—Condition of time limit—Ceylon Constitution Order in Council, 1946, s. 17 (5)—Parliament (Powers and Privileges) Act, No. 21 of 1953, ss. 3, 4, 9, 22, 23, 25, 26.

The two respondents were members of the House of Representatives. At a sitting of the House another member, X, on being suspended from the service of the House, refused to leave the House when he was ordered by the Speaker to do so. The Speaker thereupon ordered the Sergeant at Arms to remove the member from the House, stated "I suspend the sitting of the House", and vacated the Chair. The mace remained on the Speaker's table. Thereafter, and before the Sergeant at Arms removed X with Police assistance obtained upon an order from the Speaker in Chambers, the 2nd respondent proposed that the 1st respondent do take the Chair, and another member seconded that motion. The Deputy Speaker and the Deputy Chairman of Committees were not in the Chamber when the motion was moved. As no objection was taken to the motion, the 1st respondent took the Chair. Thereafter X made a speech in the Chamber and continued to speak until the Sergeant at Arms entered with the Police and removed X from the Chamber. On the entry of the Sergeant at Arms with Police officers, the 1st respondent vacated the Chair.

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The Attorney-General alleged *inter alia* in the present application made under section 23 of the Parliament (Powers and Privileges) Act that the 1st respondent was guilty of disrespectful conduct in the precincts of the House (an offence specified in paragraph 7 of Part B of the Schedule to the Act) and that the 2nd respondent was guilty of abetment of the said offence of disrespectful conduct (an offence specified in paragraph 10 of Part B).

Assuming (without deciding) that the sitting of the House was validly suspended by the Speaker and that there was no occasion for the operation of section 17 (5) of the Ceylon Constitution Order in Council, 1946, which provides that in the absence of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, at a sitting of the House, a member proposed and seconded in that behalf may preside at the sitting—

Held, that the conduct of the two respondents, even if it was disrespectful, was not justiciable by the Supreme Court. It was conduct included within the scope of sections 3 and 4 of the Parliament (Powers and Privileges) Act and could not therefore be questioned or impeached in proceedings taken in the Supreme Court under section 23 of the Act. The jurisdiction to take cognisance of such conduct was exclusively vested in the House of Representatives.

Quaere, (i) whether the provisions of section 25 (2) of the Parliament (Powers and Privileges) Act preclude a respondent from challenging the validity of an application made under section 23 on the ground that the application includes charges not specified in the Report furnished by the Attorney-General under section 26.

(ii) whether, on every occasion of the suspension of a sitting of the House of Representatives, it is the duty of the Speaker to give notice of the time when the sitting will be resumed.

(iii) whether paragraph 7 of Part B of the Schedule to the Parliament (Powers and Privileges) Act covers only disrespectful conduct *in the precincts of the House*, and not such conduct in the House itself or in a Committee.

THE ATTORNEY-GENERAL *v.* SAMARAKKODY 412

Partition Actions—

1. *Partition Act, No. 16 of 1951—Section 2—Dismissal of action—Jurisdiction of Court to allot shares among the defendants thereafter.*

When an action for partition of a land is dismissed on the ground that the plaintiff has no title to the land, the Court has no jurisdiction to proceed to allot shares among the defendants if the defendants do not agree to ask for partition.

WEERAKOON *v.* WAAS 25

2. Res judicata—*Partition action—Withdrawal of action—Consent by some of the defendants—Failure to obtain leave to institute fresh action—Effect on rights of parties in a subsequent action—Civil Procedure Code, ss. 207, 406* 241

See RES JUDICATA (2).

3. *Partition action—Summons not duly served on a party defendant—Waiver of irregularity—Effect on final decree.*

In a partition action the appellant, who was not mentioned as a defendant in the plaint, was ordered by Court to be made a party. His name thereafter appeared as one of the defendants and he took part in the proceedings between interlocutory decree and final decree. He admitted that the share allotted to him in the interlocutory decree was correct.

Held, that the failure to give the appellant notice of the action and/or to call upon him to file a statement of claim was not an irregularity that could entitle him to challenge the validity of the interlocutory decree. He was therefore bound by the final decree.

HENDRICK *v.* PODINONA 494

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Payment—

Landlord and tenant—Payment of rent—Agreement by landlord to accept cheques sent by post—Computation of date of payment—Rent Restriction Act, No. 13 of 1948, s. 13 (1) (a).

Where a landlord had expressly agreed that payment of rent should be made monthly by means of a cheque posted to his address—

Held, that the posting of the cheque by the tenant on a particular date operated as payment of the rent on that date, for the purpose of ascertaining whether the tenant was in arrear of rent.

SENEVIRATNE *v.* SENEVIRATNE 557

Penal Code—

Section 32 350
Section 81 202
Sections 138, 140 58
Section 146 350
Section 294 350
Section 294, Exception 1 .. .. 100, 226
Sections 303, 304, 305 202
Section 317 350
Section 457 358

See also COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL LAW.

Perjury—

See PRIVY COUNCIL DECISIONS (1).

Postponement—

Costs—Adjournment of hearing of a case—Power of Court to order payment of " incurred costs "—Civil Procedure Code, ss. 143, 214 .. 46

See COSTS.

Prescription—

1. *Rent Restriction Act, No. 29 of 1948—Sections 13 (1) (a) and 15—Overpaid rents—Set-off against rent in arrear—Appropriation of the overpayments—Prescription Ordinance (Cap. 55), s. 10.*

Under section 15 of the Rent Restriction Act any rent paid in excess of the authorised rent must be appropriated by the landlord in the way which is most favourable to the tenant for the purposes of prescription. Therefore, if overpayments of rent were made by the tenant during a period of three years immediately preceding the date when he fails to pay rent for a particular month, the sum due as rent for such month should be deducted from the earliest overpayment in the hands of the landlord.

MUNIDASA *v.* RICHARD APPUHAMY 108

2. *Muslim Law—Claim for kaikuli —Prescriptive period commences on date of demand* 239

See MUSLIM LAW (2).

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Price Control—

See CONTROL OF PRICES ACT.

Privy Council—

1. *Appeals (Privy Council) Ordinance (Cap. 85)—Rule 1 (a) and (b) of Schedule—" Directly or indirectly "—" General or public importance".*

The discretion vested in the Supreme Court under Rule 1 (*b*) of the Schedule to the Appeals (Privy Council) Ordinance will not be exercised in favour of a party when his only ground for invoking the Rule is that he is dissatisfied with the decision of the Supreme Court.

SUBRAMANIAM *v.* KUMARASWAMY 130

2. *Privy Council—Conditional leave to appeal—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, s. 15—Judgment of Supreme Court—Right of appeal therefrom—" Civil suit or action "—Appeals (Privy Council) Ordinance (Cap. 85), s. 3, Rule 1 (b) of Schedule.*

A judgment given in an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act is a judgment in a " civil suit or action in the Supreme Court " within the meaning of section 3 of the Appeals (Privy Council) Ordinance.

TENNEKONE *v.* DURAISWAMY 436

3. *See also* RES JUDICATA (1).

Privy Council Decisions—

1. *Contempt of Court—Perjury—Exercise of summary powers of punishment —Principles applicable—Criminal Procedure Code, s. 440.*

The summary power conferred by section 440 (1) of the Criminal Procedure Code is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury. It was never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witness in the case. If such an investigation is necessary it can and should be set on foot under section 440 (4).

SUBRAMANIAM *v.* THE QUEEN 409

2. *Master and servant—Negligent driving of motor car—Retention of control by person other than driver—Responsibility for damage.*

A person in control of a motor vehicle—though not actually driving—is liable for the negligence of the driver over whom he has the right to exercise control.

P was one of three "field officers" employed by the defendant insurance Company. The work of the field officers was to supervise and control the canvassers and to assist them to bring in business to the Company. They were paid a monthly salary and an overriding commission on business introduced through them. It was the duty of any canvasser or field officer bringing in a proposal for life insurance to forward with it a doctor's certificate with regard to the proponent. The doctor's fees were paid by the Company.

One day the plaintiff, who was a doctor, suffered personal injuries by reason of the negligent driving by H, a canvasser, of a motor car in which the plaintiff was a passenger on a journey undertaken from Colombo for the purpose of examining a number of proponents in Jaffna. On the journey there were present in the car four persons, viz., the plaintiff, H, P, and G who was a paid driver. P, H, and G took turns in driving the car. At the time of the accident H was driving and P was sitting in the back seat. The evidence disclosed that the car had been supplied

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to P by the Company under a hire purchase agreement which recited that P was employed by the Company as a field officer and that under the conditions of his appointment he was obliged to discharge certain obligations and that with a view to helping him discharge these obligations the Company had lent him the money to purchase a car in the name of the Company. It was also accepted by the trial Court that the plaintiff had stipulated with H that transport should be supplied for the journey and that H had agreed and arranged with P for the use of his car.

Held, that P was a servant of the Company and that in making the journey in the car which had been supplied to him for the purpose of carrying out his duties he was acting in the course of and for the purposes of his employment. Accordingly, although H was at the wheel of the car at the moment of the accident, the fact that P was at all times in control of the car and was exercising that control as a servant of the Company on its behalf rendered the Company liable to pay damages to the plaintiff.

THE TRUST CO., LTD. *v.* E SILVA 433

3. *Maintenance—Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy—" No access ".*

Non-access within the meaning of section 112 of the Evidence Ordinance can be established by proof of the absence of such personal contact between husband and wife as would give rise to the presumption of sexual intercourse. " The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived. "

In an application for maintenance in respect of an illegitimate child born on 24th May, 1950, the following facts were established :—The applicant was married about nine years before the hearing to one M. M left her after a few years—whether 2 or 4 is not clear—and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the applicant was living at all material times. For 5 or 7 years before the hearing the applicant and her husband had been living apart and during the time three children were born to M's mistress. In August, 1949, the applicant was living at Kallar where she had sexual intercourse with the defendant in his house in which she was residing with him and his wife and daughter. At this time, M was living with his mistress at Annamalai some 3 or 4 miles distant, but the applicant had never seen him from the time he left her.

Held, that the facts warranted a finding of no access within the meaning of section 112 of the Evidence Ordinance.

KANAPATHIPILLAI *v.* PARPATHY 553

Provocation—

Provocation—Charge of murder—Mere abuse may amount to grave and sudden provocation—Question of fact for jury—Penal Code, s. 294, Exception 1 .. 226

See COURT OF CRIMINAL APPEAL DECISIONS (6).

Public Servants—

Action against public officer—Notice of action—Procedure—Malice alleged in plaint—Is notice necessary then ?—Civil Procedure Code, s. 461 .. 457

See CIVIL PROCEDURE (14).

Public Trustee Ordinance—

See BUDDHIST ECCLESIASTICAL LAW (2).

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Punishment—

See SENTENCE.

Quia Timet Actions—

Quia timet *action—Remedy of declaratory decree—Jurisdiction of Court to grant it—Liability of Crown.*

A party who has a concrete dispute with another may obtain in anticipation a declaration by Court that his opponent does not have a good cause of action against him. The jurisdiction of Court to grant a declaratory decree is, of course, discretionary, and would not be exercised for the purpose of making premature pronouncements as to future contingent rights of litigants.

The Crown enjoys no special immunity from declaratory decrees in cases where they would be appropriate in actions between private litigants.

The plaintiff, when he was a Public Works Department overseer, had been called upon by the Director of Public Works to refund a certain sum of money which was alleged to have been over-paid to him. Plaintiff denied that there had been any over-payment, but the Director persisted in his claim for a refund. Even after he retired from the Public Service, the Government refused to withdraw its claim for a refund and, the plaintiff alleged, was withholding payment of arrears of salary and pension due to him. He instituted the present action asking for a formal declaration in his favour that, *inter alia*, he was not liable to refund any sum of money.

Held, that the action was maintainable.

THE ATTORNEY-GENERAL *v.* SABARATNAM 481

Reciprocal Enforcement of Judgments Ordinance—

See CONTRACTS (4).

Rent Restriction—

See LANDLORD AND TENANT.

Res Judicata—

1. Res judicata—*Point of law—Erroneous decision thereon—Right of parties to raise same point of law in another suit.*

An erroneous decision on a pure question of law will operate as *res adjudicata* in regard only to the subject-matter of the suit in which it is given. It does not prevent the Court from subsequently deciding the same question correctly in another suit between the same parties when the subject-matter of the suit is different. Therefore, if the subject-matter of a suit is a land of the value of less than Rs. 5,000, the aggrieved party seeking to appeal to the Privy Council on a point of law is not entitled to claim that the appeal involves "indirectly" a question respecting property of the value of over Rs. 5,000 within the meaning of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance merely because a dispute between the same parties regarding other lands of over Rs. 5,000 in value will involve the same point of law.

SUBRAMANIAM *v.* KUMARASWAMY 130

2. Res judicata—*Partition action—Withdrawal of action—Consent by some of the defendants—Failure to obtain leave to institute fresh action—Effect on rights of parties in a subsequent action—Civil Procedure Code, ss. 207, 406.*

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A instituted action No. 1 for the partition of a land on the basis that it was exclusively owned in common, from a common source of title, by him and the defendants one of whom was B. C intervened claiming for himself an undivided 2/9 share of the land. A decided to avoid a contest on the issue of C's claim. He obtained, with B's consent, permission from the Court to " withdraw the action " but did not ask for liberty to institute a fresh action. Accordingly, the trial Judge entered a decree dismissing A's action with costs in favour of C.

About a year later the successors-in-title of B instituted action No. 2 against C in respect of the identical land claiming declaration of title to the 2/9 share which C had claimed in action No. 1. A was also joined in action No. 2 as a defendant in order to ensure a more complete and effectual adjudication of the issues arising in the action.

Held, (*a*) that the failure of A to obtain liberty under section 406 of the Civil Procedure Code to bring fresh proceedings at the time when he " withdrew " from the partition action (Action No. 1) was fatal to any fresh attempt by A to reagitate a claim which came into conflict with C's title to an undivided 2/9 share.

(*b*) that the plaintiffs in action No. 2, being privies of B who had consented to the unconditional withdrawal of action No. 1, were also precluded from asserting that the title which had passed to them from B prevailed over the title of C.

KANDAVANAM *v.* KANDASWAMY 241

Rural Courts—

Rural Court—Exclusive jurisdiction—Village Tribunals Ordinance, No. 12 of 1945, ss. 12, 13.

In a prosecution by a public officer in respect of an offence triable by a Magistrate's Court the accused cannot be convicted of a lesser offence which was not included in the charge and which is exclusively triable by a Rural Court.

HEEN APPU *v.* SALIH 282

Sale of Goods—

See CONTRACTS (4).

Sale of Immovable Property—

See VENDOR AND PURCHASER.

Sentence—

1. *Sentence—Assessment of it—Governing considerations—Conditional release of offenders—Applicability to grave offences—Criminal Procedure Code, s. 325 (2).*

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender.

The accused-respondent, a clerk in the Food Control Department, pleaded guilty to charges of forging certain documents. He had forged the documents in order to enable two non-citizens to obtain residence permits. Having regard to the age, antecedents, and previous good character of the accused, the trial Judge, purporting to act under section 325 of the Criminal Procedure Code, ordered the accused to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years.

Held, that the offence was far too grave to be dealt with under section 325 of the Criminal Procedure Code.

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Per BASNAYAKE, A.C.J.—" A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

THE ATTORNEY-GENERAL *v.* DE SILVA .. 121

2. *Sentence—First offender—" Deterrent punishment ".*

Sentence of imprisonment passed as " deterrent punishment " on a first offender altered to one of fine.

SENEVIRATNE *v.* SUBRAMANIAM 187

3. *Criminal Procedure Code, s. 312 (1) (b)—Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938, s. 12 (2).* .. 279

See INCOME TAX ORDINANCE (3).

Shop Act—

1. *Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—" Serving of customers "—Sections 62 (2), 68.*

A customer is served within the meaning of the Shop and Office Employees (Regulation of Employment and Remuneration) Act when a man who enters a shop and inquires for the price of an article is told what the price is.

SOCKALINGAM *v.* ASANERIS APPU 191

2. *Shop and Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954—Closing order—Contravention thereof—Serving of customers—Necessary ingredient—Sections 43 (1), 62 (2), 68.*

The presence of customers in a shop after closing time does not conclusively establish that the shop was kept open for the purpose of serving of customers. Section 62 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act does not raise any presumption that the presence of a customer presupposes that the shop was kept open for serving him.

The accused was charged with keeping his shop open for the serving of customers in contravention of a closing order. There was evidence of the presence of certain persons who had come to take away goods from the shop on behalf of a man who had purchased the goods earlier.

Held, that the evidence was not by itself conclusive proof of " serving of customers " within the meaning of section 43 (1) and 68 of the Shop and Office Employees (Regulation of Employment and Remuneration) Act.

SHARUFDEEN *v.* SINNADURAI 214

Specific Performance—

See CONTRACTS (1).

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Thesavalamai—

1. *Thesavalamai—Debts of a deceased person—Right of surviving spouse to settle them by sale of deceased's property—Applicability of Roman-Dutch law.*

Where the Thesavalamai is silent the Roman-Dutch law is applicable.

The rule of Roman-Dutch law that the surviving spouse may validly sell immovable property of a deceased person in order to pay his debts is applicable to parties governed by the Thesavalamai.

SARAVANAMUTTU *v.* NADARAJAH 332

2. *Thesavalamai—Property of deceased wife—Rights of husband—Sale by son—Rights of vendee—Cap. 51, Part I, ss. 9 and 11—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 4, 14, 37, 38, 40.*

Sections 9 and 11 of Part I of the Tesawalamai (Cap. 51) apply to the estate of a spouse married before, and dying after, 17th July 1911 (the date of commencement of the Jaffna Matrimonial Rights and Inheritance Ordinance). Section 37 of the Ordinance has no application to such a case.

SOOSAIPILLAI *v.* SOOSAIPILLAH 529

Torts—

See DELICTS.

Trade Marks—

Trade Marks Ordinance—Section 17—" Calculated to deceive ".

When considering whether a trade mark, which is proposed to be registered, so nearly resembles an already registered trade mark as to be " calculated to deceive " within the meaning of section 17 of the Trade Marks Ordinance, a test to apply is not whether if a person is looking at the two trade marks side by side there would be a possibility of confusion, but whether the average person who sees the proposed trade mark in the absence of the registered trade mark would mistake the proposed trade mark for the registered trade mark.

MOHIDEEN *v.* REGISTRAR OF TRADE MARKS 535

Trusts Ordinance—

1. *Constructive trust—Minor—Person in fiduciary relation entering upon and possessing minor's estate—His liability as trustee—Agent—His status as express trustee—Prescription—Fraud—Trusts Ordinance (Cap. 72), ss. 82, 90, 92, 111.*

Plaintiff was a minor and lived with his elder sister. Each of them was entitled to a half share of the business of a Tea Factory. Defendant, who was the husband of the sister, of his own accord undertook to manage the business on behalf of the plaintiff and conducted the entire business.

Held, (i) that under section 90, read with section 82, of the Trusts Ordinance the defendant was a constructive trustee as an agent who stood in a fiduciary relation to the plaintiff and, accordingly, held the half share of the business for the benefit of the plaintiff.

(ii) that, inasmuch as a person in the position of an agent is generally treated by English law as an express trustee, the provisions of section 111 (5) of the Trusts Ordinance precluded the defendant from pleading the benefit of the Prescription Ordinance.

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(iii) that the liability of the defendant as trustee extended for a short period beyond the period of minority of the plaintiff in regard to profits derived from transactions with third parties.

(iv) that section 111 (1) (*b*) of the Trusts Ordinance does not require the element of fraud to be proved in order to avoid the plea of prescription.

MOHAMED *v.* ABDUL GAFOOR 228

2. *Trusts—Resulting trust—Transfer by person* in loco parentis—*Presumption of advancement—Rebuttability—Trusts Ordinance* (*Cap. 72*), *ss. 83, 84.*

If a person transfers property to another to whom he stands *in loco parentis* there is a presumption of advancement, so that a resulting trust under section 84 of the Trusts Ordinance does not arise in favour of the transferor. But, under section 83 of the Trusts Ordinance, the presumption of advancement may be rebutted by proof that the transferor did not intend to dispose of the beneficial interest in the property unconditionally to the transferee.

Plaintiffs had deposited a total sum of Rs. 5,000 in favour of their younger sister, the defendant, in the Post Office Savings Bank. Although the account in the Post Office Savings Bank was in the name of the defendant, the Bank pass book was retained by the eldest brother (the 1st plaintiff). The attendant circumstances showed that the beneficial interest in the money was intended to be " given as dowry " to the defendant only if and when she would be " given in marriage " to a bridegroom approved by the family. Defendant, however, soon after she attained her majority, eloped with and married a man of her own selection without the approval of her parents or her brothers.

Held, that when the defendant contracted a marriage without the approval of her family, she became disentitled to receive the sum of Rs. 5,000. The money, therefore, belonged to the plaintiffs.

PERERA *v.* PERERA 265

3. *Charitable trust—Construction of deed—Purchase of property for a Hindu temple—Legal position of the purchaser—Co-trustees—Survival of trust on death of a co-trustee—Trusts Ordinance* (*Cap. 72*), *ss. 5, 6, 78, 84, 107.*

Where a transfer of immovable property contained a recital that the consideration was paid by the transferee " for " a specified Hindu temple—

Held, that the transferee must be taken to have purchased the property with funds provided by, or held by him for, the religious charity represented by the temple. The transferee, therefore, held the property as trustee, and, on his death, the land devolved on his heirs subject to the same trust.

Held further, that section 78 of the Trusts Ordinance is applicable to charitable trusts. On the death, therefore, of a co-trustee, the trust property passes to the other co-trustees and not to the heirs of the deceased trustee.

FERNANDO, A. J.—The words " for the Temple " were not merely precatory but were sufficient to create a trust.

MURUGESOE *v.* CHELLIAH 463

Unlawful Assembly—

See CRIMINAL LAW (1).

Urban Councils—

See LOCAL AUTHORITIES.

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Vendor and Purchaser—

1. *Vendor and purchaser—Covenant to warrant and defend title*—Actio rei vindicatio *instituted by purchaser—Notice to vendor—Dismissal of action—Duty of purchaser to appeal—Liability of vendor to pay damages.*

Where a purchaser of immovable property fails to succeed in a vindicatory action instituted by him in respect of the property, his omission to appeal to the Supreme Court does not exempt the vendor from liability for damages for breach of his covenant to warrant and defend title, if the vendor was given sufficient notice of the action but did not induce the vendee to appeal.

DHARMAWATHIE HAMINE *v.* KIRA 361

2. *Vendor and purchaser—Speculative purchase—Express warranty of title—Right of purchaser to claim damages.*

Where a purchase of land was speculative and the purchaser knew that the title of the vendor might be defective—

Held, that the purchaser, when evicted, was not entitled to claim damages from the vendor even though the deed of sale contained an express warranty of title.

POTUHERA *v.* UKKU MENIKA 396

3. Exceptio rei venditae et traditae—*Seizure of immovable property and registration of notice of it—Sale by judgment-debtor pending the seizure—Subsequent purchase by his nominee from execution purchaser—Validity and effect of such purchase—Civil Procedure Code, ss. 237 (1), 238.*

Where, during the pendency of a duly registered seizure of immovable property, the judgment-debtor sells the property by private alienation prior to the Fiscal's sale, the vendee is entitled to the benefit of the *exceptio rei venditae et traditae* if the judgment-debtor or his nominee buys the property subsequently from the person who purchases it at the Fiscal's sale. Although section 238 of the Civil Procedure Code declares *inter alia* that any sale during the pendency of the registration of a notice of seizure shall be " void " as against an execution purchaser and as against " all persons " deriving title under or through him, and although the words " all persons ", being words of the utmost generality, are *ex facie* wide enough to include the judgment-debtor himself, it does not necessarily follow that the superior title acquired by the judgment-debtor by virtue of section 238 can be vindicated in violation of his subsisting personal obligations independently undertaken by contract or imposed on him under the general law.

PERERA *v.* PERERA 440

4. *See also* CONTRACTS.

Village Communities Ordinance—

See LOCAL AUTHORITIES (1).

Village Tribunals—

See RURAL COURTS.

Wages Boards Ordinance—

1. *Wages Boards Ordinance, No. 27 of 1941—Sections 50 and 52 (b)—" Hindering an officer in the exercise of his powers ".*

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The accused-appellant prevented an Inspector of Labour from asking routine questions as to wages and holidays from a labourer in a tea factory while the labourer was in charge of certain noisy machinery.

Held, that the conduct of the accused did not amount to hindering an officer in the exercise of his powers within the meaning of section 52 (*b*) of the Wages Boards Ordinance.

FERNANDO *v.* APPADURAI 77

2. *Wages Boards Ordinance, No. 27 of 1941—Prosecution thereunder—Burden of proof—Sections 21, 39 (1), 42.*

Where an employer is charged with failing to pay a worker wages at not less than the minimum rate, in contravention of section 21 of the Wages Boards Ordinance, but the evidence properly admitted at the trial is insufficient to prove that the worker was entitled to payment of wages in respect of the period mentioned in the charge, there is no burden on the accused to prove, in terms of section 42, that payment was duly made by him.

WAAS *v.* GANEGODA 544

Witnesses—

1. *Witness—Right of a party to recall him—Discretion of Court—Evidence Ordinance, s. 138 (4)* 169

See COURT OF CRIMINAL APPEAL DECISIONS (7).

2. *Witness—Conflict between evidence on oath and an earlier statement—Verdict should then be found on the rest of the evidence—Power of Judge to interrogate witnesses* 255

See COURT OF CRIMINAL APPEAL DECISIONS (9).

Words, Phrases and Maxims—

Account stated 268
Audi alteram partem 505
Shall be deemed 307

Workmen's Compensation Ordinance—

Workmen's Compensation Ordinance (Cap. 117)—Claim thereunder—Failure to institute it in due time—Effect of delay thereafter—"Sufficient cause"—Section 16 (1) and (2).

Where a claim for compensation in respect of the death by accident of a workman was made nearly three years after the date of the death—

Held, that the Commissioner's jurisdiction under section 16 (2) of the Workmen's Compensation Ordinance to admit and decide a claim for compensation after the expiry of the period of six months specified in section 16 (1) is regulated by the question whether the failure to institute the claim *within that period* has been sufficiently excused ; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance. The reasons for the subsequent delay would, however, be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim.

MARTIN FERNANDO *v.* ELIZABETH FERNANDO 106

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PAGE

Writ of Certiorari—

1. *Village Communities Ordinance—Section 62—Removal of Chairman of a Village Committee from office—Executive function of Minister—* Certiorari.

When the Minister of Local Government, by virtue of the power vested in him by section 61 of the Village Communities Ordinance, removes the Chairman of a Village Committee from office on being satisfied " that there is sufficient proof of " misconduct in the performance of his duties, he performs an executive and not a judicial act. Such act cannot be the subject of a writ of *certiorari.*

GUNAPALA *v.* KANNANGARA 69

2. Certiorari—" *Judicial act* "—*Excess of jurisdiction—Burden of proof—Land Redemption Ordinance, No. 61 of 1942 (as amended by Ordinance No. 62 of 1947)—Sections 3 (1) and (4), 8—" If the Land Commissioner is satisfied* "—" *Agricultural land* ".

If an inferior tribunal making a judicial decision has to be " satisfied " that a certain state of facts exists before adopting a permitted course of action that state of facts must *in fact* exist, and the burden is on the tribunal, whose jurisdiction has been challenged, to prove the facts which give it jurisdiction. If upon the facts the excess of jurisdiction is manifest, or if the material placed before the superior Court is plainly insufficient to justify a conclusion that the limited jurisdiction has not been exceeded, *certiorari* will lie.

A writ of *certiorari* is available against the Land Commissioner, if purporting to act under the Land Redemption Ordinance, he orders the compulsory acquisition of property that is not " agricultural land " within the meaning of sections 3 (1) and 8 of that Ordinance.

The mere existence of coconut trees and plantain bushes on residential property does not automatically convert it into " agricultural land " within the meaning of the Land Redemption Ordinance.

Bandiya v. The Land Commissioner (1950) 52 N. L. R. 95, not followed.

LEO *v.* THE LAND COMMISSIONER 178

Writ of Mandamus—

1. *Buddhist Ecclesiastical Law—Sripadasthana—Nomination of Trustee by Viharadhipathi—Public Trustee's refusal to issue letter of appointment to Trustee—Dispute as to person entitled to be Viharadhipathi—Remedy of Trustee—*Mandamus *or regular action?—Procedure for election of Viharadhipathi—Buddhist Temporalities Ordinance (Cap. 222), ss. 2, 10 (1), 11, 33, 41—Public Trustee Ordinance (Cap. 73), s. 3—Civil Procedure Code (Cap. 86), s. 217 (E) and (G)* .. 78

See BUDDHIST ECCLESIASTICAL LAW (2).

2. *Writ of* Mandamus—*Availability against a servant of the Crown—Land Acquisition Act—Sections 16 and 27—Award of compensation—Mode of enforcing payment of it.*

A writ of *mandamus* does not lie against a servant of the Crown where the duty sought to be enforced is not one which is imposed on the servant himself but is imposed on him only in the capacity of agent for the Crown. It does not therefore lie to order an Assistant Government Agent to pay to a particular person money awarded as compensation for land acquired under the Land Acquisition Act. The proper remedy in such a case is a regular action against the Crown.

MUNASINHA *v.* DEVARAJAN 286

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THE

NEW LAW REPORTS OF CEYLON

VOLUME LVII

1955 *Present :* **Gratiaen J., Pulle J. and Sansoni J.**

THAHEER *et al.*, Appellants, *and* ABDEEN, Respondent

S. C. 389—D. C. Colombo, 19,175

Contract—Agreement to sell immovable property—Specific performance—Principles applicable—Covenant to pay liquidated damages.

Specific performance cannot be claimed in a contract which provides for the substituted obligation of payment of an agreed sum by way of liquidated damages.

In a contract for the sale of certain residential premises, clause 8 provided as follows :—

" 8. In the event of the purchaser being ready and willing to complete the said sale in terms hereof and the vendors failing refusing or neglecting to execute and cause to be executed the said deed of transfer as aforesaid then and in such case the vendors shall repay forthwith the said deposit of rupees twelve thousand five hundred (Rs. 12,500) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the purchaser a sum of rupees fifteen thousand (Rs. 15,000) as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of rupees twelve thousand five hundred (Rs. 12,500). "

Clause 9 provided further that, should the purchaser default for any reason, he would, though liable to pay an agreed sum to the vendors as liquidated damages, be entitled to a refund of his earlier deposit.

Held, that the purchaser was not entitled to claim specific performance of the contract in the event of the vendors failing, refusing or neglecting to execute and cause to be executed a conveyance of the premises.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. J. Cooray* and *N. C. J. Rustomjee*, for the defendants appellants.

S. Nadesan, Q.C., with *G. T. Samarawickreme* and *J. Senathiraja*, for the plaintiff respondent.

Cur. adv. vult.

2—J. N. B 48135—1,592 (9/55)

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June 10, 1955. GRATIAEN J.—

This appeal came before the present Bench in view of a difference of opinion between the Judges before whom it was originally argued.

The plaintiff claimed a decree against the 1st and 2nd appellants and against the other appellants (as subsequent transferees of the 1st appellant's interests) for specific performance of a contract No. 4080 dated 3rd October, 1947, for the sale of residential premises called " Barnes House " in Barnes Place, Colombo.

The contract sought to be enforced had been entered into between the plaintiff (as " purchaser ") and seven out of eleven co-owners of the premises including the 1st and 2nd appellants (described as the " vendors ") whereby the purchaser agreed to buy, and the " vendors " undertook to sell " *and cause to be sold* " the entire premises on or before 31st December, 1947, for an aggregate sum of Rs. 92,000 out of which Rs. 12,500 had already been paid to the " vendors " by way of deposit. Vacant possession of the entire premises by an agreed date was also stipulated. In my opinion, the obligation of the " vendors " was single and indivisible and no individual vendor could be said to have fulfilled his part of the contract if he merely conveyed his share of the property together with the limited rights of occupation which a co-owner enjoys. I would therefore reject the argument that the contract was severable in any respect.

The remaining four co-owners were not parties to the contract, and, as they were minors at the time, their interests could not be sold without the authority of the District Court of Colombo. In the result, the " vendors ", in binding themselves to secure for the purchaser a single conveyance passing title to the entire premises in exchange for a composite consideration, had undertaken to produce a result which it was not wholly within their power to achieve.

Clause 8 of the contract provides as follows :—

> " 8. In the event of the purchaser being ready and willing to complete the said sale in terms hereof and the vendors failing refusing or neglecting to execute and cause to be executed the said deed of transfer as aforesaid then and in such case the vendors shall repay forthwith the said deposit of rupees twelve thousand five hundred (Rs. 12,500) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the purchaser a sum of rupees fifteen thousand (Rs. 15,000) as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of rupees twelve thousand five hundred (Rs. 12,500)."

The learned District Judge held in favour of the purchaser that clause 8 merely fixed the amount of compensation which would be payable by the " vendors " in the event of the purchaser electing to enforce one

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of the alternative remedies available to him upon a breach of their contractual obligation ; and that the purchaser was not precluded from enforcing instead the other remedy of specific performance.

The only question which was argued before us was whether, upon a proper interpretation of the document read as a whole, the plaintiff could claim specific performance of the contract (or, if he so chose, of a part of the contract) in the event of all or any of the " vendors " failing, refusing or neglecting to execute and cause to be executed a conveyance of the entire premises within the stipulated period. Mr. H. V. Perera very properly conceded that, if clause 8 must not be construed as providing the only legal remedy available to the purchaser upon a breach by the " vendors " for whatsoever reason, this was an appropriate case for ordering specific performance having regard to the events which had occurred between 3rd October, 1947, and 31st December, 1947. During this interval the District Court had in fact sanctioned a sale of the minors' shares at a proportionate price, and their curators as well as the other vendors (except the 1st and 2nd appellants) were willing to execute, and ultimately signed, the draft conveyance tendered by the purchaser. The refusal of the 1st and 2nd appellants to join in the conveyance alone prevented the completion of the transaction. No valid grounds therefore exist for denying specific performance unless it was not available to the purchaser upon a proper interpretation of the contract. Accordingly, the appellants can only succeed if we adopt their submission as to the legal effect of clause 8.

In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a Court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain *prima facie* enjoys a legal right to demand performance by the other party ; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases. *Farmers' Co-operative Society v. Barry* [1] ; *Woods v. Walters* [2] ; *Lee's Roman-Dutch Law (5th ed.) 265.*

So much for the distinction between English law and Roman-Dutch law on this topic. But in either system, the terms of a particular contract may expressly or by necessary implication exclude the remedy. For instance, the equitable remedy would not be available in England if the seller had bound himself either to convey the property or, *at his election*, to pay a sum of money by way of substituted performance.

[1] *(1912) S. A. A. D. 343.*

[2] *(1921) A. D. 303.*

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Fry on Specific Performance (6th ed.) chapter 3. Similarly, *Wessels on Contract para 1460* explains that under the Roman-Dutch law, " if one of (two) alternative promises is the performance of an act and the other the payment of money, we must gather from the contract and the circumstances whether the payment of money is intended merely as a penal clause *or whether it is to operate as a liquidated debt* . . . . If the payment of the money is not to be construed to be a penal clause, but as an alternative prestation, then directly the performance of the act becomes impossible or the promisor refuses to carry it out or cannot do so, *the money is due* ". A distinction is drawn in paragraphs 1453 and 1454 of the text-book between conjunctive, alternative and facultative obligations. " In the facultative obligation, there is a promise to deliver some definite thing or to perform some definite act, but at the same time the debtor reserves to himself the right of performing his contract by some other prestation e.g. I promise to deliver A, but I reserve to myself the right of delivering B instead. The primary object of the obligation is A, but I have the power (*facultas*) of substituting B ". The author also observes (para 1478) that " if the contract is silent as to whether the choice belongs to the debtor or the creditor, the law presumes that it lies with the debtor. It is the person that has to make the payment who is entitled to the choice ".

So much for the general principles ; but it is their application to particular cases which often presents enormous difficulties. The question always is, of course, *What is the contract ?* " The Courts must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation ",—*Ranger v. G. W. R.* [1]. I would also repeat what I had occasion to observe recently in a similar context, namely, that the interpretation of any particular words appearing in one written instrument is seldom of much assistance as a precedent for deciding the true meaning of some other written instrument. *Sivasambu v. Kathiresar Ambagar* [2].

I now proceed to consider whether clause 8 (as Mr. Nadesan contends) entitles the purchaser to elect at his option to enforce his legal remedy of damages against the defaulting " vendors " but leaves it open to him to enforce the alternative remedy of specific performance if he so prefers ; *or* whether (as Mr. H. V. Perera argued) clause 8 imposes a substituted obligation in the event of failure or refusal by the " vendors " to perform the primary obligation, namely, the conveyance by the " vendors " and certain others of the entire property for Rs. 92,000.

The conclusion which I have reached is that the language of clause 8 is not open to the construction contended for on behalf of the purchaser. The parties must clearly have appreciated on 3rd October, 1947, that failure on the part of the " vendors " to secure a conveyance of the entire

[1] *(1854) 5 H. L. C. 73.*

[2] *(1952) 55 N. L. R. 176 at 178.*

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property to the purchaser on or before 31st December, 1947, in terms of the contract could result from a variety of causes. For example,

(1) the sanction of the District Court to the proposed sale might not be obtained or not be obtained in time ;

(2) the title of the premises might not be " deduced to the satisfaction of Mr. John Wilson "—Clause 5 ;

(3) one or more of the " vendors " might back out of the transaction during the interval between the date of the contract and the date fixed for completion.

In the first of these contingencies, specific performance of the indivisible obligation to secure the sale of the entire property would in the very nature of things have been impossible, because the " vendors " could not be compelled to achieve a result which it was beyond their power to bring about. Clause 8 certainly provides the purchaser's only remedy in that particular contingency, namely, that the vendors "*shall forthwith* " (the words are imperative, and exclude the notion of an option being granted to either of the parties) refund the part consideration previously deposited with them, and also pay an agreed sum by way of liquidated damages.

What then if the vendors should, for some other reason equally within the contemplation of the parties, default in the performance of their primary obligation ? Clause 8 equally provides that in any such contingency the deposit must " forthwith " be refunded and a like sum paid to the purchaser by way of compensation.

It follows from this analysis that what was clearly intended to constitute a substituted obligation upon the first contingency referred to must equally have been intended to constitute the sole obligation arising upon a default in any other contemplated contingency. Had it been the intention of the parties that the substituted obligation provided by clause 8 should represent the purchaser's sole remedy in one situation, but that the alternative legal remedy of specific performance (i.e., under the general law) should nevertheless be reserved to him at his option in another, it would have been a simple matter to insert in the contract express terms making separate provision for each separate contingency.

It is only in the absence of agreement to the contrary that the Roman-Dutch law confers on a purchaser under an executory contract the right to elect one of two alternative legal remedies under the Roman-Dutch law, namely, specific performance *or* damages. But we have here a categorical stipulation that if the primary obligation is not fulfilled for any reason whatsoever, two specified sums shall immediately become due. To my mind, the stipulated return of the deposit, being part of the purchase price, necessarily implies that the primary obligation to sell is then to be regarded as having come to an end. This negatives an intention that the purchaser could still demand, if he so chose, specific performance. It is also significant that, if one considers the relevant issue of mutuality, clause 9 provides that, should the purchaser himself default for any reason, he would, though liable to pay an agreed sum

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to the vendors as liquidated damages, be entitled to a refund of his earlier deposit. Clause 9 therefore denies to the " vendors " by necessary implication the alternative legal remedy of specific performance.

Mr. Nadesan strongly relied on *Long v. Bowring*[1] and other English decisions to the effect that in England, notwithstanding an express covenant to pay liquidated damages, the jurisdiction of a Court of equity to order specific performance had not been ousted. I certainly agree that a provision for the payment of liquidated damages may, in particular contracts, legitimately be construed as having been inserted to secure the performance by the defaulter of his primary obligation. But in my opinion this is not such a case. Moreover, the historical development of the remedy of specific performance in England explains why the Courts of Chancery in the country have always assumed that their equitable jurisdiction to act upon the conscience of a defaulting party could not be ousted unless the contract clearly so indicated. Accordingly, it may well be that the insertion of a clause providing for liquidated damages in an English contract would *prima facie* be regarded as applying only to a situation where the innocent party is content to enforce his common law remedy against the defaulter. Be that as it may, I think that in a system of law which recognises that two alternative legal remedies are *prima facie* available to the innocent party as of right, an agreement providing that, in the event of a breach, the defaulter shall forthwith be obliged to pay an agreed sum by way of compensation, raises, in my opinion, a presumption that the parties intended to rule out recourse to the other legal remedy.

For these reasons I have come to the conclusion that the plaintiff has misconceived his remedy. I would allow the appeal and dismiss the plaintiff's action against the appellants with costs in both Courts. In the absence of an alternative prayer in the plaint, we are not required to consider whether the plaintiff is entitled to any other form of relief against all or any of the " vendors ".

I should mention that Mr. Nadesan had raised a preliminary objection to the constitution of the 2nd appellant's appeal on two grounds, namely, that the petition of appeal had been signed by a proctor before his appointment had been filed in Court as required by Section 24 (1) of the Code, and that the revocation of an earlier proxy in favour of another proctor had not yet been sanctioned in terms of Section 24 (2). I would reject this objection. The revocation of the first proctor's authority, and the appointment of the second proctor had both preceded the filing of the petition of appeal, and the further formalities required by Section 24 had also been complied with before the expiry of the time limit for preferring an appeal to this Court. Apart from that, even if the 1st appellant alone had appealed, Section 760 of the Code would in this case have operated to the benefit of the 2nd appellant.

PULLE J.—I agree.

SANSONI J.—I agree.

Appeal allowed.

[1] *(1863) 33 Beavan 585.*

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[COURT OF CRIMINAL APPEAL]

1954 *Present :* **Rose C.J. (President), Gratiaen J. and Sansoni J.**

NAMASIVAYAM, Appellant, *and* THE QUEEN, Respondent

APPLICATION No. 35

S. C. 20—M. C. Jaffna, 26,940

Trial before Supreme Court—Indictment—Power of Judge to quash it—Power of Judge to stop a case—Effect of failure to exercise it—Separate trial of co-accused—Stage at which application for it should be made—Criminal Procedure Code, s. 234 (1).

An Assize Judge has no power to quash an indictment before the case for the prosecution is closed merely because he anticipates that the evidence would not support the charge.

Although the decision whether or not to stop a case against any particular accused person under section 234 (1) of the Criminal Procedure Code rests primarily with the presiding Judge, an erroneous decision that a *prima facie* case had been made out against an accused person does not constitute an illegality which vitiates the trial of his co-accused.

Where an accused person desires to call, as a witness for the defence, a person jointly indicted with him, the proper course for him to take is to invite the Judge at the outset to order separate trials.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *M. M. Kumarakulasingham* and *V. Ratnasabapathy*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Crown.

May 25, 1954. GRATIAEN J.—

The appellant and two others were jointly indicted with the murder of a man named M. Vaithilingam Chettiar, the case for the Crown being that the appellant had directly committed the offence, whereas the others were vicariously responsible for what he had done in pursuance of the common intention of them all. The appellant was convicted of murder, but verdicts of acquittal were returned in favour of the other accused. At the conclusion of the argument we affirmed the appellant's conviction but stated that the reasons for our decision would be pronounced at a later date.

After the accused persons had pleaded to the indictment, the jury were empanelled and Crown Counsel opened the case for the prosecution. Counsel for the defence, who at that stage represented all the accused, then moved that the case against the 2nd and 3rd accused be withdrawn *in limine* from the jury because the opening speech for the Crown seemed to indicate that no evidence of common intention (the only suggested basis of liability) would be available against them. This submission was

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rightly rejected as premature, and the trial then proceeded. A presiding judge has no power to quash an indictment merely because he anticipates that the evidence would not support the charge—*Ex parte Downes* [1].

During the trial, arrangements were made for the separate representation of the 2nd and 3rd accused persons in view of a possible conflict between their defences and that of the appellant.

At the close of the case for the prosecution, the learned judge, who presumably considered at that stage that there was a case for each accused to meet, called for a defence. In the course of his charge to the jury, however, —i.e., after the appellant had led some evidence and after the closing speeches of Counsel—he directed them to return a verdict acquitting the 2nd and 3rd accused as there was " no evidence " of common intention against them. He also gave them adequate and proper directions as to the only basis on which the conviction of the appellant for murder (or in the alternative, a lesser offence) would be justified.

The summing-up with regard to the case against the appellant was free of misdirection, and the verdict against the appellant, who had not given evidence on his own behalf, is not open to criticism as " unreasonable ". The main ground of appeal was, however, in the following terms :

> " By reason of the fact that the 2nd and 3rd accused were held as accused after the close of the case for the prosecution without being discharged, as they should have been, the appellant was deprived of his right to call the 2nd accused into the witness box to establish the fact that it was he and not the appellant who inflicted the injuries on the deceased *in accordance with the statement made by the 2nd accused to the police.*"

Mr. Chitty conceded that an application had not been made either on behalf of the appellant or on behalf of the 2nd and 3rd accused at the close of the evidence for the prosecution that there was no case for the latter to meet. Nevertheless, he argued, it was the judge's duty to direct the jury at that stage to return a verdict of " not guilty " in their favour. While we agree that the decision whether or not to stop a case against any particular accused person under section 234 (1) of the Criminal Procedure Code rests primarily with the presiding judge, we certainly reject the view that an erroneous decision that a *prima facie* case had been made out against an accused person could ever constitute an illegality which vitiates the trial of his co-accused. Besides, although the evidence of common intention against the 2nd and 3rd accused in the present case was weak, there was in fact sufficient evidence to justify the decision to call upon them for their respective defences. Indeed, the ultimate direction " as a matter of law " that there was " no evidence " against them was unduly favourable to them. But that is not a circumstance of which the appellant has cause to complain.

In this view of the matter, the entire foundation of the appellant's ground of appeal disappears. If the appellant had intended to call the 2nd accused as his witness, the proper course to have adopted was to invite the judge at the outset to order separate trials. *Archbold*

[1] *(1953) 3 W. L. R. 586.*

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(*32nd Edn.*) *p. 53* mentions, as one of the reasons which would justify a discretion to order separate trials, a situation where one accused person desires to call for the defence a person jointly indicted with him. No such application was made on the applicant's behalf, nor was an intimation made to the presiding judge at any stage that the appellant might possibly be prejudiced (as he now says he was) if the trial took a course which would prevent him from calling the 2nd accused as a compellable witness to support his defence. Indeed, the appellant seems to be unduly optimistic in assuming that, if the 2nd accused had implicated himself in the witness box as the person who actually stabbed the deceased, such evidence would have been "*in accordance with the statement made by the 2nd accused to the police*". We have examined this statement on which the appellant had apparently hoped to rely, and it is quite clear that the 2nd accused said nothing to the police which either implicated himself or exonerated the appellant of responsibility for the stabbing.

For these reasons we made order dismissing the appeal and affirming the conviction.

Appeal dismissed.

1955 *Present :* **de Silva J. and Sansoni J.**

THE ATTORNEY-GENERAL, Appellant, *and* WILLIAM *et al.*, Respondents

S. C. 12—D. C. (Criminal) Jaffna, 4,489

Bribery Act, No. 11 of 1954—Indictment—Requirement of signature of Attorney-General—Sections 3 (2), 5, 6 (1), 8, 9 (1), 19 (b), 25, 78 (1)— Criminal Procedure Code, ss. 148 (e), 165 F, 186, 393.

In a prosecution for bribery under the Bribery Act, an indictment signed by a Crown Counsel contravenes the requirement of sections 5, 8 and 78 (1) that the indictment should not be signed except by the Attorney-General. A District Judge has no jurisdiction to try the accused upon such an indictment.

APPEAL from a judgment of the District Court, Jaffna.

Douglas Jansze, Acting Solicitor-General, with *L. B. T. Premaratne* and *V. S. A. Pullenayagam*, Crown Counsel, for the Attorney-General, appellant.

S. Nadesan, Q.C., with *J. V. C. Nathaniel*, for the accused respondent.

Cur. adv. vult.

August 22, 1955. SANSONI J.—

This is an appeal by the Attorney-General against the order of the learned District Judge of Jaffna discharging both the accused who appeared before him in these proceedings upon being served with copies of an indictment in the following terms :

"You are indicted at the instance of Thusew Samuel Fernando, Esquire, Q.C., Her Majesty's Attorney-General, and the charge against you is

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That on or about the 18th day of June 1954, at Jaffna within the jurisdiction of this Court, you, Rajapaksa Vithanage William, being a public servant, to wit, Examiner of Motor Vehicles in the Department of the Commissioner of Motor Traffic, did accept a gratification, to wit, a sum of Rs. 50, as an inducement or reward for your performing an official act, to wit, the examining of and recommending the issue of a licence to drive a motor vehicle to P. B. R. S. Cooray of Jaffna, and that you are thereby guilty of an offence punishable under Section 19 (*b*) of the Bribery Act, No. 11 of 1954.

2. That at the time and place and in the course of the same transaction aforesaid you, Arunasalam Sinnapodiya Nagalingam, the second accused above-named, did abet the commission of the said offence of bribery which said offence was committed in consequence of such abetment, and that you are thereby guilty of an offence punishable under Section 19 (*b*) read with Section 25 of the said Bribery Act, No. 11 of 1954.

This 19th day of October, 1954.

Sgd.....

Crown Counsel. "

A preliminary objection was taken by their Counsel based on S. 78 (1) of the Bribery Act, No. 11 of 1954, which reads : " No prosecution for any offence under this Act shall be instituted in any Court except by, or with the written sanction of, the Attorney-General ". It was contended that this prosecution had not been instituted by the Attorney-General or with his written sanction. The Act makes provision for the prosecution of two classes of offences, namely, offences of bribery and offences other than bribery, and these two classes are dealt with in Part II and Part V respectively. The offences with which the accused were charged fall within Part II, and all prosecutions for such offences have to be instituted by the Attorney-General.

The earliest stage at which it can be said that a prosecution has been initiated is when the Attorney-General requires a Magistrate, upon a warrant under S. 148 (1) (*e*) of the Criminal Procedure Code, to hold an inquiry in respect of an allegation of bribery—S. 3 (2), but that course was not adopted in this prosecution. A prosecution can also be said to be initiated where without such preliminary inquiry the Attorney-General indicts the offender before the Supreme Court or the District Court, or arraigns him before a Board of Inquiry—S. 5 and S. 8. It will be observed that the Attorney-General alone is empowered to act under SS. 3 (2), 5 and 8.

There are two Sections which confer upon the Attorney-General the power to indict for bribery. One is S. 5 which reads : " If the Attorney-General is satisfied that there is a prima facie case of bribery he may

(*a*) where the offender is not a public servant, indict the offender before the Supreme Court or the District Court, as the Attorney-General may determine ; and

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(*b*) where the offender is a public servant, either indict the offender as provided in the preceding paragraph (*a*) or arraign the offender before a Board of Inquiry, after informing the Public Service Commission."

The other is S. 8 which empowers the Attorney-General to indict a person for bribery without a preliminary inquiry by a Magistrate's Court as provided in Chapter 16 of the Criminal Procedure Code.

Now although the two accused were indicted in this case upon a supposed exercise of the powers vested in the Attorney-General by SS. 5 and 8, the indictment presented was not signed by the Attorney-General but by a Crown Counsel, and the preliminary objection was based on this omission. The learned Judge in his order took the view that the general scheme of the Act was that the Attorney-General himself should be concerned with the prosecution of cases arising under the Act, and he held that this was not a prosecution by the Attorney-General. The point that arises for decision is whether an indictment signed by a Crown Counsel and presented to the District Court in a case where there has been no preliminary inquiry by a Magistrate, contravenes the express provision of S. 78 (1) that no prosecution shall be instituted in any Court except by the Attorney-General.

The Act contemplates power being exercised by the Attorney-General in three different ways. In some matters he must act himself; in other matters he may act himself or through an officer authorised by him; in yet other matters he may authorise an officer *in writing* to take action.

Instances where the Attorney-General himself must act are :

(1) Under SS. 3 (2) and 3 (3) to require a Magistrate upon warrant under S. 148 (1) (*e*) of the Criminal Procedure Code, to hold an inquiry under Chapter 16 of that Code, and at the conclusion of the inquiry to require the Magistrate to record such further evidence as the Attorney-General may consider necessary.

(2) Under S. 4 (1) by written notice (*a*) to require an accused person to furnish a sworn statement in writing of his property, and the property of the members of his family; (*b*) to require the Manager of any Bank to produce the accounts of an accused person or of any member of his family; (*c*) to require the Commissioner of Income Tax to furnish all information available to him relating to the affairs of an accused person or any member of his family; (*d*) to require the person in charge of any Government Department or of a Local Authority or of a scheduled institution to produce any document in his possession or under his control.

(3) Under S. 42 to select the members of a Board of Inquiry.

(4) Under S. 80 (2) to determine how long a person remanded to Fiscal's custody in default of bail should be kept in such custody.

Instances where the Attorney-General may act himself or through an officer authorised by him are :

(1) Under S. 3 (1) to direct and conduct the investigation of allegations of bribery.

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(2) Under S. 3 (4) to direct in writing any person to appear and answer questions orally on oath or affirmation, to state facts by means of an affidavit, and to produce documents.

(3) Under SS. 4 (3) and (4) to enter and search any Department, office or establishment of the Government with such assistance as may be necessary ; and to apply to any public servant or any other person for assistance in the exercise of his powers and the discharge of his duties under the Act.

(4) Under S. 7 to apply to such Magistrate as the Attorney-General may determine for a search warrant to enter and search any place or building and to remove anything relevant to an investigation.

Instances where an officer authorised in writing by the Attorney-General may act are :

(1) Under S. 11, to present the case against a Public Servant who is arraigned before a Board of Inquiry.

(2) Under S. 81 (1) to authorise a Magistrate to tender a pardon to a person directly or indirectly concerned in or privy to an offence of bribery, with the view of obtaining the evidence of such a person.

(3) Under S. 83, to delegate to the Solicitor-General any of his powers and functions under the Act, except the power to sanction civil or criminal proceedings.

That the legislature intended to draw a clear distinction between these three classes of cases becomes apparent when one considers some of these Sections which I have already referred to. If one considers SS. 3, 4 and 7, to mention only three, one finds that each of them requires the Attorney-General to exercise certain powers himself, and authorises him to exercise other powers through an officer authorised by him. It is only too clear that this distinction has been deliberately drawn, and there is no room for the argument that where a Crown Counsel acts it should be presumed that he acted with the authority of the Attorney-General. The reason, I think, is obvious. Some of the powers conferred on the Attorney-General are of such magnitude that it was probably considered necessary that they should be exercised by him and by him alone to ensure that his judgment and decision will serve as a guarantee that those powers would be properly exercised.

When we examine the question arising on this appeal in the light of these considerations, we can understand why S. 5 empowers the Attorney-General (and nobody else) if he is satisfied that there is a prima facie case of bribery, to indict or arraign an offender, and also why S. 8 confers on the Attorney-General (and nobody else) the power to indict a person for bribery without a preliminary inquiry by a Magistrate. S. 5 makes the opinion of the Attorney-General the deciding factor as to whether there should be a prosecution or not. S. 8 brings into being an entirely novel procedure, since it abolishes such safeguards as the preliminary

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examination of witnesses on oath or affirmation, and their cross-examination. S. 3 (2) is another drastic provision which relates to cases where a preliminary inquiry has been held by a Magistrate : the Magistrate is not permitted to exercise the normal judicial function of discharging the accused in a case where he considers that no useful purpose will be served by committing him for trial, but is required instead to transmit the record to the Attorney-General. Powers such as these which have been entrusted to the Attorney-General are not to be regarded lightly ; they must be exercised by him and him alone.

Mr. Nadesan who appeared for the accused submitted that the words " no prosecution shall be instituted except by the Attorney-General " to be found in S. 78 connote that the Attorney-General and nobody else shall institute the prosecution. He drew attention to the analogous provisions of S. 148 of the Criminal Procedure Code which enumerate the different ways in which proceedings shall be instituted by different categories of persons in a Magistrate's Court, and his contention was that since the Act empowered the Attorney-General to indict an offender the signing of the indictment by the Crown Counsel would not be in compliance with the Act, for if Crown Counsel signs it is he who indicts.

Now a prosecution for an offence of bribery can be instituted in one of two ways :

1. By warrant under the hand of the Attorney-General requiring a Magistrate to hold an inquiry under Chapter 16 of the Criminal Procedure Code—S. 3 (2).

2. By indictment before the Supreme Court or District Court, or arraignment before a Board of Inquiry—S. 5. It seems to me that it is only where the Attorney-General signs the warrant or the indictment or the order for arraignment that the prosecution can be said to have been instituted by him, just as it is only where he signs the written sanction for the institution of proceedings that it can be said that they have been instituted with his written sanction.

Mr. Nadesan also relied on the judgment of Pereira J. in the case of the *Attorney-General v. Silva* [1] where the learned Judge had to interpret the provisions of SS. 336 and 393 of the Criminal Procedure Code. Under S. 336 there can be no appeal from an acquittal by a District Court or a Magistrate's Court except " at the instance or with the written sanction of the Attorney-General ". In that case the Solicitor-General acting on a delegation under S. 393 preferred a petition of appeal which was in the name of the Attorney-General, but signed by himself as Solicitor-General. Pereira J. held that the petition of appeal should in such a case have been in the name of the Solicitor-General, and that one which ran in the name of the Attorney-General should have been signed by the Attorney-General. This position is all the clearer in view of the many references to cases where officers other than the Attorney-General have been specifically empowered to act where the legislature has thought fit to empower them.

[1] *(1914) 17 N. L. R. 193.*

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The Solicitor-General relied strongly on S. 9 (1) of the Act which directs that "an indictment prepared in the manner prescribed by S. 186 of the Criminal Procedure Code shall be transmitted by the Attorney-General to the Court of trial selected by him". He submitted that since S. 186 of the Code provides that all indictments shall be brought in the name of the Attorney-General and be in accordance with the prescribed form, and shall be signed by the Attorney-General or the Solicitor-General or a Crown Counsel or some Advocate authorised by the Attorney-General, the indictment in this case could have been signed by any of those persons. But this argument overlooks the purpose for which S. 186 of the Code has been referred to in S. 9. S. 9 merely provides that the indictment should be *prepared* in the manner prescribed in S. 186, and not that it may be signed by the different officers mentioned in S. 186. The reference to S. 186 is limited in scope, and is confined to the manner of the preparation of the indictment, which I understand to mean the form in which it shall be made ready or drawn up. To that extent the indictment in question is in order, but I cannot extend the meaning of the word "prepared" to include the essential operation of signing. This duty, it seems to me, has already been cast upon the Attorney-General by SS. 5 and 8. I would refer in this connection to S. 165F of the Criminal Procedure Code which speaks of an indictment being "drawn up" and "signed" as two distinct operations; also to S. 188 of the Civil Procedure Code which similarly speaks of a decree being "drawn up" and "signed". S. 9 does not, it will be noted, require the Attorney-General to prepare the indictment, and this duty can therefore be performed by any officer in his Department; but it does require the Attorney-General to transmit the indictment to the Court of trial selected by him, and to transmit copies of the indictment for service on the accused persons to the Fiscal. A later provision of the Section requires the Fiscal to make return of such service to the Court of trial and to the Attorney-General *or any officer appointed by the Attorney-General* to represent him. Here again, then, we find a provision which draws a sharp distinction between the Attorney-General acting himself and acting through an officer appointed by him.

The Solicitor-General, however, contended that where the Act requires the Attorney-General to sign a document it says so, and therefore the absence of any provision in SS. 5 and 8 requiring the Attorney-General to sign the indictment implies that any other officer of his Department mentioned in S. 186 of the Code may sign it.

It is true that instances of the Attorney-General being required to sign documents are to be found, for example, in S. 11, under which he may authorise in writing an Advocate or Proctor or other officer to present the case against the public servant before a Board of Inquiry, and in S. 83 under which he may by writing under his hand delegate all but one of his powers and functions to the Solicitor-General. But it is one thing for the Act to require the Attorney-General to confer authority, or to delegate his functions, or to give directions, by writing under his hand; it is a different thing to require that he and he alone—for that, it seems to me, is the necessary inference in the absence of all reference

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to any other person exercising the function—should indict. The very reference to the act of indicting necessarily involves the duty of signing, for one cannot indict except by a written document, whereas one can delegate or authorise or direct orally.

In passing I would refer to S. 6 (1) of the Act which enacts that such of the provisions of the Criminal Procedure Code as are not inconsistent with the provisions of the Act shall apply to proceedings in any Court for bribery, but in my opinion those provisions of S. 186 which empower persons other than the Attorney-General to sign an indictment are inconsistent with SS. 5 and 8 of the Act, and cannot therefore apply to this case.

S. 393 of the Code which empowers the Solicitor-General and Crown Counsel to exercise all or any of the powers conferred upon, and to perform all or any of the duties imposed upon the Attorney-General *by the Code* if the Attorney-General so directs, except the power to enter a nolle prosequi, and to pardon an accomplice, does not apply either.

The absence from the Act of any provision similar to S. 393 of the Code, and the pointed references in the Act to certain duties being performed by the Attorney-General alone, and others being performed by him or officers authorised by him, necessarily flow from the far-reaching nature of certain of the powers conferred upon the Attorney-General by the Act. It is only reasonable to presume that the legislature designedly abstained from conferring upon any officer but the Attorney-General the right to exercise the more responsible powers conferred upon the latter. It was not prepared to permit the Attorney-General to delegate the power to sanction civil or criminal proceedings. This is a power which has to be exercised in connection with the prosecution of offences other than bribery. It would not be unreasonable to expect that the corresponding power of indicting or arraigning, in the case of offences of bribery, should be exercised by the Attorney-General and nobody else, and it is not easy to see why the legislature appears to have empowered the Attorney-General by writing under his hand to delegate to the Solicitor-General the power to indict, but not the power to sanction civil or criminal proceedings. The question does not, however, arise for decision in this case whether S. 83 requires such an interpretation to be placed upon it, since it is not suggested that there has been any such delegation, and in any event the indictment has not been signed by the Solicitor-General.

For the reasons I have given I would hold that the indictment in this case failed to comply with the requirements of SS. 5, 8 and 78 (1) of the Act. The District Judge therefore had no jurisdiction to try the accused upon such indictment, and the proper order to be made was that the indictment be quashed. I would make that order now and dismiss this appeal.

DE SILVA J.—I agree.

Appeal dismissed.

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1955 *Present :* **Gunasekara J. and Sansoni J.**

WILLIAM SINGHO, Appellant, *and* REV. DHAMMAJOTHI ISTHAWEERA, Respondent

S. C. 215—D. C., Badulla, 10,484

Buddhist Temporalities Ordinance (Cap. 222)—Section 23—Abandonment of robes by bhikkhu—Pudgalika property—Devolution.

Under Section 23 of the Buddhist Temporalities Ordinance uninherited pudgalika property acquired by a bhikkhu for his exclusive personal use and not alienated by him during his lifetime becomes, on his death, the property of the temple to which he belonged, even though he abandoned the robes and became a layman.

APPEAL from a judgment of the District Court, Badulla.

Cyril E. S. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *Daya Perera*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *K. C. de Silva* and *J. A. D. de Silva*, for the defendant respondent.

Cur. adv. vult.

May 12, 1955. GUNASEKARA J.—

This is an appeal from a judgment of the District Court of Badulla dismissing an action for declaration of title to an undivided half share of a paddy field.

The original owner of the field sold it on the 12th January, 1915, to two bhikkhus, Dhammananda Unnanse and Saranankara Unnanse, of whom the former was the chief incumbent of a temple and the latter was his pupil. In 1934 Saranankara abandoned the robes and became a layman, resuming his original name of Wijesekara Mudiyanselage Appuhamy. In February, 1936, he married one Bandara Menike, and he died in April of that year. On the 5th May, 1951, Bandara Menike purported to sell to the appellant an undivided half share of the field, claiming to have inherited it from her deceased husband Appuhamy. In the meantime Dhammananda Unnanse had died in 1945 and the respondent had succeeded him as the chief incumbent of the temple. The respondent, who was in possession of the entire field claiming to possess it for the temple, refused to let the appellant take possession of the half share claimed by him upon the transfer from Bandara Menike, and the appellant thereupon instituted the action that gives rise to this appeal.

The grounds urged in support of the appeal are that the evidence has established that the half share in question was pudgalika property acquired by Saranankara Unnanse for his exclusive personal use and that upon his death it formed part of the estate that passed to his heirs. The learned judge's finding is that the field had been purchased for the benefit of the temple and its produce had always been used exclusively for that purpose, but that even if the half share had been acquired by Saranankara

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Unnanse for his personal use his heirs could not inherit it in view of the provisions of section 23 of the Buddhist Temporalities Ordinance (Cap. 222). In terms of this section,

> " All pudgalika property that is acquired by any individual bhikkhu for his exclusive personal use, shall, if not alienated by such bhikkhu during his lifetime, be deemed to be the property of the temple to which such bhikkhu belonged unless such property had been inherited by such bhikkhu. "

It is contended for the appellant that the learned judge has interpreted this section erroneously and that it applies only to property acquired by a person who was a bhikkhu both at the time of the acquisition and at the time of his death. As I read the section, what it provides is that property which is not the property of a temple shall be deemed to be such property if it satisfies these conditions :

(*a*) that it is pudgalika property that has been acquired by a bhikkhu of that temple for his exclusive personal use ;

(*b*) that it has not been alienated by him during his lifetime ; and

(*c*) that it is not property that had been inherited by him.

The argument that there is a further condition that must be satisfied is based upon the expressions " if not alienated by such bhikkhu during his lifetime " and " the temple to which such bhikkhu belonged ". It is contended that these references to a " bhikkhu " connote that the only property contemplated in the section is the property of a person who was a bhikkhu at the time of his death. I do not agree. It seems to me that there is nothing more in the expression " such bhikkhu " than a reference to the person who acquired the property. I should imagine that if more was intended by the legislature that intention would have been expressed in unambiguous language.

There appears to be no ground for interfering with the judgment of the district court. The appeal must be dismissed with costs.

SANSONI J.—I agree.

Appeal dismissed.

1955 *Present :* **Sansoni J.**

FERNANDO, Appellant, *and* GOONEWARDENE, Respondent

S. C. 496—M. C. Colombo South, 62,792

Excise Ordinance—Section 44—Unlawfully manufactured liquor—Evidentiary value of Government Analyst's report.

In a prosecution under section 44 of the Excise Ordinance for possession of unlawfully manufactured liquor the report of the Government Analyst is evidence, even though he is not called to testify in person.

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APPEAL from a judgment of the Magistrate's Court, Colombo South.

S. B. Lekamge, for the accused appellant.

Ian Wikramanayake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 24, 1955. SANSONI J.—

The accused in this case was charged with having in his possession without lawful authority 7 gallons and 2 drams of unlawfully manufactured liquor in breach of S. 44 of the Excise Ordinance. The defence raised was an alibi which was disbelieved.

The only point urged in appeal was that the prosecution failed to prove that the liquor was unlawfully manufactured.

The evidence led by the prosecution on this point was the report of the Government Analyst who found on examination that the samples P 2, P 4 and P 6 of the liquor sent to him contained 6%, 5·7% and 6·7% by volume of alcohol respectively. He also reported :

" The characteristics of P 2, P 4 and P 6 are not similar to those of samples of either approved brands of imported liquors or liquors manufactured under licences issued under the Excise Ordinance.

" In my opinion P 2, P 4 and P 6 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. "

It is argued, however, that in spite of this report the prosecution has failed to establish that the liquor seized in the accused's possession was unlawfully manufactured, and I have been referred to the judgment of Nagalingam S. P. J. in *Ramsamy Kone v. Ginigathena Police* [1]. I would point out that the report of the Government Analyst in that case did not say that the liquor which was the subject matter of the charge was not a liquor which has been manufactured under licence issued by the Excise Commissioner, and the learned Judge held that the prosecution had failed to exclude the possibility of the liquor having been manufactured under a licence. But the report furnished in this case does exclude that possibility, and says expressly that the liquor seized is not a liquor manufactured under a licence issued under the Excise Ordinance. This is sufficient to bring it within the category of an unlawfully manufactured liquor.

Nagalingam S.P.J., however, also added that when the Government Analyst said in his report that the liquor seized was not manufactured under a licence issued by the Excise Commissioner " he

[1] *56 N. L. R. 404.*

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is giving utterance to some information which he has probably obtained from the Excise Commissioner himself. The Government Analyst cannot say of his own knowledge what licences have been issued by the Excise Commissioner ". With respect, I am not prepared to take this view of the Analyst's means of knowledge in the absence of further proof. It is not, it seems to me, a necessary inference that the Government Analyst was acting on hearsay, for there is nothing in the record which compels me to arrive at that conclusion. The Analyst's report is evidence, even though he was not called to testify in person.

If the defence intended to raise an objection to the contents of the report on the ground that certain findings made by the Government Analyst should be disregarded for any particular reason, the Government Analyst should have been summoned and cross-examined on his means of knowledge, or the sources of his information. No such course was adopted by the defence. It was therefore quite permissible for the learned Magistrate to act upon the report and that is what he has done. Having regard to the terms of the report I think the prosecution has proved that the liquor in question was unlawfully manufactured. The appeal is dismissed.

Appeal dismissed.

1954 *Present :* **Pulle J.**

DEVASAGAYAM, Appellant, *and* AZEEZ, Respondent

S. C. 155—C. R. Colombo, 42,413

Jurisdiction—Action for damages and ejectment—Defendant's false plea of tenancy—Determination of value of subject-matter of action—Power of Court to examine not only plaintiff's claim but also defendant's answer.

In order to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court it may be necessary to examine not only the plaintiff's claim but also the defendant's answer to it.

Plaintiff instituted action in the Court of Requests praying for damages and an order of ejectment against the defendant in respect of certain premises which were of the value of over Rs. 300. The defendant pleaded that he was tenant under the plaintiff and, in the alternative, that the court had no jurisdiction to try the action as the value of the subject-matter of the action exceeded Rs. 300. The Commissioner rejected the defence of tenancy as false and gave judgment for the plaintiff.

Held, that as the substance of the dispute was whether the defendant was a tenant under the plaintiff or a bare licensee the Court of Requests had jurisdiction to try the action.

APPEAL from a judgment of the Court of Requests, Colombo.

C. Renganathan, with *H. C. Kirthisinghe*, for the defendant appellant.

M. Ramalingam, with *B. E. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

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July 19, 1954. PULLE J.—

The action which gives rise to this appeal was instituted by the tenant of premises No. 287A, Old Moor Street. He alleged that at the time he went into occupation he found that the defendant appellant, who was himself a tenant and occupier of the neighbouring premises bearing No. 285, had placed a part of his stock in trade in the rear compound of premises No. 287A. He prayed for damages and an order of ejectment against the defendant. The position taken up by the defendant was that he occupied the portion in dispute as a sub-tenant of the person who was the previous tenant of premises No. 287A and that when the plaintiff went into occupation the defendant entered into an express agreement with him to occupy that same portion as a tenant on a monthly rental of Rs. 10. He pleaded in the alternative that the court had no jurisdiction to try the action as the value of the portion exceeded Rs. 300.

The learned Commissioner rejected the defence of sub-tenancy as false and gave judgment for the plaintiff. He apparently accepted the evidence of the plaintiff and of his brother, who was the previous tenant. That evidence was to the effect that the plaintiff's brother permitted the defendant to store his goods on payment of Rs. 10 a month and that at the time he terminated his own tenancy the defendant removed the goods and he thereupon gave vacant possession to his landlord. The Commissioner further found that before the plaintiff could under his agreement with the owner take possession of the entirety of premises No. 287A the defendant again moved into the disputed portion with his goods.

When the plaintiff took possession of the premises, including the rear compound, the defendant promised to move out in a week's time. This permission was granted but the defendant did not keep his word. He later wanted a sub-tenancy and this was refused. It is beyond all dispute that the plaintiff did not want to have the defendant as a sub-tenant.

The only point taken on behalf of the defendant at the argument in appeal was that the value of the portion of the rear compound in which the goods were stored being of the value of over Rs. 300 the Court of Requests had no jurisdiction to entertain the action. It was submitted on the authority of *Bastian Appuhamy v. Haramanis Appuhamy* [1] that the action being one involving the right to possession of land, it was immaterial in what capacity the plaintiff sought possession. The mode of valuation of the subject-matter of actions of this kind had been debated in several cases and the Divisional Bench in *Bastian Appuhamy v. Haramanis Appuhamy* [1] after reviewing them expressed approval of cases like *Lebbe v. Banda* [2] and *Laidohamy v. Goonetilleke* [3]. The learned Commissioner answered the issue of jurisdiction against the defendant by directing himself on the lines indicated in the judgment of the Divisional Bench [1], namely,

> "In order, therefore, to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court, the nature and extent of the subject-matter in dispute has to be ascertained, and for that purpose, it would be necessary to examine not only the plaintiff's claim but also the defendant's answer to it."

[1] *(1945) 46 N. L. R. 505 ; 31 C. L. W. 33.* [2] *(1918) 20 N. L. R. 343.*
[3] *(1913) 5 Bal. N. C. 14.*

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The defendant did not set up an independent claim either against the owner who gave the premises to the plaintiff or against the plaintiff by virtue of an earlier contract of tenancy with the owner implemented by possession. He pleaded a tenancy under the plaintiff himself and, having regard to the evidence, the substance of the dispute was whether the defendant was a tenant under the plaintiff or a bare licensee. According to the evidence which has been accepted the defendant sought from being a licensee to become a tenant but the plaintiff refused to accede to his request. The defendant acknowledged the plaintiff's right to evict him and asked for time to leave. When the time arrived to leave he asked to become a tenant and the plaintiff declined. The learned Commissioner was, therefore, right in holding that the value of the action was about Rs. 10 and not the market value of the disputed portion which was over Rs. 300.

I dismiss the appeal with costs.

Appeal dismissed.

1954 *Present :* **Pulle J. and Swan J.**

ARUNASALAM CHETTIAR, Appellant, *and*
MURUGAPPA CHETTIAR, Respondent

S. C. 352—D. C. Colombo, 18,106

Interest—Tender of debt due—Liability to pay interest thereafter—Minor—Debt due to him—Mode of payment.

A debtor is not liable to pay interest after he makes tender of the money due to his creditor. Where the creditor is a minor, the offer to pay may be made to the natural guardian of the minor, especially if the minor is of a very tender age. If the natural guardian is not the duly appointed curator it is for him or her to take the necessary steps to have the appointment made.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *M. Ramalingam*, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *R. Manicavasagar*, for the plaintiff respondent.

Cur. adv. vult.

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July 19, 1954. SWAN J.—

The only question to decide in this case is whether the appellant is liable to pay the respondent interest at the Loan Board rate as ordered by the District Judge, or any interest at all. The other point taken in the petition of appeal, namely that the respondent could not maintain the action as there was no privity of contract between him and the appellant was not pressed.

In November 1929 one Vellasamy Pillai deposited with the appellant for the benefit of the respondent who was a minor of very tender age at the time a sum of Rs. 11,500. The appellant agreed to hold the same in deposit for the respondent and pay it to him together with what is known as " Chetty " interest. On 11th August, 1932, Proctor R. Muttusamy acting on behalf of the appellant wrote letter D5 to Sekappi Atchy the appellant's mother and natural guardian inquiring who was the appellant's lawful guardian as his client was ready and willing to pay over the money he held for the respondent's benefit and obtain a discharge of his obligations. The letter ends with the following sentence :— " Kindly note that unless payment is received on or before the 21st August my client will not pay interest thereon thereafter, and also will deposit it in Bank ".

To this letter Sekappi Atchy replied through Mr. S. Krishnaswamy, Advocate, by D7 dated 28th September, 1932, to the effect that she was the guardian of her son and was willing to receive the money.

The appellant, wisely I would say, refused to pay the money to Sekappi Atchy. On 25th September, 1953, Proctor Muttusamy wrote letter D8 informing Sekappi Atchy that his client had deposited the sum of Rs. 13,217·42 on 10th August, 1932, in the Mercantile Bank of India. He requested her " to obtain the appointment of a duly constituted lawful guardian and curator, or if any has already been appointed to get the said guardian to appoint by special Power of Attorney some responsible person in Ceylon to receive payment of the said sum of Rs. 13,217·42 ". To this letter there was no reply.

The money was not deposited in the Bank in a separate account but the copies produced by the Bank of the appellant's own account show that in July 1932 two sums of Rs. 10,000/- and Rs. 5,000/- were paid to the appellant's credit and that thereafter there was always a balance standing to the appellant's credit sufficient to meet a demand for Rs. 13,217·42.

The appellant appears to have done all that was possible to return the money to the respondent, but nobody seems to have taken sufficient interest in the respondent to obtain payment. It has been contended on behalf of the respondent that the appellant could have filed a curatorship case or an ordinary action and deposited the money in court. Even if the appellant could have adopted either of these courses I do not think he was under any obligation to do so. It was the respondent's mother's duty to have taken the necessary steps to have a curator

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appointed. The basis of the judgment under appeal in effect is that the appellant was under a duty to file a curatorship case and to deposit the money in court.

As regards D5 it has been argued that it does not constitute a valid tender in as much as Sekappi Atchy was not a person lawfully entitled to receive payment on behalf of the respondent. When money is due to a minor the only person to whom an offer to pay it can be made is the natural guardian of the minor specially if the minor is of a very tender age. If the natural guardian is not the duly appointed curator it is for him or her to take the necessary steps to have the appointment made. *Vander Linden* in his Institutes of the Laws of Holland (Cap 4, Section 1) says :—

> " This parental power with us is possessed not only by the father but also by the mother, and after the death of the father by the mother alone. It consists of the entire direction of the maintenance and education of their children, *and the management of their estates.*"

In *Ramalingam Chettiar v. Mohamed Adjward*[1] Soertsz S.P.J. relying upon this passage held that in a case where certain minors were sued for damages on a breach of a covenant to warrant and defend title by their deceased father notice of action given by the vendee to their mother was sufficient notice to them, as the mother was their natural guardian.

I would therefore hold that the offer to pay Sekappi Atchy was a good tender to the respondent. In the result I would allow the appeal. Judgment will be entered for the respondent for Rs. 13,217·42 and half costs of action. The appellant will be entitled to the costs of appeal.

PULLE J.—I agree.

Appeal allowed.

[1] *(1938) 41 N. L. R. 49.*

1955 *Present :* **Swan J.**

HEENBANDA, Appellant, *and* COMMISSIONER OF MOTOR TRAFFIC *et al.*, Respondents

S. C. 364—Appeal under Section 212 of the Motor Traffic Act from a decision of the Transport Appeals Tribunal, No. 385

Motor Traffic Act, No. 14 of 1951—Refusal of public carrier's permit—Discretion of Commissioner—Right of appeal to Supreme Court—" Question of law "—Sections 90 and 212.

The Commissioner of Motor Traffic, acting on the report of the Divisional Road Transport Officer, refused an application for a public carrier's permit on the ground that the area in question was well served. The Transport Appeals Tribunal dismissed the applicant's appeal for the same reason. The applicant thereupon appealed to the Supreme Court on the ground that the Commissioner acted contrary to the principles of natural justice in acting on the report of the Divisional Road Transport Officer without affording the applicant an opportunity of disproving the statements in the report.

Held, that the ground of appeal was not a question of law within the meaning of section 212 of the Motor Traffic Act.

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APPEAL under section 212 of the Motor Traffic Act.

N. M. de Silva, with *C. de S. Siriwardene*, for the appellant.

Mervyn Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 25, 1955. SWAN J.—

In or about September 1953 the appellant made on application to the 1st respondent above named for a Public Carrier's Permit authorizing the use of a two ton lorry for an area of operation in the Central Province. After inquiry the 1st respondent refused the application on the ground that the area was well served. Thereafter the appellant restricted his application to the Kandy District only. This application was also refused on the same ground. From this refusal the appellant appealed to the Transport Appeals Tribunal which made order dismissing the appeal. The appellant now asks this Court to set aside the order of the Transport Appeals Tribunal and of the 1st respondent, and direct the 1st respondent to issue to the appellant a Public Carrier's Permit as applied for.

Section 212 of the Motor Traffic Act gives a right of appeal to the Supreme Court against the decision of the Tribunal only on a question of law. The point of law relied on in the petition of appeal is that the 1st respondent acted contrary to the principles of natural justice in acting on the report of the Divisional Road Transport Officer without affording the appellant an opportunity of meeting or disproving the statements in the report. Conceding however that the Commissioner was entitled to act on the report it is submitted that he acted wrongly in not allowing the appellant an opportunity of meeting the same.

Section 90 of the Motor Traffic Act gives the Commissioner " full power and discretion to make a determination either to grant or refuse an application ". It would render that discretion nugatory if it could be canvassed by the pretence of an appeal on a point of law.

The Commissioner refused the application on the ground that the area was well served. The Transport Appeals Tribunal dismissed the appellant's appeal for the same reason. I can see no point of law on which the appellant can appeal to this Court.

The appeal is dismissed with costs.

Appeal dismissed.

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1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

WEERAKOON *et al.*, Appellants, *and* WAAS *et al.*, Respondents

S. C. 377–378—D. C. (Final) Colombo, 3,077/P

Partition Act, No. 16 of 1951—Section 2—Dismissal of action—Jurisdiction of Court to allot shares among the defendants thereafter.

When an action for partition of a land is dismissed on the ground that the plaintiff has no title to the land, the Court has no jurisdiction to proceed to allot shares among the defendants if the defendants do not agree to ask for partition.

APPEALS from a judgment of the District Court, Colombo.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke*, for the Plaintiff-Appellant in No. 377 and the Plantiff-Respondent in No. 378.

D. S. Jayawickrema, Q.C., with *M. Rafeek* and *H. L. de Silva*, for the 1st and 2nd Defendant-Appellants in No. 378 and the 1st and 2nd Defendant-Respondents in No. 377.

N. E. Weerasooria, Q.C., with *T. B. Dissanayake*, for the 30th to 34th Defendant-Respondents in both appeals.

June 22, 1955. BASNAYAKE, A.C.J.—

This is an action for partition of a land called Pelengahawatta described in the schedule to the plaint as all that allotment of land called Pelengahawatta with the buildings and plantations thereon situated at Maharagama in the Palle Pattu of Salpiti Korale in the District of Colombo, Western Province, bounded on the North by Dewata Road, East by Weerakkodigewatta and Embuldeniyawewatta, on the South by a part of this land, and on the West by Kalutantrigewatta, containing in extent land sufficient to plant about 300 coconut plants in extent four acres. After trial the learned District Judge found that the plaintiff had not established title to the land and dismissed the plaintiff's action. But he added :—

" The defendants 30 to 34 in their answer denied the title of the defendants 1 to 22 but admitted the title of the 20 to 22 defendants to an acre at the trial. I find that the owners of the land sought to be

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partitioned are the defendants 30 to 34, 21, 22, 71, 72, as well as the other heirs of Jeelis and Babanis and the defendants 4 to 19, 61 to 64, and 69 and 70 who are the children and grandchildren of Githan Hamy.

The improvements are owned as follows :

The plantations on the eastern side of the land of the age of 50 years and above belong to the heirs of Jeelis and Babanis.

The other plantations belong to the 30 to 34 defendants.

The buildings and other structures are owned as follows :

. . . . . "

He then proceeded to allot the buildings.

It would appear from section 2 of the Partition Act, No. 16 of 1951, that an action for partition can be instituted only by a person to whom a land belongs in common with two or more persons. The Act creates a special jurisdiction and provides for a special procedure. Where after trial it appears that the basis on which the action can be brought is non-existent, the Court cannot make any order other than the dismissal of the action and any other order which is ancillary to such order. This Court has decided that in an action under the repealed Partition Ordinance each party to a partition action had the double capacity of plaintiff and defendant and that he who first brought the action was taken to be the plaintiff. It has also been held by this Court that in an action under the same Ordinance where the plaintiff failed to prove his title there was no objection to a partition among the defendants who had established their title if they so desired it, because defendants in a partition action are for some purposes in the position of plaintiffs. The new Act is not different from the old Ordinance in respect of the provisions under which those decisions have been given and decisions under the repealed Ordinance can properly be regarded as applicable to the new Act. But in the instant case the defendant did not agree to ask for a partition.

There are two appeals, one by the plaintiff and the other by the 1st and 2nd defendants. The plaintiff-appellant has not satisfied us that the learned District Judge is wrong in his finding that he has no title to the land. We do not think that after having dismissed the action on the ground that the plaintiff had no title the learned District Judge had any jurisdiction to proceed to allot the plantations and the houses among the parties to it.

We accordingly set aside that part of the order which proceeds to allot plantations and buildings to various parties. Subject to that variation, the appeal of the plaintiff is dismissed with costs.

The parties who are dissatisfied with the learned trial Judge's order made without jurisdiction have had to come to this Court to have it set aside.

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The 1st and 2nd defendants-appellants are declared entitled to recover the costs of this appeal from the 30th to 34th defendants who resisted their claims to the land.

PULLE, J.—I agree.

Appeal No. 377 dismissed.

Appeal No. 378 allowed.

1954 *Present :* **Gratiaen, J., and Fernando, A.J.**

MUTHTHAL ACHY (Widow of Letchuman Chettiar) *et al.*, Appellants, *and* MURUGAPPA CHETTIAR, Respondent

S. C. 153—D. C. Colombo, 20,429

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

In a claim against the estate of a dead man the plaintiff based his claim on a witness's version of a conversation which allegedly took place between the witness and the deceased over 20 years before the trial commenced.

Held, that in a claim against a dead man's estate, though there is no rule of law that judgment cannot be obtained on the uncorroborated evidence of the claimant, it is the duty of the Court to scrutinise the plaintiff's case with " great jealousy ".

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam Q.C., with *N. Nadarasa*, for the defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *P. Navaratnarajah* and *C. Manohara*, for the plaintiff respondent.

Cur. adv. vult.

July 9, 1954. GRATIAEN, J.—

A wealthy Natucottai Chetty named Muttiah was the head of a joint Hindu family domiciled in South India. By his first marriage he had two daughters, one of whom was married to K. R. K N. L. Letchuman

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Chettiar (hereinafter called "the deceased"). By his second marriage he had two grown-up sons (Nadarajah and Thiagarajah) and a minor son (Manickam). He finally married a woman named Sigappi, and by that union he had a daughter and a minor son (the plaintiff).

On 18th May, 1929, Muttiah decided to partition his estate among his four sons who were co-parcenary members with him of the joint family. An award P9 made by certain of his trusted neighbours made elaborate provision for this proposed separation. Clause 11 of the award provided that, as far as the plaintiff was concerned, "the properties and cash which the fourth share-holder minor Murugappah Chettiar *is to get* are to be held *to the order of his father Muttiah Chettiar*, which sum is to be enhanced profitably *and paid to him after his attainment of majority*".

The plaintiff was at this time only 17 months old. In accordance with the award P9, he became (although he was too young to appreciate the alteration in his status) the head of a new joint Hindu family consisting of himself, his mother and his sister. The legality of such a partition during the minority of one or more of the co-parcenary members is well recognised by the Mitakshara law, and clause 11, which I have previously quoted, was no doubt intended to meet the recommendation in the *Baudhayana* that "the shares of sons who are minors, together with the interest, should be placed under good protection until the majority of the owners"—*Mayne's Hindu Law* (*8th Ed.*) *sec. 476.*

Muttiah took early steps to implement the award P9. With regard to the plaintiff's share, he had himself registered in Colombo on 22nd May, 1929, as the proprietor of a new business under the vilasam "MR. M. M. MR.", and it is perfectly clear that he did so not for his personal advantage but in order to discharge the trust imposed on him for the benefit of the plaintiff and of the new family unit of which the plaintiff had become the sole co-parcenary member. The initial amount credited to the plaintiff in the firm's books was Rs. 181,962, i.e., his proportionate share of the proceeds of the partition.

Very shortly after the business of MR. M. M. MR. had commenced, Muttiah died in Colombo on 28th May, 1929, when the plaintiff, his mother and his sister were still in India. In consequence of this event, the plaintiff's mother became his natural guardian. Unfortunately, no express provision had been made in P9 as to who should succeed to the management of the plaintiff's affairs upon Muttiah's death until the plaintiff attained majority.

As to what took place immediately after the death of Muttiah is, on certain important matters, controversial. It has been sufficiently established, however, that out of the liquid assets of MR. M. M. MR., Vellasamy, a trusted servant of Muttiah who had been employed in Muttiah's own business for several years and had also become the senior kanakapulle of the new business, caused various sums amounting in the aggregate to Rs. 18,700 to be deposited in Colombo between 28th September, 1929 and 27th November, 1929 with Letchuman's firm

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(K. R. KN. L.). The main dispute in this case relates to the circumstances in which those sums were deposited with K. R. KN. L., and, more particularly, the precise obligations undertaken by the deceased, as the sole owner of K. R. KN. L., in regard to the payment of interest on the amount so deposited. Before considering this vital issue, however, I shall refer to certain subsequent events the details of which are no longer controversial.

On 9th January, 1930, Vellasamy left Ceylon for India after severing his connection with the firm of MR. M. M. MR. and handing over all accounts-books and relevant documents to the plaintiff's eldest step-brother Nadarajah. In these books, the plaintiff was shown as a " creditor " of the firm in a sum of Rs. 181,962 (i.e., the original capital brought into the business) ; the firm of K. R. KN. L., on the other hand, was shown as a " debtor " in the sum of Rs. 18,700. After this date, Vellasamy ceased to have any business relationship with any member of Muttiah's family until 1947.

An incident of some importance took place ten years later. In February, 1940, the plaintiff's mother Sigappi drew a bill of exchange or " *undial* " in India for Rs. 5,000 on the deceased's firm K. R. KN. L. in Colombo in favour of a firm named V. R. K. R., with a direction that, when this sum was paid by K. R. KN. L., it should be *debited to the firm of MR. M. M. MR.* The explanation of this transaction, which was accepted by the learned judge, was that Sigappi had previously borrowed Rs. 5,000 from V. R. K. R. in India in order to meet the household expenses of the joint family consisting of herself, the plaintiff and her daughter. She accordingly arranged with the deceased (also in India) that his firm in Colombo should honour the " *undial* " and debit the payment against his outstanding account with MR. M. M. MR. The *undial* was in fact met on presentation as arranged, and Rs. 5,010.18 was debited as arranged in K. R. KN. L's books. *The person who actually received this payment in Colombo on behalf of V. R. K. R. was no other than Muttiah's former kanakapulle Vellasamy who had since joined V. R. K. R. in a similar capacity.*

On 19th February, 1942, the plaintiff (still a minor) was living in India under the care and protection of his mother Sigappi. Another debtor of MR. M. M. MR. was anxious to repay his debt in view of repeated demands by Sigappi. On legal advice, he obtained an order that the Secretary of the District Court of Colombo be appointed curator of the plaintiff's estate, so that someone would be in a position to give valid receipts for payments of this kind.

On 8th April, 1943, the deceased Letchuman also deposited Rs. 20,480·18 to the credit of the curatorship case. This amount represented, according to the deceased's books of accounts, the total sum due at that date (less Rs. 5·32) from the firm of K. R. KN. L. to the firm of MR. M. M. MR. in connection with the original deposits aggregating Rs. 18,700 made between September, 1929 and November, 1929. The small outstanding sum of Rs. 5·32 was shortly afterwards caught up in a payment of income tax by K. R. KN. L. on behalf of MR. M. M. MR., and the account of the transactions between these two firms was then closed.

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All moneys credited to the curatorship case were withdrawn in due course by the plaintiff with his mother's formal consent during his minority.

Letchuman himself died on 18th March, 1945. According to his own books of account, he had long since completely settled his debt to the firm of MR. M. M. MR. Over three years later, however, i.e., on 1st December, 1948, the plaintiff (who was still a minor) sued the appellants (the heirs of the deceased) in the present action for the recovery of a further sum of Rs. 22,455·52 alleged to be still due to him in connection with the original deposit of Rs. 18,700 in 1929 (i.e., 19 years before the action commenced). The action was instituted through the plaintiff's next friend Vellasamy who had joined him as his attorney and kanakapulle in 1947.

The validity of the plaintiff's claim depends very largely, if not entirely, on the truth of Vellasamy's version of the terms on which sums aggregating Rs. 18,700 had been deposited with the defendants' firm K. R. KN. L. in 1929. According to Vellasamy, he decided, *on his own initiative*, to invest the assets of MR. M. M. MR. after the death of his employer Muttiah with various Chetty firms owned (except in two cases) by close relatives of Muttiah's family. He regarded these assets as the exclusive property of the plaintiff, and considered it his duty to promote the interests of the minor (who was powerless to protect himself) by entering into those transactions on the minor's behalf as a *negotiorum gestor*.

Vellasamy's version is that he directly (and on his own responsibility as the self-constituted agent of a 21-month old infant) contracted with the deceased Letchuman in connection with the deposits or loans which form the subject matter of this action; and that the deceased unequivocally agreed to repay the principal in due course *to the plaintiff* together with accrued compound interest calculated at "nadappu vattai" rates—that is to say, at "rates 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 chettiars in their dealings with one another".

The schedule annexed to the plaint sets out in detail the manner in which the plaintiff's claim was computed. It credits the deceased's account with the sum of Rs. 20,488·18 deposited on 8th April, 1943, in the curatorship case, but makes no allowance for the earlier payment in 1940, against Sigappi's *undial*.

The learned judge accepted Vellasamy's evidence as to the terms of his alleged agreement with the deceased in 1929, but directed (in favour of the appellant) that credit be given for the payment of Rs. 5,010·18 in 1940, as "this would be a reasonable charge which could be made against the joint family assets of the firm of MR. M. M. MR". In accordance with a reconstructed statement of account filed in Court, a decree was entered against the defendants jointly and severally for Rs. 16,658·17 together with legal interest from date of the decree until payment in full.

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The main ground of appeal which was pressed before us relates to the issues of fact. It was also argued, as a matter of law, that the money deposited with deceased in 1929 was the money of Muttiah Chetty—so that, although it was no doubt invested for the ultimate benefit of the joint Hindu family of which the plaintiff was the sole co-parcenary member, the only person entitled to recover it from the deceased or his heirs was a duly appointed representative of Muttiah's estate.

In any view of the matter, it was an extremely difficult case to decide. The trial commenced on 13th December, 1949, before the (then) District Judge Mr. S. J. C. Schokman. After Vellasamy's cross-examination had been nearly completed, Mr. H. A. de Silva was appointed District Judge of Colombo, and the trial commenced afresh before him on 25th October, 1950, subject to an agreement that Vellasamy's previous evidence be incorporated in the new proceedings. After some further evidence of Vellasamy had been recorded, the trial was put off for 21st December, 1950. In the meantime, Mr. de Silva had ceased to function as District Judge, and the trial was resumed *de novo* before the learned Judge whose judgment is now under appeal. Vellasamy's evidence was once again recorded (subject to a similar agreement regarding the earlier proceedings). He was examined and cross-examined on 21st December, 1950. His cross-examination was resumed on 25th April, 1951, and concluded on 5th September, 1951. The case for the appellant was closed on 6th September, 1951. Eventually, judgment was delivered on 12th October, 1951. In the result, the learned judge was faced with the task of assessing the evidence of the chief witness who had testified before him on three dates covering a period of nearly 9 months, and of testing it in the light of his earlier evidence recorded before two other judges in December, 1949, and October, 1950. Having regard to these long delays, the advantage which a trial judge normally enjoys of forming his personal impression of a witness' credibility (based on demeanour) was considerably reduced.

Apart from these special considerations, the inherent difficulty in deciding the issues of fact in this litigation was more fundamental. The plaintiff based his claim on Vellasamy's version of a conversation which allegedly took place between him and the deceased man Letchuman over 20 years before the trial commenced. No independent witness was present at that conversation, and the suggested agreement was not contemporaneously or even subsequently reduced to writing. In addition, the Court was necessarily deprived of the advantage of hearing Letchuman's explanation of the circumstances in which his firm received the money, and the precise nature of his obligations in regard to the payment of interest. The situation therefore necessarily called for a very cautious judicial approach.

Jessell M. R. remarked, with reference to cases of this kind, "it is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant, with a view, no doubt, of preventing perjury, and with a view of protecting a dead man's estate from unfounded claims"—*In re Finch, Finch v. Finch*[1]. These observations were at one time regarded as laying down a rule (equivalent to a rule of

[1] *(1883) 23 Ch. D. 267 at 269.*

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law) that claims against a dead man's estate could never be maintained unless they were corroborated by independent evidence. But it is now recognised that the true principle is not so rigid. The Court's duty is 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 "—*per* Fry L. J. in *Re Gannett ; Gandy v. Macaulay* [1]. " The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it ; *but if the evidence given by the living man brings conviction to the tribunal* which has to try the question, then there is no rule of law which prevents that conviction being acted upon "—*per* Sir John Hannen in *Re Hodgson ; Beckett v. Ransdale* [2]. These views were adopted with approval in *Rawlinson v. Scholes* [3], and have also been acknowledged in Ceylon as prescribing the correct judicial approach to claims against the estate of a deceased person—*Velupillai v. Sidambaram* [4].

I find no indication in the judgment under appeal that the learned judge specially directed his mind to the standard of proof laid down by these authorities. Besides, his main reason for believing Vellasamy's evidence was that he considered it to be " corroborated " by certain entries in the deceased's books of accounts—whereas they are equally consistent with the view that Letchuman had in fact undertaken (and discharged) obligations less onerous than those imputed to him by Vellasamy.

As I read the judgment under appeal, the learned Judge's acceptance of the plaintiff's case was largely based on his objective assessment of Vellasamy's testimony, and not on his personal impression of the demeanour of the witness. In these circumstances, and in view of the non-direction to which I have previously referred, it is our duty to decide for ourselves whether Vellasamy's version can safely be acted upon in regard to two crucial issues—

(1) Was the money deposited with K. R. KN. L. in pursuance of a contract directly entered into *between Vellasamy and the deceased* ?

(2) If so, had the deceased bound himself *unconditionally* —i.e. even after the year 1933—to let the sum deposited accumulate at " nadappu vattai " rates of compound interest until repayment ?

As to the first question, one should, in my opinion, examine with considerable caution (and perhaps with strong suspicion) Vellasamy's assertion that he acted entirely on his own initiative in entering into a number of money-lending contracts for a minor's benefit without the prior authority of senior members of the child's family—particularly as, according to his version, the plaintiff's mother and eldest step-brother had themselves made conflicting claims to be entrusted with the funds

[1] *(1885) 31 Ch. D. 1 at 16.*
[2] *(1885) 31 Ch. D. 177 at 183.*
[3] *(1898) 15 T. L. R. 8.*
[4] *(1929) 31 N. L. R. 97 at 99.*

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available. Vellasamy was not bound to the plaintiff by ties of kinship or even of race. His authority as the kanakapulle of MR. M. M. MR. had terminated on his master's death, and it seems inherently improbable that, if he had virtually defied the instructions of Sigappi and Nadarajah (who was still his employer in regard to other business affairs) he would have undertaken the functions of a gratuitous intermeddler. It is more natural to suppose that he would have left these important decisions to persons who were more closely concerned with the future management of the minor's affairs. There is no independent oral evidence to prove that the contemporaneous loans to other Chetty firms had also been directly negotiated by Vellasamy entirely on his own initiative. The fact that Rs. 18,700 was in fact handed over to K. R. KN. L. by Vellasamy in 1929 (or at least in pursuance of his instructions to the junior kanakapulle) has no doubt been sufficiently established, but that does not completely solve the issues which are more vitally controversial.

In regard to the defendant's claim to be credited at least with the amount paid on the *undial* in 1940 on Sigappi's directions, Vellasamy's partisanship and palpable lack of candour in the witness box also justify the criticism that his evidence on other important issues called for special vigilance—having regard particularly to the circumstance that the deceased was not available to give the Court his own explanation of these disputed matters.

It has not been suggested that Letchuman was a dishonourable man who could normally be disposed to fabricate his books of accounts in order to avoid liability to an infant to whom he was very closely connected by marriage. According to his books, he credited the firm of MR. M. M. MR. with " nadappu vattai " rates of interest until 1933, and thereafter only at the ruling Bank rates of interest. The learned judge regarded these earlier entries as strong corroboration of Vellasamy's version. To my mind, they are equally consistent with the theory that Letchuman had bound himself by contract (either with Vellasamy or with someone else) to pay compound interest in accordance with Chetty custom so long as he had the money invested with outsiders in the ordinary course of his money-lending transactions, *but not during periods when the money was merely lying idle in the Bank, owing to altered conditions, without profit to himself.* The learned judge was satisfied that during the latter period (i.e., after the year 1933) " Letchuman Chettiar had deposited large sums of money in the Bank, and was therefore paying interest at the rate at which he received it from the Bank ". I find it very difficult to believe that, in these circumstances, Letchuman would have chosen to retain the money after 1933 on such unprofitable terms if he was still obliged to pay " nadappu vattai " rates of interest without any corresponding commercial advantage to himself.

Letchuman was in close touch with Sigappi in India throughout the relevant period, and it is significant that the *undial* transaction took place in consequence of an arrangement directly arrived at between them in India. If, therefore, the plaintiff's case is scrutinised with " great jealousy ", we cannot reasonably rule out the possibility that the money was taken over by Letchuman in 1929 as the result of some agreement

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arrived at after a family conference in India, and not (as Vellasamy alleges) in pursuance of a contract entered into in Colombo with a mere intermeddler. Again, although the original obligation (according to the debtor's own books) was to pay compound interest on the amount deposited, is it unreasonable to suppose that the terms were subsequently altered by mutual agreement within the family circle when conditions in the money market had so fundamentally changed in 1933 ? Letchuman did not lack the funds to return the money in 1933 ; nor was he under any proved necessity to retain it for his personal benefit. Sigappi who is still alive was not called by the plaintiff to state what she knew concerning the terms of the transaction.

It is a matter of common knowledge that it was customary for Chettiar moneylenders to pay each other " nadappu vattai " rates of interest on short-term accommodation loans received for the purpose of profitable investments by the borrower. It seems very unlikely, on the other hand, that a prudent chetty with business instincts characteristic of his race would bind himself to pay such onerous rates merely for the doubtful privilege of keeping the money in fixed deposit in a Bank.

The learned judge was not prepared to accept the 4th defendant's version of the transaction. It would therefore be improper for us, sitting in appeal, to take a contrary view. Let it then be assumed that this particular appellant had succumbed to the temptation to give false evidence in resisting what he perhaps believed to be an unfounded claim. Nevertheless, the real issue for decision was whether, in the circumstances of this case, the testimony of Vellasamy (the only surviving party to the alleged oral contract) was sufficiently convincing to justify a decree against the heirs of a man who had died some years before the action was instituted.

I am very conscious of the limits which necessarily circumscribe the right of an appellate tribunal to disturb the conclusions arrived at by a judge of first instance on questions of fact. In the present case, however, I am satisfied that it is our duty to set aside the judgment under appeal. The learned judge had not reminded himself of the special vigilance which ought to be exercised whenever a Court of law adjudicates upon belated claims against a dead man's estate. In addition, he paid insufficient attention to certain improbabilities inherent in Vellasamy's version. Finally, he has treated items of evidence as corroboration which were in truth corroborative only of matters which were not in controversy. Indeed, I take leave to doubt if Vellasamy's evidence would have brought *conviction* to the learned judge's mind if he had himself approached the case with " great jealousy " as he should have done. I would allow the appeal and make order dismissing the plaintiff's action with costs in both Courts. In the view which I have taken it is unnecessary to decide the question of law raised by Mr. Thiagalingam.

FERNANDO, A.J., agreed, adding certain additional reasons in support of the conclusion.

Appeal allowed.

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[In the Court of Criminal Appeal]

1955 *Present :* **Basnayake, A.C.J. (President), Gunasekara, J., and K. D. de Silva, J.**

REGINA *v.* M. P. PERERA *alias* K. P. MEDAWATTE

Appeal No. 37 of 1955, with Application No. 65 of 1955

S. C. 18—M. C. Galle, 16,220

Evidence—Commission of cognizable offence—Investigation by police officer—Right to continue it after commencement of Magisterial inquiry—Statement of accused to police officer—Right of Crown to use it after close of defence—Mode of proving such statement—Criminal Procedure Code, ss. 153, 155 et seq., 237 (1)—Evidence Ordinance, s. 155.

The appellant was convicted of murder. At the trial he gave evidence on his own behalf. In the course of the cross-examination he was asked whether he made certain statements to the police officer who investigated the circumstances of the commission of the offence. As he did not admit the statements, the prosecuting Counsel, after the close of the defence, sought to impeach his credit by proving that he made those statements. The statements in question were recorded by the police officer after the Magistrate had commenced his preliminary inquiry at the scene of the offence and after he had made order remanding the accused to Fiscal's custody.

Held (by the majority of the Court), (i) that an investigation by a police officer under Chapter 12 of the Criminal Procedure Code does not automatically come to an end upon the commencement of the Magisterial inquiry under section 153, or Chapter 16, of the Criminal Procedure Code.

(ii) that the statements made by the accused to the police officer were admissible under section 155 of the Evidence Ordinance to impeach the credit of the accused by proof of former statements inconsistent with his evidence. *R. v. Thuraisamy* (1952) 54 N. L. R. 449, distinguished.

(iii) that the police officer's evidence in the instant case amounted to his giving oral evidence of the contents of the statement made to him and was therefore unobjectionable. *R. v. Jinadasa* (1950) 51 N. L. R. 529, followed.

Held further (by the whole Court), that even if the appellant was under illegal detention at the time his statement was recorded by the police, evidence of the statements made by him could not properly be excluded on the sole ground that he was illegally detained when he made the statements sought to be proved.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *M. M. Kumarakulasingham* and *A. W. W. Gunewardena* (Assigned), for Accused-Appellant.

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V. T. Thamotheram, Crown Counsel, for Attorney-General.

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Cur. adv. vult.

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July 6, 1955. BASNAYAKE, A.C.J.—

At the end of the argument of this appeal we announced that the majority of the Court were of the opinion that the appeal should be dismissed and accordingly dismissed the appeal. We indicated to counsel that we would give the reasons for our decision at a later date.

This is an appeal from a conviction of murder. The appellant, who gave evidence on his own behalf, does not deny that he caused the injuries that resulted in the death of the deceased, but he pleads that he caused the death of the deceased whilst deprived of the power of self-control by grave and sudden provocation.

The appellant is a mechanic and an electrician ; the deceased was a nurse. It would appear that the appellant and the deceased had come to know each other about four years prior to this tragedy and had become so friendly that at one time they were contemplating marriage. According to the prosecution about four months prior to the date of this crime the appellant had approached Miss Gunasekara, the Matron in charge of the Nurses' Quarters where the deceased lived, and had confided in her the fact that he was in love with the deceased and that she was trying to give him up and had asked her to intercede on his behalf. The Matron did not agree to do so. According to the appellant the cordial relations between him and the deceased had never been disturbed until this tragic event, and he says that he continued to visit the deceased once a month as he was wont to do and that this tragedy occurred on the day of his monthly visit.

It is common ground that on the afternoon of 23rd November, 1954, the appellant came at about 5 p.m. to the Nurses' Quarters of the Galle Hospital. The versions of the prosecution and the defence differ as to what happened after the appellant entered the building. According to the prosecution, in about two or three minutes after the appellant entered the sitting room the deceased ran out into the front verandah pursued by the appellant. He caught up with her, seized her by the left upper arm, and began to stab her on the back of her chest and kept on stabbing. The deceased endeavoured to get away but the appellant followed stabbing her till she fell, and did not stop even then. The attack on the deceased is described in detail by a witness named Caroline Nona, who deposed as follows :—

> "I only saw the accused entering the verandah from the steps. The gentleman (points to the accused in the dock) entered the sitting room in front of the deceased. The deceased immediately got up, and wanted to go into her own room.
>
> *To Court.*
>
> I knew that because I was watching, as I had not seen the accused before, and as he entered the sitting room I was looking to see what he was going to do. As the accused went up to the deceased she moved towards the back door of the sitting room in which direction her own room was situated.

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The accused seized the deceased by the arm. The deceased released the hold and rushed out to the front of the quarters to the verandah. At that time I did not see the coat which the accused had been carrying on his arm. I do not know what had happened to it. As the deceased ran out the accused ran behind her. Then the accused held the deceased and went on stabbing her. The deceased was running in the direction of the ping pong table. The accused held her by the upper arm from behind and went on stabbing her. I did see the weapon then. Then the deceased fell, and even after she fell the accused stabbed her once. Up to that time he had stabbed her 5 or 6 times. Then the deceased ran. I did not see in which direction she ran as I ran away from the verandah towards the back of the quarters crying out, with the intention of informing the Matron in the hospital quarters. After the stabbing the accused said : ' Don't trouble me, I am going to the Police. ' He said that in Sinhalese. Then he got out of the verandah and went out of the front gate. "

The doctor who examined the deceased described fourteen injuries. Of these twelve were stab wounds. Three of them were round about the left arm pit, one on the left upper arm, two on the scapula, three on the neck, two on the back near the spine and above the pelvis. The injuries were consistent with the evidence that they were inflicted from behind.

The appellant in his evidence stated that on the fatal day at about 5 p.m. he came to the Nurses' Quarters to see the deceased as usual with a parcel of apples, grapes and chocolates. As there was no one in the verandah he entered the sitting room. He took off his coat as he was used to do and placed it on the settee. As he heard the deceased whispering in a room, he went near it and called her. She came out and they both sat on the settee. She appeared to be pleased to see him. He asked for a cup of tea and after he had drunk it he handed to the deceased the parcel he had brought her. She took it and left it in her room. A little while later he asked her to bring two apples from the parcel and began to peel an apple. While doing so the appellant asked the deceased whether it was true that she was getting married to Franklin Dharmadasa. She then asked him who had given that information and was told that some one who had walked out of those quarters had given him the news. Then the deceased said that the appellant should not interfere with her private affairs and asked him to leave the quarters at once. He then said jocularly that those were not her quarters. Then she started pushing the appellant away. She said she would be getting married to Franklin Dharmadasa on the 28th of November and that she would not allow anybody to see her in those quarters after that. She continued to push the appellant and attempted to pull out from his top pocket a handkerchief she had given him. The pocket was torn in the attempt. She continued to push the appellant out of the hall. The appellant's version of what happened thereafter in his own words is as follows :—

" Then I lost my self-control and I cannot give any further account of what happened. I had the knife and I do not know what I did.

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Later I found blood on the blade. I know that we were last together on the verandah and the deceased was clinging to me trying to take the handkerchief from my shirt pocket. When she gave me the information that she was getting married on the 28th November I felt disheartened. I had been looking after her for the last so many years and I lost my head at that moment.

Q. It is reasonable to suppose that you were not pleased by the news that she was going to get married to somebody else ?

A. I was not pleased.

Q. Were you provoked ?

A. Yes

Q. Then ?

A. At that time I have been stabbing her and after a few minutes I saw blood on the blade. Then I knew that my girl had been injured.

Q. You knew having seen blood on the blade that your girl had been injured and you also surely must have known that the injuries must have been inflicted by you. Is that not so ?

A. Yes. "

The plea of causing death while deprived of the power of self-control by grave and sudden provocation was rejected by the jury who returned a unanimous verdict of guilty of murder against the appellant.

Learned Counsel for the appellant submits that the appellant's trial was vitiated by the admission of inadmissible evidence and he invited us either to quash the proceedings and order a re-trial or to substitute for the verdict of the jury a finding of culpable homicide not amounting to murder on the ground that the death was caused by the appellant whilst deprived of the power of self-control by grave and sudden provocation.

It will be convenient at this point to refer to the specific evidence to which exception is taken. In the course of his cross-examination, the appellant was asked whether he had made the following statements to Sergeant Dhrahaman :

(*a*) " The last time I visited was somewhere in June this year. I met the deceased. She spoke to me and asked me to go home and she went into her room. I then told Miss Gunasekera the attitude adopted by the deceased and requested her to speak to the deceased and bring her out. Miss Gunasekera informed me that she has nothing to do with private affairs. "

(*b*) " I then sent a letter of demand through my lawyer Mr. E. P. Rupasinghe of No. 11, Belmont Street, Colombo, dated 28th July, 1954 to the deceased. I have got a copy of the same. "

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(*c*) " I then left to the quarters at about 5.20 p.m. As I entered through the first gate I noticed Lucihamy entering through the other gate of the quarters. She smiled at me. I went into the sitting room with the coat folded in my arm. "

As the appellant did not admit the statements, learned Crown Counsel after the close of the defence sought to impeach his credit by proving that he made those statements. With this end in view he applied for leave to call Sergeant Dhrahaman " in rebuttal ". The application was allowed. Police Sergeant Dhrahaman was thereafter examined by Crown Counsel. Under examination he said :

" On the 23rd of November last year, I recorded a statement of this accused at the hospital police post at 10 p.m. (The witness is asked to refer to the statement recorded by him).

Then follows the following questions and answers :—

Q. During the course of that statement, did the accused say " The last time I visited was somewhere in June this year. I met the deceased. She spoke to me and asked me to go home and she went into her room. I then told Miss Gunasekera the attitude adopted by the deceased and requested her to speak to the deceased and bring her out. Miss Gunasekera informed me that she has nothing to do with private affairs "?

A. Yes, he did.

Q. Did the accused in his statement to you also say this : " I then sent a letter of demand through my lawyer Mr. E. P. Rupasinghe of No. 11, Belmont Street, Colombo, dated 28th July, 1954 to the deceased. I have got a copy of the same. On this letter of demand I got a letter from the deceased that she proposes to settle the same in instalments of Rs. 100 a month. I have this letter too with me " ?

A. Yes.

Q. Did the accused further state as follows :—" I then left to the quarters at about 5.20 p.m. As I entered through the first gate I noticed Lucihamy entering through the other gate of the quarters. She smiled at me. I went into the sitting room with the coat folded on my arm " ?

A. Yes.

I read this statement back to the accused after I had recorded it and he signed it and accepted the statement as a correct record of what he had told me, and I have made a note of that too. "

Learned Counsel for the appellant submitted that these statements were inadmissible on the following grounds :—

(*a*) that they were taken by Sgt. Dhrahaman after the appellant had been remanded to Fiscal's custody and was being illegally detained by the Police ;

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(*b*) that the statements consisted of non-severable parts of an inadmissible confession taken out of their context ;

(*c*) that oral evidence of statements taken down in writing has been given ;

(*d*) that such evidence is excluded by the decision of this Court in *Rex v. Jinadasa* [1] ;

(*e*) that what Sergeant Dhrahaman in effect did was to give inadmissible secondary evidence of the contents of a document alleged to have been signed by the appellant ;

(*f*) that the appellant had been given no opportunity of dealing with this allegation, which was made for the first time after the defence had closed its case.

The first of the objections taken by learned Counsel for the appellant was not raised in the court of trial. There was therefore no occasion at the trial to elicit all the facts relating to the circumstances in which the statement of the appellant came to be recorded after the Magistrate had commenced proceedings. It would appear from the transcript of the proceedings that the appellant came to the Police Post at the Galle Hospital premises at 5.25 p.m. and that Sergeant Dhrahaman came there at about 6.15 p.m. and began the investigation. Twenty minutes later, Inspector Wickremasinghe who came there continued the investigation. The Magistrate arrived at the scene shortly after 6.45 p.m. and commenced his preliminary inquiry at the Police Post where the appellant was. The charge was explained to him and some evidence taken. At the conclusion of the proceedings the Magistrate made order remanding the appellant to the custody of the Fiscal and adjourned the inquiry for the next day at the Magistrate's Court. The appellant does not appear to have been removed to the remand jail by the Fiscal at all that night. Sergeant Dhrahaman's evidence shows that it was he who took the appellant to the jail at 1.15 a.m. that night or more correctly the next morning and handed him to the jail guard, after recording the appellant's statement on the orders of Inspector Wickremasinghe. It would appear that the statement was long for it took nearly three hours to record it. As the prosecution has not had an opportunity of explaining why the Fiscal did not remove the appellant to the remand jail immediately after the Magistrate made the order of remand we do not think we would be justified in expressing an opinion on the question whether the appellant was illegally detained by the police.

The evidence discloses that, when the Magistrate arrived, the inquiry under Chapter XII of the Criminal Procedure Code had commenced and was in progress. On his arrival it appears to have been suspended and continued after his departure. There is nothing in the Criminal Procedure Code which provides that on the commencement of an inquiry under Chapter XVI an investigation under Chapter XII should cease, nor has Counsel cited any authority in support of that proposition. In the view of the majority of us an investigation under Chapter XII does not automatically come to an end upon the commencement of the preliminary inquiry under section 153 of the Criminal Procedure Code or

[1] *51 N. L. R. 529.*

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under Chapter XVI. (The other member of the Bench is of the view that this question does not arise for decision, for the reason that it has no bearing on the admissibility of the evidence.)

The majority of us are therefore of the opinion that the recording of the appellant's statement by Sergeant Dhrahaman was not illegal for the reason that it was done after the commencement of the Magisterial inquiry. We are all agreed that even if the appellant was under illegal detention at the time his statement was recorded evidence of the statements made by him cannot properly be excluded on the sole ground that he was illegally detained when he made the statements sought to be proved. We are not aware of any previous case in which this very question has been decided nor has either counsel cited any such case. But there are numerous decisions of this Court which hold that the mere fact that evidence is obtained in the course of a search in which the officers making the search fail to comply with the provisions of the law governing such search is no ground for excluding evidence so obtained if such evidence is otherwise admissible. The majority of those cases are decisions under the Excise laws. It is sufficient here to refer to the cases of *Rajapakse v. Fernando* [1] and *Peter Singho v. Inspector of Police, Veyangoda* [2]. Learned Crown Counsel has drawn our attention to the recent Privy Council decision of *Kuruma, son of Kaniu v. The Queen* [3], where on a trial on a charge of unlawful possession of ammunition evidence of the search and the finding of the ammunition by an officer who by virtue of his subordinate rank had no power to search was held to be admissible. We should not be taken as laying down the broad proposition that evidence illegally obtained would under all circumstances and in every case be admissible. Cases in which a Court of law may properly exclude such evidence are conceivable.

The next question that arises for decision is whether the evidence of the appellant's statements to Sergeant Dhrahaman has been properly given. Learned Counsel for the appellant strenuously argued that in the circumstances of this case the learned Trial Judge was wrong in allowing Sergeant Dhrahaman to be called in rebuttal under section 237 (1) of the Criminal Procedure Code. He contended that Dhrahaman's evidence included evidence of admissions alleged to have been made by the appellent about the state of his relations with the deceased in June and July 1954, and about the prosecution witness Lucihamy's presence at the tragedy ; that the facts so alleged to have been admitted were in issue at the trial ; and that if the Crown relied on these admissions the Crown could, and therefore should, have led evidence of them before the appellant entered upon his defence. The decision in *R. v. Thuraisamy* [4] was relied upon in support of this contention. Rebutting evidence is evidence which is given by one party in a case to explain, repel, counteract or disprove evidence produced by the other party. In the instant case Crown Counsel was not seeking to introduce new evidence to meet the evidence given by the appellant and what he sought to do was in fact to exercise the right he had under section 155 of the Evidence Ordinance to impeach the credit of the appellant by proof of former statements

[1] *52 N. L. R. 361 ; 45 C. L. W. 6.*
[2] *42 C. L. W. 15.*
[3] *(1955) 2 W. L. R. 223.*
[4] *(1952) 54 N. L. R. 449 ; 47 C. L. W. 105.*

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inconsistent with his evidence. The majority of the Court are of the view that the learned Trial Judge was right in permitting Sergeant Dhrahaman to be called in order to prove former statements of the appellant inconsistent with his evidence. Our view gains support from the decision of this Court in the case of *Rasiah v. Suppiah* [1].

Alternatively he submitted that if it was not the written statement that was proved oral evidence of the contents of a document had been given when under the Evidence Ordinance such evidence is excluded.

We now come to the submission of learned Counsel that what Crown Counsel in effect did was to adduce oral evidence of the contents of a written statement alleged to be signed by the appellant and to contain what the appellant said in answer to Sergeant Dhrahaman. The majority of us are unable to uphold this submission. In the case of *Rex v. Jinadasa* (*supra*) it has been held by this Court that a Police Officer or Inquirer may give oral evidence of a statement made to him. This is what Sergeant Dhrahaman did. He was asked by Crown Counsel to use the written statement for the purpose of aiding his memory but it is not clear from the transcript whether he used it for that purpose. In support of his argument that it was the written statement that was proved learned counsel for the appellant relied strongly on Sergeant Dhrahaman's evidence that he read the statement back to the appellant after he had recorded it and that the appellant signed it and accepted it as a correct record. It is unfortunate that Sergeant Dhrahaman should have gone on to say this. But the majority of us are unable to regard this evidence as amounting to the production in evidence of the statement itself.

Appeal dismissed.

1955 *Present:* **Gratiaen, J., and Pulle, J.**

P. H. S. FERNANDO, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 313—D. C. Colombo, 77/T (Special)

Estate Duty Ordinance (Cap. 187)—Section 6 (d)—"Property passing on death"—Transfer of property by A to C—Consideration furnished by B—Death of B—"Disposition purporting to operate as gift inter vivos".

A contracted with B to sell to B or to B's nominee or nominees the entirety of a property for a consideration of Rs. 505,000. B thereafter called upon A to convey the property to himself and to certain members of his family (including C) in certain agreed shares. Accordingly A transferred an undivided one-fifth share to C in exchange for the consideration of Rs. 101,000 which was furnished by B. Within three years of the date of the execution of the conveyance B died. The value of the share at the time of B's death was higher than it had been at the time of the transfer.

Held, that the conveyance executed by A in favour of C was a disposition by B by way of gift within the meaning of section 6 (*d*) of the Estate Duty Ordinance and that the subject-matter of the gift was the share which C received and not the sum of Rs. 101,000 provided by B as purchase price.

[1] *50 N. L. R. 265; 40 C. L. W. 10.*

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APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. M. de Silva*, for the petitioner-appellant.

V. Tennekoon, Crown Counsel, for the respondent.

Cur. adv. vult.

March 10, 1955. GRATIAEN, J.—

This is an appeal under Section 43 of the Estate Duty Ordinance against a decision of the District Court of Colombo upholding an assessment of estate duty in respect of the estate of the appellant's father, Peter Solomon Fernando (hereinafter called the "deceased"). The dispute relates to the effect of a conveyance P1 dated 28th April 1944 whereby, in exchange for consideration admittedly furnished by the deceased out of his own funds, the Lunawa (Ceylon) Tea and Rubber Estates Limited transferred an undivided 1/5 share of Arampola Estate to the appellant. The deceased died on 8th July 1946, that is to say, within three years of the date of execution of P1. The learned trial Judge upheld the contention of the Crown that the appellant's 1/5 share of Arampola Estate constituted "property taken under *a disposition made by* (*the deceased*) purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust *or otherwise*" within the meaning of Section 6 (*d*) of the Ordinance. He rejected the argument that only the consideration of Rs. 101,000 provided by the deceased (but not the property itself) constituted a disposition by way of gift within the meaning of Section 6 (*d*). The practical importance of the dispute lies in the fact that the value of Arampola Estate at the date of the deceased's death was higher than it had been at the time of the transfer.

There is no controversy as to the circumstances in which the appellant became the owner of a share in Arampola Estate on 28th April 1944. An earlier notarial agreement R1 had been entered into between the deceased and the Lunawa (Ceylon) Tea and Rubber Estates Company Limited whereby the deceased agreed to purchase, and the Company to sell, the entire property for a consideration of Rs. 505,000. The transaction was to be completed on or before 30th April 1944, and, on the deceased paying the agreed purchase price and complying with certain other conditions, the Company was to execute a conveyance "*in favour of the purchaser or his nominee or nominees*".

The conveyance P1 dated 28th April 1944, was executed in implementation of this earlier agreement. P1 recites that the deceased "had called upon the Company in terms of (R1) to transfer and convey the said Arampola Estate" to himself and to certain other members of his

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family (including the appellant) in certain agreed shares. With regard to the 1/5 share conveyed to the appellant the deceased had out of his own funds entrusted the proportionate consideration to the attesting notary for payment to the Company.

It is now our duty to give a " juristic interpretation " to this simple transaction. That the father intended his son to receive a " disposition " by way of gift is clear enough. But what precisely was the subject matter of the gift—was it the money, or was it the share in Arampola Estate which the Company conveyed to him in exchange for the payment of the money provided by the deceased ?

There can be no doubt that, if the father had placed the money at the absolute disposal of his son, and the son had, on his own initiative, utilised it to purchase a share of the property direct from the former owner, the money would have been the subject matter of the gift. It is equally clear that, if the father had purchased the property directly in his own name from the Company, and then proceeded to donate a share of it to his son, the property would have been the subject matter of the gift. But on which side of the dividing line does the present transaction stand ?

Section 6 (*d*) of the Estate Duty Ordinance has been taken over from Section 38 (2) of the Customs and Inland Revenue Act, 1881 of England as amended by two later enactments. We have not been able to discover any decisions of the English Courts which throw any light directly on the present problem. In *Hanson on Death Duties* (9th ed.) at page 80, however, there is a passage to the following effect :

> " A case frequently occurring in practice is that of the purchase of a house for the donee. If B contracts to buy a house upon a promise by A to pay for it, the house is his under the contract. The gift is a gift of money, completed only when actually paid. *On the other hand, if A contracts to buy a house and directs the conveyance to be made to B, this is a gift of the house, completed when the conveyance is executed, up to which time A remains the owner.* "

The Crown relies strongly on that part of the quotation which is italicised. Mr. Perera points out, however, that in England a person to whom the owner of property has undertaken to sell it immediately becomes, apparently, its equitable owner—so that in the hypothetical case discussed in the test-book, A has in truth " disposed " of the equitable estate to B by way of gift. In Ceylon, on the other hand, A would not enjoy real rights of any kind until the agreement of sale is actually implemented ; he has only a *right in personam*, so that (Mr. Perera submits) there can be no effective disposition by him of the property itself to the donee. *Dias v. Alahakoon* [1].

In my opinion, the particular problem before us calls for a realistic approach, by analysing the transaction with reference (1) to the result which the deceased intended to achieve (2) to the practical means by which he

[1] (*1938*) *40 N. L. R. 153.*

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procured its achievement. At the outset, I remind myself that, while the agreement R1 was still in operation, the deceased was the only person in a position to control the destination of the future title to Arampola Estate. If he exercised his rights under the agreement, the entire property had to be purchased for the agreed price stipulated, as the Company was under no obligation to sell only a share for a proportionate sum. The appellant, on the other hand, did not enjoy any contractual right to purchase the property or any part of it.

The deceased decided to claim, as against the Company, performance of the Company's obligation under R1. At the same time, he formed an intention to take the steps required to divert a share in the property to his son's ownership. This result could have been achieved in one of two ways. The *direct* solution would have been to purchase the entire property from the Company and thereafter to convey a share to the appellant. The alternative solution (which was more economical) was to achieve the same object *indirectly* by appointing the appellant his "nominee" under R1 to the extent of a 1/5 share and, having himself paid the full consideration stipulated, to call upon the Company to convey that share directly to the appellant. Either process was calculated to bring about the same result, namely, that the appellant would become vested with title which he did not possess before by reason (1) the deceased's generosity and (2) of the exercise by the deceased of his power to nominate the transferee in terms of R1. It seems to me that the selection of the indirect method of achieving the desired result does not preclude us from regarding the conveyance executed by the Company as a "disposition made *by the deceased*" within the meaning of Section 6 (*d*) of the Ordinance. I would respectfully adopt the observations made by Stirling J. in *Carter v. Carter* [1] where he said :

> "The words *dispose* and *disposition* (in the Fines and Recoveries Act) are not technical words, but ordinary English words of wide meaning ; and where not limited by the context, those words are sufficient to extend to *all acts by which a new interest (legal or equitable) in the property is effectually created.*"

Similarly, in *Parr v. Attorney-General* [2], Lord Carson observed :

> "In my opinion in all the relevant sections (of the Finance Acts, 1894 and 1900) *disposition* means the same thing—namely, the effective disposition under which the property passes."

The significance of the words "*or otherwise*" in Section 6 (*d*) now becomes apparent. In this context they are not *eiusdem generis* with the forms of "disposition" previously enumerated ; they indicate that a donor may also be regarded as having personally made a disposition of property by way of gift whenever the property effectually passes to the "donee" by an indirect process which was controlled at every stage by the "donor" himself. The purchase price was not intended to pass into the ownership of the appellant, so that it never became his

[1] (*1896*) *1 Ch. 62 at 67.*

[2] (*1926*) *A. C. 239.*

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to do with as he wished ; the property, on the other hand, did so pass in accordance with the deceased's intentions and in consequence of the arrangements which the latter had made to achieve the desired result.

I would dismiss the appeal with costs.

PULLE, J.—I agree.

Appeal dismissed.

1955 *Present :* **de Silva, J., and Fernando, J.**

RAJASEKERAM, Appellant, *and* RAJARATNAM, Respondent

S. C. 220—D. C. Pt. Pedro, 4,323

Costs—Adjournment of hearing of a case—Power of Court to order payment of " incurred costs "—Civil Procedure Code, ss. 143, 214.

When a Judge, acting under section 143 of the Civil Procedure Code, grants an adjournment of the hearing of a case, he may order the party, at whose request the adjournment is granted, to pay " incurred costs ". But when he makes such an order he should state his estimate of the " incurred costs " and the grounds on which he bases that estimate.

APPEAL from a judgment of the District Court, Point Pedro.

S. Nadesan, Q.C., with *C. Renganathan*, for the defendant appellant.

H. V. Perera, Q.C., with *T. Arulanandan*, for the plaintiff respondent.

Cur. adv. vult.

July 21, 1955. DE SILVA, J.—

The plaintiff instituted this action on July 28th, 1952, against his brother, the defendant, for a declaration that he was the owner of 2/3 share of the business carried on under the name of " S. Veeragaththippillai & Sons " at Jaffna and of the assets and goodwill thereof and for an order for an accounting. In the plaint the subject matter of the action was valued at Rs. 600,000. The defendant in his answer denied the claim of the plaintiff and set up various defences. The case first came up for trial on 25.6.'53 when issues were framed and adopted. Thereafter the hearing was continued on 6.11.'53 and adjourned for the 11th and 12th January, 1954. On 11.1.'54 in the course of cross-examining the plaintiff the Counsel for the defendant sought to add three new issues to the fifty issues which had been adopted earlier. The Counsel for the plaintiff objected to the three new issues and the learned District

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Judge made order rejecting them. Thereupon the defendant's Counsel moved to amend the answer to enable him to raise the three issues in question. The plaintiff's Counsel objected to that application also, on the ground that it was an attempt to keep his client away from the business. The learned District Judge, however, allowed the application to amend the answer but ordered the defendant to pay to the plaintiff the " incurred costs " of that day and the following day. Later, on the suggestion of the Counsel for the plaintiff, the three issues in question were adopted without the amendment of pleadings in order to obviate delay. But the order for costs however already made was retained. Further hearing was refixed for 15th and 16th March, 1954. This appeal is by the defendant against the order for costs referred to above. The order appealed from was obviously made under Section 143 of the Civil Procedure Code (herein after referred to as the Code). The Sub-Section 1 of that Section empowers the Court to adjourn the hearing of the action on the application of either party if sufficient cause is shown. Sub-section 2 of the same Section enacts " in all such cases the Court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment. " Mr. Nadesan conceded that the Court in granting an adjournment of the hearing, is entitled to order the party at whose request the adjournment is granted, to pay costs as taxed by the Court or to pay a specified amount fixed by it as costs. He however argued that there is no provision in the Code which empowers the Court to order a party to pay the " incurred costs ". Provision is made in Section 214 to tax bills of costs. According to that Section a bill of costs in a District Court has to be taxed by the Secretary, according to the rates specified in the Second Schedule. Mr. Nadesan in support of this argument submitted that there was no provision in the Code to tax bills in respect of " incurred costs ". But I do not think that there is any insurmountable difficulty in the matter of taxing such bills. Section 214 itself can be availed of for that purpose, subject to one variation, the variation being the substitution of the costs actually incurred in place of the rates specified in the Second Schedule. Of course, the party who is to receive " incurred costs " would be entitled to recover such costs only in respect of items taxable under that Schedule. In other words he would be entitled to get the bill taxed in terms of the Second Schedule, but free from the restrictions set out therein in regard to the amounts permitted under it. Such amounts will be limited to the sums actually incurred.

The awarding of costs is a matter in the discretion of the Judge. But that discretion must be exercised judicially. The Judge is not entitled to make an order in a vague or arbitrary manner. But he should be guided by rules of reason and justice—*Sunderam v. Gonsalves* [1]. In *Yapa v. Don Davith* [2] Hearne J. stated, " It is true that a Court of Appeal does not ordinarily interfere with the discretion exercised by a Court of trial as to costs but where it is clear that a Court of trial has exercised no discretion at all and has arbitrarily given costs against the party who succeeded on the issues before the Court, it would be contrary to all principles of justice if it did not interfere ". As observed by

[1] (*1948*) *51 N. L. R. 15.*

[2] (*1937*) *10 C. L. W. 25.*

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Basnayake J. in *Sunderam v. Gonsalves* (supra) the interference should not be restricted to the instance referred to by Hearne J. if it is evident that the Judge has not exercised his discretion at all or if he has used it arbitrarily. There are various factors to be taken into consideration in fixing the amount of costs when the hearing of a case is adjourned on the application of a party. One such factor is the amount involved in the litigation, and another is the extra expenditure that is incurred by the other party as a result of the postponement. The Judge is also entitled to take into consideration the stage of the case at which the postponement is granted, in fixing the costs. But in no case should a Judge enhance the amount of costs for the reason that the party who is condemned to pay the same is in affluent circumstances. In this case the learned District Judge in making the order for costs has made the observation "the defendant is not a poor person." That is indeed an unfortunate remark to have been made. The fact that the defendant was not a poor person appears to have influenced the Judge in ordering him to pay unusually heavy costs. Although I would not go so far as to say that a Judge in no circumstances should order a party to pay "incurred costs" I would however venture to observe that such an order is an undesirable one and should be made only in cases where the Judge is in a position to form a fairly accurate estimate of the "incurred costs". Where he makes such an order the record also should show that he had material before him to arrive at the estimate of "incurred costs". Otherwise it would not be possible for this Court to ascertain whether or not the Judge had exercised his discretion judicially. In this case it is not possible to gather from the Judge's record even a very rough idea of the amount of costs incurred by the plaintiff and which the defendant was ordered to pay. If the Judge had no means of knowing what the plaintiff had spent it cannot be said that he used his discretion judicially in ordering the defendant to pay the "incurred costs". The learned District Judge should have stated in his order his estimate of the "incurred costs" and the grounds on which he based that estimate before he made the order. In these circumstances I am not satisfied that the Judge used his discretion judicially. If the learned District Judge felt that an order for taxed costs in favour of the plaintiff was inadequate it would have been desirable if he fixed a specified amount as costs after consulting the Counsel for both parties. The order to pay "incurred costs" is set aside. The plaintiff however is entitled to an order for costs. I would fix the costs at Rs. 1000. There will be no costs of this appeal.

FERNANDO, J.—I agree.

Order varied.

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[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Fernando, J.**

REGINA *v.* PINTHERIS *et al.*

APPLICATIONS 93-95 OF 1955

S. C. 12—M. C. Matara, 1,870

Conviction for murder—Grounds of appeal—Time limit for stating them—Strict compliance necessary—Court of Criminal Appeal Ordinance, No. 23 of 1938, ss. 4, 5 (1), 8 (1), 16.

Evidence—Burden of proof—" Reasonable doubt "—Misdirection.

(i) *Held* (by the majority of the Court), that, in the case of a conviction involving sentence of death, fresh grounds of appeal, in addition to those stated in the notice of appeal or application for leave to appeal, will not be entertained by the Court after the expiration of the time limit of fourteen days laid down in section 8 (1) of the Court of Criminal Appeal Ordinance.

(ii) The three prisoners were convicted of murder. The defence of the 1st and 3rd accused was that they were not present at the scene of the offence and took no part in it, while the defence of the 2nd accused was that he killed the deceased in the exercise of the right of private defence. Of the three accused, only the second gave evidence at the trial. He stated that he acted in self-defence and that the 1st and 3rd accused were not present at the scene.

In the summing-up, the Judge stressed that if the jury accepted the evidence of the 2nd accused that the 1st and 3rd were not present at the scene they had to acquit the 1st and 3rd accused. He did not, however, direct the jury that if the version of the 2nd accused raised reasonable doubt as to the presence of the 1st and 3rd accused these two had still to be acquitted.

Held, that even if the jury held that the burden resting on the 2nd accused in regard to his own defence had not been discharged because they were left in a state of honest doubt whether or not to accept the material parts of his evidence it was nevertheless possible that he raised a reasonable doubt as to the presence of his co-prisoners. The 1st and 3rd accused were therefore entitled to succeed in appeal on the ground of misdirection.

APPLICATIONS for leave to appeal against three convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *R. A. Kannangara* and *W. D. Thamotheram*, for the accused-appellants.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

2——J. N. B 49373—1,592 (10/55)

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August 25, 1955. PULLE, J.—

The three prisoners, of whom the first is the father of the second and the third, were convicted on the charge that they did on the 7th November, 1954, commit murder by causing the death of one Ganhewage Samson and were sentenced to death. The case for the prosecution was that the death of the deceased was caused by a joint attack of the prisoners, of whom the first and second were armed with katties and the third with a mammoty. The defence of the first and the third was that they were not present at the scene of the offence and took no part in it, while the defence of the second was that he killed the deceased in the exercise of the right of private defence. The principal submission made on behalf of the first and third is that the learned Commissioner in his charge to the jury failed to differentiate their defence from that of the second thereby creating an impression on the minds of the jury that if they rejected the defence of the second they had perforce to convict the first and the third. In regard to the second prisoner it was urged that the manner in which a statement made by him to the Police was elicited in evidence was gravely prejudicial to his defence and amounted to a miscarriage of justice. At the close of the argument we set aside the convictions of the first and third prisoners and dismissed the appeal of the second and refused his application for leave to appeal and intimated to learned counsel that we would deliver our reasons later.

To understand the submissions made on behalf of the prisoners it is necessary to state the evidence in greater detail. According to the prosecution the events which led to the death of the deceased happened in two stages. According to the witness G. H. Peter, the elder brother of the deceased, he was returning from a boutique with a bag of flour and sugar and some articles along a path running over a field when he met the second prisoner. The latter had a katty and some cassava. The witness taxed the prisoner with having behaved improperly towards his sister Sopihamy who was married to one Sumathipala Abeyagunawardena. Words passed between the two and a blow with the katty injured the right knee of Peter. The bag of sugar and flour fell down and then ensued a tussle for the katty. In response to the cries of Peter, Sumathipala ran up to the spot, wrenched the katty and threw it into the field. Thereupon the second prisoner ran across the field over a ridge towards the direction of his house where he was living with his father, the first prisoner. Sumathipala asked Peter to remain at the spot and set out to make a complaint to the Police.

About fifteen or twenty minutes afterwards Peter says he saw the deceased first at a distance of about 100 yards and also the three prisoners. The prisoners were converging towards the deceased from a route different to that taken by the latter. About thirty feet away from where Peter was lying the prisoner closed in on the deceased. The first blow was dealt by the father with a katty on the head of the deceased. He was felled to the ground whereupon the second prisoner attacked with a katty and the third with a mammoty. When the two sisters ran up to the

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deceased they were also set upon. Peter says he too went up with some difficulty. He was injured by blows struck by the second and third prisoners.

Of the prisoners only the second gave evidence. According to him there was only one incident in the course of which he clashed with both Peter and the deceased under circumstances different to what was deposed to by the prosecution witnesses. He says that in the course of the struggle with Peter he did not lose hold of the katty and succeeded in escaping with it and ran along the field for some distance and got on to the foot-path. He continued his story as follows :

> " Then I met a certain man whom I could not recognise. He said, ' Take this fellow to be eaten '. He came towards me. I jumped into the field. He had a katty in his hand. After I escaped from Peter, Sumathipala and Sopihamy went away. That man aimed a blow at me. Then I also struck him with the katty. I cannot say how many blows I dealt. I gave him more than one blow. "

He went on then to say that Peter and others came up to the spot and he attacked them as well. Then he threw the katty into the field and went home where he asked his father to accompany him to the Police. He next proceeded to Waralla Police Station and made a statement at about 7 p.m. The contents of this statement were elicited in the circumstances which will be referred to later.

When the charge to the jury is examined there are directions of a general character to the effect that the burden rested on the prosecution to prove its case against each accused beyond reasonable doubt. The Commissioner also stressed in a number of passages that if the jury accepted the evidence of the second prisoner that the first and the third were not present at the scene they had to acquit the first and third. The complaint is that, while it was obvious that if the jury thought that the version given by the second prisoner was probably true they had to acquit the first and the third, the Commissioner did not direct the jury that if the version of the second prisoner raised a reasonable doubt as to the presence of the first and third these two had still to be acquitted and that the failure so to direct amounted to a misdirection resulting in a miscarriage of justice. It was submitted with considerable force that the frequency with which the jury were told that, if they considered the evidence of the second prisoner to be probably true, then the first and third were entitled to be acquitted may have created the impression that if they rejected the plea of self-defence set up by the second prisoner, then they had necessarily to convict all three prisoners of murder. It suffices to quote only two or three passages from the charge on which learned Counsel for the appellants based his submission :

> " You consider the whole case and see whether there is any truth in the second accused's story. If you do not accept his story then

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you reject it. If you accept it, on the other hand, then the first and third accused are not guilty. "

" You will ask yourselves the question whether the prosecution story is true, that proof must be to a high degree of certainty, or whether the second accused's story is probably true. It is a matter for you to decide. "

" It is now for you to decide whether he (the second prisoner) acted in the right of private defence. He had that right at that stage, if what he says is true, and if you accept that he acted in the right of private defence then the first and third accused will get off. "

After the second prisoner had given evidence and closed his defence, the prosecution had on his own admissions fully discharged its burden as far as he was concerned and his conviction for murder was inevitable, unless the jury were satisfied that he had proved the existence of either exculpatory or mitigatory circumstances. The first and third prisoners, however, were not in like peril. The burden was still on the prosecution to satisfy the jury that they were present in the company of the second prisoner and took part in a concerted attack on the deceased. Even if the jury had rejected out of hand the plea set up by the second prisoner, they had still to be satisfied that they could with confidence accept the evidence of the prosecution witnesses implicating the first and third prisoners. If the jury held that the burden resting on the second prisoner had not been discharged because they were left in a state of honest doubt whether or not to accept the material parts of his evidence, it becomes obvious that while his defence had in law to fail, he had nevertheless succeeded in raising a reasonable doubt as to the presence of his co-prisoners. In this view of the matter the first and third prisoners were entitled to succeed in this appeal on the ground of misdirection. There was nothing so very compelling in the evidence called for the prosecution to have justified us in applying the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938.

It is common ground that the first information connected with this case was given to the Police by the second prisoner. That fact was elicited by the prosecution from the police officer who recorded his statement. In the course of his evidence in cross-examination he stated,

" The 2nd accused made a complaint to me. I recorded his statement. I did not take him into custody. "

At this point the record reads,

" At this stage court asks the jury to retire and they do so. Court explains the implications of that question to the defence counsel and asks whether he is going to call the accused and produce the statement. Defence counsel gives an undertaking to put in the statement

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and call the accused. Jury returns. Court explains to the jury that a statement or confession made by an accused person cannot be put in evidence during the prosecution case. He states that the Defence counsel has given an undertaking to call the accused and produce that statement."

In our opinion the learned Commissioner should not have apprised the jury of what took place in their absence, for it defeated the very purpose for which they were asked to retire. The reference to a confession by an accused person would have had dangerous repercussions if, as fortunately it did not happen in this case, the jury were in ignorance of the statement which was definitely non-confessional. Again, there was nothing in the evidence given by the police officer which necessitated an undertaking by counsel to produce that statement. Eventually he kept his undertaking and proved that statement through the same police officer. The procedure adopted to obtain evidence of that statement is irregular but having regard to the terms of that statement which was not challenged as being an incorrect record and which might legitimately have been used to contradict the evidence given by the second prisoner, we are of the opinion that no prejudice of any kind was caused to him. It is manifest that the jury rejected the plea of self defence and we have seen no reason to doubt the correctness of the verdict against him.

There remains to be considered the preliminary objection taken by learned Crown Counsel that the court should not entertain the additional grounds of appeal on which it was sought to argue this case. The date of the convictions was the 2nd August, 1955, and a notice of appeal and applications for leave to appeal in Form XXXIII dated the same day were lodged with the clerk of assize. The prisoners were defended by counsel and proctor whom they had retained and with them was associated the proctor who had been assigned to defend them. It would serve no purpose to pursue the question whether the lawyers whom he had retained should have advised them early in regard to the grounds of appeal. If the lawyer who is assigned certifies that he has drafted the grounds of appeal he is entitled to a fee but he is under no obligation by reason of the assignment to settle the grounds of appeal. The fact that learned counsel for the prisoners did not rely on a single one of the grounds appearing in the notice suggests that they received no advice from any of the lawyers who took part in their defence, a situation which, whatever be the reason, is much to be deplored.

This appeal was set down for hearing on Monday the 22nd August. On that day learned senior counsel stated he wished to urge fresh grounds of appeal and asked for an adjournment until the next sitting commencing on the 5th September. We intimated to him that we were not prepared to grant the adjournment but only the concession of placing the case at the bottom of the list. On the 23rd August when the case was reached at the point at which it was originally listed counsel handed

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up to the court the fresh grounds of appeal. Crown Counsel had been informed orally on the 22nd evening of the new points. We accept the statement of counsel that the transcript of the evidence and the charge was not ready until late on Friday the 19th August but not as justifying an application to add fresh grounds.

The objection taken by the Crown that the court should not entertain fresh grounds was supported on the authority of *The King v. Bello Singho et al*[1]. In that case in which the appellants had been sentenced to death the notice of appeal was filed on the 25th September, 1947. A further ground of appeal was filed out of time on the 19th October, 1947, and at the hearing counsel for the appellants sought to raise yet another point to which an objection was taken and upheld. In the judgment reference was made to *Rex. v. Cairns*[2] in which counsel for the prisoner in a capital case asked for leave to add at the hearing misdirection to the grounds of appeal, though it was not mentioned in the notice. The court granted leave as it was a capital case. At the conclusion of the judgment the Lord Chief Justice referred with approval to *Rex v. Wyman*[3] in which Darling, J. said,

> "The Court wishes it to be understood that in future substantial particulars of misdirection, or of other objections to the summing-up, must always be set out in the notice of appeal, even if the transcript of the shorthand note of the trial has not been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If Counsel has a genuine grievance regarding a summing-up, he knows substantially what it is as soon as the summing-up is finished, and can certainly specify his general objection when he settles the notice of appeal."

> "This direction the Court has repeated in later cases. In future it will act upon it."

Apparently one of the later cases was *Rex v. Benjamin Adler*[4]. After referring to a number of cases decided by this court the learned President (Jayetileke, J.) said,

> "These decisions show that the practice of raising points which are not set out in the notice, which, I regret to say, seems to be growing, has been condemned in no uncertain terms . . . . We think it is desirable that this Court should act upon the words of the Lord Chief Justice in *Rex. v. Cairns* [2], and insist on a strict compliance with the provisions of the Ordinance."

Dr. Colvin R. de Silva conceded that the case relied on by Crown Counsel was in point but argued that it was wrongly decided. The

[1] *(1947) 48 N. L. R. 542.*
[2] *20 C. A. R. 44.*
[3] *13 C. A. R. 163, 165.*
[4] *17 C. A. R. 105.*

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substance of his argument is that there is nothing in the Ordinance which ties an appellant down to the grounds set out in the notice of appeal and that once grounds for setting aside the verdict exist, even though they be raised for the first time at the hearing, the provisions in section 5 (1) of the Ordinance make it mandatory on the Court to set aside the verdict, the words being, " The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal ".

The majority of us are unable to accept this submission. It is elementary that there is no right of appeal from a decision of a judicial or other tribunal, unless such a right is conferred by statute. It flows from the bounty of the legislature and, therefore, the same legislature can impose any restrictions it pleases on the exercise of that right and hence no argument can be validly addressed to a court to the effect that the restrictions might work harshly in any particular case.

The strictness with which procedural steps required by statute to constitute an appeal are insisted on is exemplified in the case of *Coldman v. Kade* [1] in which a person who had been convicted before a bench of justices handed in their presence to the clerk of the court an application signed by him requesting them to state a special case. The clerk handed the application to the justices who stated a case, even though the applicant did not conform to rule 52 of the Summary Jurisdiction Rules which required him to serve on each of the justices a copy of the application. The appeal came on for hearing before the King's Bench Division consisting of Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ. The respondent took the preliminary point that the court had no power to hear the appeal as the rule in question was mandatory in character and had to be strictly complied with. For the appellant it was contended that the procedure followed was sufficient, since the rule had been complied with in substance. In rejecting this argument the Lord Chief Justice said,

> " Counsel for the appellant raised the point that, though the rules have not been complied with in their literal sense, something has been done which is sufficient to satisfy the substance of the intention of those rules. Cases have been cited to us which show that the court, including the Court of Appeal, have taken a stricter view than that of these provisions. We think that the objection taken by counsel for the respondent is one that stands good on the strength of those decisions, *and that we have no power to hear this special case.*"

The case of *Cosmas v. Commissioner of Income Tax* [2] followed in *North Western Blue Line v. K. B. L. Perera* [3] is illustrative of the same principle. In *Re Shanoff v. Glanzer* [4] it was laid down that a rule governing service of notice of appeal from a decision must be strictly complied with and that otherwise the appeal court has no jurisdiction to hear the appeal. One is also familiar with several decisions of the court of appeal in Ceylon

[1] (*1945*) *1 All E. R. 154.*
[2] (*1938*) *39 N. L. R. 457.*
[3] (*1943*) *44 N. L. R. 523.*
[4] (*1949*) *1 D. L. R. 414.*

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to the effect that where a procedural step in the course of perfecting an appeal is not taken within the prescribed time it has no jurisdiction to extend the period. Craies on Statute Law [1] states the position as follows :—

> "When a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with."

Now the substantive right of appeal conferred by section 4 must be read with the procedure laid down in section 8 (1) which states,

> "Where a person convicted desires to appeal under this Ordinance to the Court of Criminal Appeal, or to obtain the leave of that court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, *in such a manner as may be directed by rules of court*, within fourteen days of the date of conviction."

In our opinion the "appeal" referred to in section 5 (1) is one which conforms to the requirements of the Ordinance. The Court of Criminal Appeal Rules, 1940, before the amendment published in *Gazette* No. 9,130 of 4th June, 1943, provided for two separate forms,—Form IV giving notice of appeal on questions of law and Form VI for leave to appeal "on the grounds hereinafter set forth". It is perfectly clear that in Form IV the questions of law had to be set out and in Form VI the grounds for applying for leave to appeal. Since the amendment referred to Forms IV and VI have been superseded by Form XXXIII modelled entirely on the English Form XXXIV which as a matter of practice is used in England in place of the statutory Forms IV and VI. Our Form XXXIII is now used whether the notice is one of appeal or of application for leave to appeal or both and space is provided for setting out the grounds of appeal or application.

It is clear from the rules and the forms that the grounds of an appeal or application are an integral part of a proper notice under section 8 (1) and there is nothing in the Ordinance to suggest the contrary. Section 16, on the other hand, indicates that a notice of appeal on law alone must contain the grounds. It provides that if it appears to the Registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may refer the appeal to the court for summary determination, and, where the case is so referred, the court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily. This power has been conferred on the basis that the grounds of appeal must be set out in the notice, for otherwise neither the Registrar nor the court would be able to act under the section.

[1] *5th Ed. p. 246.*

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Again, the Crown has a right of audience in every appeal. If a point of law is taken just before or during the hearing, a miscarriage of justice may result unless an adjournment is granted to the Crown to meet the new point. If the appellants' submission is correct he may take a new point as a matter of right at the adjourned hearing as well and this process may go on indefinitely until every conceivable point of law has been exhausted. Such a procedure could not possibly have been contemplated by the Legislature.

If an appellant, as in this case, who has been convicted of murder is allowed by the court to raise fresh grounds of appeal delivered after the appealable time it would in effect be granting an extension of time for giving notice of appeal. This is prohibited by section 8 (1) of the Ordinance the second paragraph of which reads,

> " Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Criminal Appeal. "

On this point the observations of Lord Reading in the case of *Twynham* [1] are apposite. The Lord Chief Justice said,

> " If it were possible to extend the time it would be open to a murderer, having failed in one appeal, to give notice asking for an extension of time in order to bring some other matter before the court and not give the notice until the last moment, in order to provide for a further extension of time. "

The English Act and the rules thereunder are in all material respects identical with ours. The English authorities especially *Rex. v. Cairns* [2] and our own are entirely inconsistent with the construction sought to be placed by learned Counsel for the appellant on section 5. A practice had grown up in England which we have followed of showing indulgence under exceptional circumstances. There is nothing in any of the cases to indicate that this indulgence was shown in the exercise of a judicial discretion to give relief to an appellant who has failed to give a notice of appeal conforming to the requirements of the statute. Unfortunately it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit laid down in section 8 (1). This Court will in future show no indulgence and strictly limit argument only to matters of law raised within the prescribed limit of fourteen days.

Convictions of the 1st and 3rd prisoners set aside.

Appeal of the 2nd prisoner dismissed.

[1] *15 C. A. R. 38.*

[2] *20 C. A. R. 44.*

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[Assize Court]

1955 *Present :* **Gratiaen, J.**

THE QUEEN *v.* THIAGARAJAH *et al.*

2nd Northern Circuit

S. C. 9—M. C. Mallakam, 1,408

Indictment—Charges contained therein—Must not be different from those inquired into by Magistrate—Scope of Attorney-General's power to re-open Magisterial inquiry—Criminal Procedure Code, ss. 156, 159, 160, 161, 162 (1), 163, 389, 390 (2), 391, 393.

Penal Code—Unlawful assembly—Sections, 138, 140.

An accused person can in no circumstances be committed for trial or tried upon indictment under Chapter 16 of the Criminal Procedure Code except upon the basis of the charges which had been read out to him under section 156 and to which he was later called upon to answer in terms of sections 159 and 160. The power of a Magistrate to commit under section 163 and the powers of the Attorney-General to direct a committal under section 391 are both determined by the scope of the particular charges which formed the subject matter of the Magisterial inquiry ; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

If the Attorney-General takes the view that an accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed) he may instruct the Magistrate under section 390 (2) to reopen the proceedings by formulating an amended charge under section 156, and thereafter to take all the steps prescribed by Chapter 16. It is not permissible to give a direction that the accused person should be committed for trial upon an amended charge after complying only with the requirements of sections 159, 160 and 161.

A person cannot be convicted of the offence of being a member of an unlawful assembly except in association with four others.

PRELIMINARY objection raised against the validity of the indictment in a trial before the Supreme Court.

M. Balasunderam, with *S. Gurunathan*, for the 1st accused.

A. Amirthalingam, for the 2nd accused.

N. T. D. Kanakaratne, Crown Counsel, for the Crown.

Cur. adv. vult.

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August 1, 1955. GRATIAEN, J.—

A retired post-master named Kadiresu Sambandar (of the Vellala community) lived with his wife in the village of Urelu, where he cultivated a plantain garden adjoining the compound of his house. The adjoining allotment of land, similarly cultivated, belonged to Thevasi Kanavathy (a Palla man).

Mr. Sambandar also owned some cattle. At about 2 a.m., on 21st October, 1953, he woke up and went into his compound to tether a cow-calf. Shortly afterwards, his wife heard some suspicious noises and, as her husband had not yet returned, she and their immediate neighbours (the Thambidurais) went in search of him. A few moments later they heard the sound of a gun being fired, and of people running away. Mr. Sambandar was found lying, with bleeding injuries, near the entrance to Thevasi Kanavathy's land. He was not in a fit condition to make a dying declaration before he died. He had sustained a blow on the head with a heavy, sharp cutting instrument and had also been shot in the stomach from a very close range. Each injury was necessarily fatal. It was also discovered that 135 plantain trees standing on Thevasi Kanavathy's land had been wantonly destroyed. Obviously more than one person had been concerned in the commission of these crimes.

The Police were unable for some time to discover any clue to the mystery. There had admittedly been caste ill-feeling in the locality, and Mrs. Sambandar suspected that her husband had been murdered by members of the Palla community. Thevasi Kanavathy, on the other hand, was equally convinced that Vellalas were responsible for the mischief committed on his land. The most likely theory, of course, is that a number of people entered Thevasi Kanavathy's land with the primary object of causing damage to it, and, in order to escape detection, murdered Mr. Sambandar when he unexpectedly arrived on the scene.

A few Palla men were from time to time arrested on suspicion, but they were released after the Police contacted a motor-car driver named V. Krishnasamy on 12th November, 1953. He was detained (perhaps illegally) in Police custody for about four days, and eventually told them a remarkable story in consequence of which the three prisoners who appeared before this Court were eventually prosecuted upon the following indictment dated 25th June, 1955 :

" (1) That on or about the 21st day of October, 1953, at Urelu, in the division of Jaffna, within the jurisdiction of this Court, you *with one Swaminathan Thiagarajah and another person unknown to the prosecution* were members of an unlawful assembly the common object of which was to commit mischief by cutting down the plantain trees standing on a land at Urelu cultivated by one Thevasi Kanavathy ; and that you have thereby committed an offence punishable under section 140 of the Penal Code.

(2) That at the time and place aforesaid and in the course of the same transaction one or more of the members of the said unlawful assembly did use force or violence in prosecution of the common

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object of the said unlawful assembly ; and that you have thereby committed an offence punishable under section 144 of the Penal Code.

(3) That at the time and place aforesaid and in the course of the same transaction one or more members of the said unlawful assembly did commit murder by causing the death of one Kadiresu Sambandar, which offence was committed in prosecution of the said common object, or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object, and that you being members of the said unlawful assembly at the time of the committing of the said offence of murder have thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(4) That at the time and place aforesaid and in the course of the same transaction *you Kandiah Thiagarajah, the 1st accused, and a person unknown to the prosecution* did commit murder by causing the death of the said Kadiresu Sambandar ; and that you Kandiah Thiagarajah, the 1st accused, have thereby committed an offence punishable under section 296 of the Penal Code. "

A preliminary objection was raised on behalf of all three prisoners to the effect that they had been improperly committed for trial upon these counts, and that the indictment should be quashed.

It was argued that each count in this indictment is fundamentally at variance with the charges which formed the basis of the Magisterial inquiry ; that the Magistrate, in the exercise of his judicial discretion under section 162 (1) of the Criminal Procedure Code, had discharged all three prisoners and their (then) co-accused, four in number, on " the particular charges under inquiry " ; and that the Attorney-General's subsequent directions (which had been obeyed by the Magistrate) requiring him to commit the prisoners for trial upon substantially different charges (now contained in the indictment) were *ultra vires*. I upheld the objection and quashed the indictment, ordering the prisoners to be released from Fiscal's custody.

The proceedings against the three prisoners and their co-accused under Chapter 16 of the Code had commenced on 30th November, 1953, by the Magistrate reading out the charges which formed the subject matter of the inquiry. These charges were later amended in minor respects on the instructions of the legal adviser of the Police. Accordingly, the inquiry commenced afresh on 10th February, 1954, when it was duly explained to the three prisoners and their co-accused under section 156 of the Code that they stood charged with the commission of 12 offences :

(1) the first charge alleged that 5 persons consisting of *the three prisoners and two named co-accused* had been members of an unlawful assembly the common object of which was to commit mischief

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by cutting down the plantain trees on Thevasi Kanavathy's land ; and it was not alleged that any person besides these 5 persons had been a member of the unlawful assembly ;

(2) the second charge alleged that the same 5 persons were guilty of rioting in prosecution of their common object ;

(3) the third charge alleged that mischief had been committed by one or more members of the said unlawful assembly in prosecution of their common object ;

(4) the fourth charge similarly alleged that the murder of Mr. Sambandar had been committed by one or more members of the unlawful assembly in prosecution of their common object ;

(5) the fifth charge alleged that the three prisoners and *two named co-accused* had committed mischief ;

(6) the sixth charge alleged that one of the other accused (not himself an active member of the unlawful assembly) had abetted the commission of the offence of mischief ;

(7) the seventh charge alleged that yet another co-accused (also not a member of the unlawful assembly) had abetted the commission of the same offence ;

(8) the eighth charge alleged that the 1st prisoner and *one of his co-accused named Murugesu Sinnadurai* (who had since been discharged) had committed the murder of Mr. Sambandar ;
(the additional charges numbered 9 to 12 are not material to the present discussion).

It will be observed generally that the case for the prosecution was to the effect that *the unlawful assembly consisted of precisely 5 named accused persons, instigated by 2 other named co-accused.* In support of all 12 charges, the prosecution relied almost entirely on the evidence of the motor-car driver Krishnasamy, and on certain statements of a confessional character alleged to have been made by some (but not all) of the 7 accused persons.

The witness Krishnasamy was, according to his own version, a most disreputable character who claimed to have been engaged on the night in question in transporting illicit immigrants by motor-car and thereafter in conveying a number of persons to Thevasi Kanavathy's land where the murder was committed.

On 12th August, 1954, the learned Magistrate decided that there was insufficient evidence to put any of the accused persons on trial. Accordingly, they were all discharged under the provisions of section 162 (1) of the Code.

So matters stood until about three months later, when the Law Officers of the Crown intervened. On 24th November, 1954, the Solicitor-General (acting under the authority of the Attorney-General in terms of section 393) issued a direction to the Magistrate under section 391 to re-open the

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inquiry *into "the charges" preferred against the 1st, 2nd and 3rd prisoners and against one of their co-accused named Swaminathan Thiagarajah,* but not against the three other persons previously accused. The specific directions were that the Magistrate should (*a*) record any further evidence adduced by the prosecution, (*b*) read "*the said charges*" to the accused as required by section 159, (*c*) comply with the provisions of sections 160 and 161, and (*d*) commit the 3 prisoners and Swaminathan Thiagarajah for trial to the Supreme Court upon "the said charges".

The 3 prisoners were re-arrested and produced before the Court, and further evidence was recorded in their presence. Efforts to trace the whereabouts of Swaminathan Thiagarajah, however, proved of no avail. The prosecution therefore decided to proceed for the time being against only the 3 prisoners, the case against Swaminathan Thiagarajah being left in abeyance.

The case against the prisoners still rested largely on the evidence which the Magistrate had previously considered insufficient to justify a committal. But, being bound by the Solicitor-General's directions, he made a brave attempt to comply with them. He discovered, however, that strict obedience would produce a most incongruous result. The reason was that, whereas 5 persons (no more, no less) were alleged in "the said charges" to have formed themselves into an unlawful assembly, one of them (Murugesu Sinnadurai) had already been discharged, and the Solicitor-General had given no direction that the order in his favour should be vacated. In these circumstances it was felt that the prosecution of the remaining 4 members of the alleged unlawful assembly would rest on an illegal foundation—there being an insufficient quorum of allegedly guilty persons to constitute an unlawful assembly as defined by section 138 of the Penal Code. Finding himself in this predicament, the Magistrate invited the Attorney-General's department to clarify the earlier directions received by him. In reply, he received a fresh communication, dated 2nd March, 1955, and signed by a Crown Counsel, directing the Magistrate to amend the charges based on the alleged formation of an unlawful assembly by substituting the name of Duraisamy Velupillai for that of Murugesu Sinnadurai against whom the case has not been re-opened.

These new directions, purporting to have been given on behalf of the Attorney-General *under section 389 of the Criminal Procedure Code,* were clearly *ultra vires.* In the first place, section 389 only empowers the Attorney-General to order fresh evidence to be recorded *after committal* if in his opinion the earlier evidence forming the basis of the committal was "not sufficient to afford a foundation for a full and proper trial". In the second place, it had never been alleged in "the particular charges" read out to the prisoners at the commencement of the inquiry under Chapter 16 that Duraisamy Velupillai had in fact been a member of the unlawful assembly; on the contrary, the implied suggestion at that time was that he had not. And finally, Duraisamy had already been discharged from the proceedings and there was no direction that the case against him should be re-opened for any purpose whatsoever.

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All or some of these difficulties seem to have been realised 10 days later by the Department, and on 12th March, 1955, a further communication was sent to the Magistrate cancelling the letter dated 2nd March, 1955. Instead, Crown Counsel purported to give fresh directions in the name of the Attorney-General (*also under the provisions of section 389 which was inappropriate*) requiring the Magistrate to take action as follows :—

(A) to read out to the 3 prisoners *under section 159* of the Code certain amended charges alleging (1) that they, together with Swaminathan Thiagarajah " *and another person unknown to the prosecution* " had in truth been the members of the alleged unlawful assembly, and (2) that the murder of Mr. Sambandar had been committed by the 1st prisoner and this " unknown person " ;

(B) to commit the prisoners for trial on these amended charges.

It must here be observed that no direction was given that the amended charges should be read out to the prisoners under section 156 and that fresh proceedings under Chapter 16 should be taken from that earlier stage.

The defence very naturally protested against this further change of front on the part of the prosecution. The learned Magistrate, however, considered himself under a statutory obligation to obey the Attorney-General's directions. Accordingly, but without enthusiasm, the charges (amended as directed) were formally read out and explained under section 159 to the prisoners, each of whom, while protesting his innocence, truthfully replied as follows in answer to the statutory question addressed to him under section 160 :

" I am not guilty. There is no inquiry in respect of these charges ".

I am satisfied that in the circumstances described by me the order of committal and the subsequent indictment embodying the charges so amended were invalid and contrary to the provisions of the Criminal Procedure Code.

In England, " *when a person charged has been committed for trial*, the indictment presented against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment ". *Administration of Justice* (*Miscellaneous*) *Provisions Act, 1933, section 2* (*2*) (*8*) *proviso 1.* Indeed even when the justices have refused to commit on any particular charge a man who has been committed on other charges, the prosecution may include in the indictment a count based on that charge subject to the power of the presiding Judge, upon objection, to rule that there was no evidence to support the allegations. *R. v. Morry* [1].

In Ceylon, however, the powers of the prosecution in this respect have become narrower since Chapter 16 of the Criminal Procedure

[1] *(1945) K. B. 153.*

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Code was subjected to the sweeping amendments contained in Ordinance No. 13 of 1948. Apart from an exception to which I shall shortly refer, an accused person can in no circumstances be committed for trial or tried upon indictment except upon the basis of the charges which had been read out to him under section 156 and to which he was later called upon to answer in terms of section 159 and 160. In other words, the power of a Magistrate to commit under section 163 and the powers of the Attorney-General to direct a committal under section 391 are both determined by the scope of the particular charges which formed the subject matter of the Magisterial inquiry ; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into. All this has been very clearly explained in the judgment of Gunasekara J. in *Vaithilingam v. The Queen* [1].

The Ceylon procedure is admittedly far from satisfactory in this respect, because it involves an unprofitable expenditure of time in framing amended charges followed by the commencement of what are virtually fresh proceedings under Chapter 16. But this is still the law, and recommendations for simplifying the procedure have not yet received the attention of Parliament.

On the other hand, the Attorney-General in Ceylon is vested with certain extra-ordinary powers (unknown in the English system) whenever a Magistrate, at the conclusion of the inquiry under Chapter 16, has discharged an accused person in terms of section 162 (1) of the Code. Section 391 then authorises the Attorney-General, if he considers that the accused should not have been discharged, to over-ride the Magistrate's discretion by directing a committal, and the Magistrate in that event has no option but " to re-open the inquiry " and comply with " such instructions as to (the Attorney-General) shall appear requisite ". But the Attorney-General's powers are themselves controlled by the requirements of Chapter 16. Section 391 must clearly be read in the context of section 162, so that a direction to commit must necessarily be confined to " the particular charges under inquiry " in respect of which the Magistrate had discharged an accused person. In other words, the Attorney-General can only direct a Magistrate to enter an order of committal on charges in respect of which the Magistrate himself was previously vested with power to commit.

If the Attorney-General takes the view that an accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed) a different procedure must be resorted to. He is authorised to instruct the Magistrate *under section 390 (2)* to reopen the proceedings by formulating an amended charge, and thereafter to take all the steps prescribed by Chapter 16. It is certainly not permissible to give a direction that the accused person should be committed for trial upon an amended charge after complying only with the requirements of sections 159, 160 and 161—because, if that were

[1] *(1953) 54 N. L. R. 345.*

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done, the accused would be deprived of a fundamental right which the Legislature has (under the present Code) conferred on him. *Moreover, where such directions have been given under section 390 (2), it is for the Magistrate alone to decide in the first instance whether or not a committal on the amended charge would be justified.* The residual powers of the Attorney-General under section 391 only come into operation at a later stage—that is to say, if he considers that the Magistrate has wrongly exercised his discretion in favour of the accused on this vital issue.

Let us consider, in the light of these principles, the steps which were taken in the present case after the Magistrate had lawfully discharged the prisoners on 12th August, 1954. The original directions issued to the Magistrate on 25th November, 1954, in terms of sections 391 and 393 of the Code were (for what they were worth) *intra vires* the Solicitor-General because they ordered a committal, after certain formalities had been complied with, on the "particular charges" which had in fact been "under inquiry". But these instructions were subsequently cancelled by implication, if not expressly, and are not relied on as having any bearing on the objections now under consideration.

The second set of instructions issued in the name of the Attorney-General on 2nd March, 1955, call for no discussion because they too were cancelled before they were obeyed. The order of committal made in compliance with the final instructions issued on 12th March, 1955, was contrary to law for the following reasons :

(1) the instructions went far beyond the particular powers vested in the Attorney-General under section 389 ;

(2) even if they had been given under section 391, they would have been equally *ultra vires* because they directed a committal on charges substantially different from those which formed the subject matter of the inquiry under Chapter 16 ;

(3) if, again, the intention had been merely to instruct the Magistrate in terms of section 390 (2) to hold a fresh inquiry upon the charges as finally amended, the direction to commit the prisoners *automatically* upon those charges would also have been *ultra vires* because they would in that event have purported to relieve the Magistrate of his duty to decide judicially whether or not an order of committal was justified by the evidence.

The offences punishable under sections 140, 144 and 146 of the Penal Code on which the Magistrate committed the prisoners for trial in obedience to the Attorney-General's final instructions were clearly different from those which were originally "under inquiry". An allegation that a man was a member of an unlawful assembly of 5 consisting of himself and four named persons is not the same as an allegation that he was a member of an unlawful assembly of 5 consisting of himself, three named persons and "a person unknown to the prosecution". Just as it requires at least two persons to form a criminal conspiracy punishable under section 113B of the Penal Code, the offence of being a member of

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an unlawful assembly cannot be committed except in association with 4 others. The acquittal of one of two accused persons on a conspiracy charge therefore necessarily results in the acquittal of the other unless the indictment or charge specifically alleged (and it is proved) that someone else, known or unknown, had also participated in the crime. *The King v. Dharmasena*[1]. The same principle applies, *mutatis mutandis*, to an indictment or charge alleging participation in an unlawful assembly.

In this case, the scope of the inquiry under Chapter 16 was confined to the issue whether the prisoners had joined an unlawful assembly of 5 persons in association with Murugesu Sinnadurai (the original 2nd accused) and Swaminathan Thiagarajah (the original 4th accused) ; but there was no inquiry at any time into the later allegation that " a person unknown to the prosecution " had been a member of any such assembly. Accordingly, counts 1, 2 and 3 in the indictment cannot be allowed to stand.

The 4th count in the indictment now alleges that the 1st prisoner " *and a person unknown to the prosecution* " committed the murder of Sambandar, whereas the relevant charge " under inquiry " under Chapter 16 alleged that he and *Murugesu Sinnadurai* (a named person) had committed the offence. Mr. Kanakaratne invited me during the argument to cure any objectionable features in this count by permitting the words " and a person unknown to the prosecution " to be deleted. I declined to do so. It is no doubt correct to say that, if two persons are properly committed for trial for an offence punishable under section 296 of the Penal Code, one of them may be convicted even though the other is acquitted. But in the present case the 1st prisoner has in his favour the earlier order of discharge validly entered by the Magistrate on 12th August, 1954, and that order has not been validly superseded.

As far as can be gathered from the record of the inquiry held by the Magistrate under Chapter 16, and also from the subsequent directions issued by the Attorney-General's department, the prosecution had considered it essential at every stage to call in aid the provisions of section 32 of the Penal Code in order to establish that either the 1st prisoner or a guilty associate had killed Mr. Sambandar in furtherance of the common intention of both. There is certainly no indication that the Law Officers of the Crown had specially addressed their minds to the question of preferring against the 1st prisoner a charge of murder based solely on his individual acts. In these circumstances, the order of discharge entered by the Magistrate on 12th August, 1954, stands in the way of an indictment for murder against the 1st prisoner alone until it is supplemented by an overriding decision unequivocally made in the exercise of the extra-ordinary powers vested in the Attorney-General under section 391 of the Code.

Preliminary objection upheld.

Indictment quashed.

[1] *(1950) 52 N. L. R. 481.*

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1955 *Present:* **Gunasekara, J.**

SOOSEY FERNANDO, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 229—In the Matter of an Appeal under the provisions of Section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 13—Inquiry thereunder—Documents used by Commissioner as evidence—Notice to applicant necessary.

In the inquiry into an application for citizenship by registration under the Indian and Pakistani Residents (Citizenship) Act, the Commissioner examined, apart from the documents submitted by the applicant, certain other documents, purporting to be householder's lists, that he found in the Assistant Food Controller's office. He based on what he found in those documents inferences adverse to the credibility of the applicant. The applicant's attention had not been drawn to this new evidence and he had been given no opportunity of explanation before the Commissioner made his order.

Held, that the use of the documents as evidence without notice to the applicant was contrary to the principles of natural justice and vitiated the Commissioner's order which was in large part based on that evidence.

APPEAL under section 15 of the Indian and Pakistani Residents (Citizenship) Act.

G. F. Sethukavalar, for the applicant-appellant.

V. Tennekoon, Crown Counsel, for the respondent.

Cur. adv. vult.

July 11, 1955. GUNASEKARA, J.—

This is an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, against an order made by a deputy commissioner refusing an application made by the appellant, an Indian resident, for the registration of himself and his wife and four minor children as citizens of Ceylon.

The application was made on the 21st June 1951. By a letter dated the 1st February 1954, the deputy commissioner notified the appellant that he would inquire, under section 13 of the Act, into the questions whether the appellant was resident in Ceylon uninterruptedly from the 1st January 1939 to the 21st June 1951, whether his wife and children were so resident during certain specified periods, and whether the appellant was possessed of an assured income. He began an investigation into these questions on the 25th February 1954. At the end of that day's proceedings he held in effect that there was *prima facie* proof of the

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requirements as to the appellant's residence in Ceylon and of the possession by him of an assured income. The inquiry into the question of the residence of the appellant's wife and children was first adjourned to the 5th April and was eventually resumed on the 28th May 1954. At the close of the proceedings held on the 28th May the deputy commissioner made the following order :

> " Applicant to produce householder's schedules from 1947 to 1951. On receipt of these schedules I shall make my order. Issue letter to Dy. Food Controller of Colombo. "

On the 2nd June 1954, he wrote to the deputy food controller of Colombo asking him to issue to the appellant certified copies of householder's schedules from 1947 to 1951 on payment of the necessary charges. On the 22nd June 1954 the appellant submitted to the deputy commissioner certified extracts from the householder's list for 1947 in respect of No. 242, Modera Street, Colombo, and from the lists for the years 1948 to 1951 in respect of No. 156/4, Barber Street, Colombo, showing that the appellant had been one of the occupants of these houses in those years and that the chief occupant of 242, Modera Street, in 1947 was his brother. The deputy commissioner then pointed out to him, by a letter of the 6th July 1954, that what he required were copies of the lists " showing all the names appearing on the original schedules ". The appellant thereupon submitted, on the 8th September, certified extracts from the lists for the years 1948 to 1951 in respect of No. 156/4 Barber Street. These extracts contain the names of his wife and four children. In reply to an application made by him for an extract from the list for 1947 in respect of this house he had been informed by the assistant food controller for the Colombo Municipality that these names appeared in that list but the entry had been made in pencil and he was therefore not prepared to certify its genuineness.

The deputy commissioner made his order on the 14th October 1954. It appears from this order that, apart from the documents submitted by the appellant, he examined also certain other documents, purporting to be householder's lists, that he found in the assistant food controller's office, and he bases on what he found in those documents inferences adverse to the credibility of the appellant. The latter's attention had not been drawn to this new evidence and he had been given no opportunity of explanation before the deputy commissioner made his order. The use of these documents as evidence without notice to the appellant was contrary to the principles of natural justice and vitiates the deputy commissioner's order, which is in large part based on the new evidence.

It seems to me that there must be a fresh investigation into the question relating to the residence of the appellant's wife and children that is formulated in the letter of the 1st February 1954, and both counsel agree that this should be done. I set aside so much of the deputy commissioner's order as relates to that question and I direct that it should be investigated afresh. The respondent will pay the appellant Rs. 105 as costs.

Order partly set aside.

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1955 *Present :* **Swan, J.**

B. D. GUNAPALA, Petitioner, *and* HON. MR. C. W. W. KANNANGARA (Minister of Local Government), Respondent

S. C. 269—Application for a Mandate in the nature of a Writ of Certiorari to quash an order purported to have been made under Section 61 of the Village Communities Ordinance

Village Communities Ordinance—Section 62—Removal of Chairman of a Village Committee from office—Executive function of Minister—Certiorari.

When the Minister of Local Government, by virtue of the power vested in him by section 61 of the Village Communities Ordinance, removes the Chairman of a Village Committee from office on being satisfied " that there is sufficient proof of " misconduct in the performance of his duties, he performs an executive and not a judicial act. Such act cannot be the subject of a writ of *certiorari*.

APPLICATION for a writ of *certiorari* on the Minister of Local Government.

Sir Lalita Rajapakse, Q.C., with *G. T. Samarawickreme, G. C. Weerasinghe* and *T. G. Goonesekera*, for the petitioner.

T. S. Fernando, Q.C., Acting Attorney-General, with *V. S. A. Pullenayagum* and *Mervyn Fernando*, Crown Counsel, for the respondent.

Cur. adv. vult.

March 25, 1955. SWAN, J.—

This application was filed on 9.6.54. It came before my brother Gunasekara on 11.6.54 who allowed notice on the respondent. The matter now comes up before me for disposal. Mr. T. S. Fernando who appears for the respondent has taken the preliminary objection that a writ of *certiorari* does not lie.

The petitioner was the Chairman of the Ambagamuwa Village Committee. The respondent by his order dated the 14th May 1954 and published in the *Government Gazette* bearing No. 10,673 dated 21st May 1954 removed the petitioner from office on the grounds of (*a*) misconduct in the performance of his duties as imposed by the Village Communities Ordinance and (*b*) abuse of the powers conferred upon him by the Ordinance. The petitioner states that one of the consequences of the order is that under Section 62 of the said Ordinance the petitioner is disqualified for a period of four years from exercising his civic rights as a voter and from being a candidate in an election for a Village Committee. In point of fact as the result of various amendments the petitioner is disqualified from election to membership of a Local Authority for five years but his right to vote at an election is not taken away.

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The petitioner in the affidavit supporting his application states that on 22.4.54 the Commissioner of Local Government called upon him for an explanation why he had failed to account for in the cash book a part of the electricity fees collected by the Committee's collector. He duly submitted his explanation on 29.4.54. At no time was there any allegation of misconduct on his part, nor of any abuse of his powers as Chairman. The order removing him from office was made without any inquiry, and without giving him an opportunity to show cause why such an order should not be made.

The respondent and the Commissioner of Local Government have filed two affidavits dated the 11th December 1954. In the affidavit of the respondent it is stated that representations were made to him in or about April 1954 that the petitioner had failed to account for monies that had been received from the consumers in the Bogawantalawa area and he directed an immediate inquiry to be held. An inquiry was accordingly held by an Investigating Officer and it revealed that the petitioner had failed to bring into account a sum of Rs. 694·10 for a period of over seven months until the examination of the books by the Investigating Officer. The respondent directed the Commissioner of Local Government to draw the petitioner's attention to this lapse and to notice him to show cause why action should not be taken against him under Section 61 of the Village Communities Ordinance. The petitioner by his letter dated 25.4.54 showed cause. Having considered the explanation given in that letter as well as all other material before him the respondent was satisfied that there was sufficient proof of (*a*) misconduct in the performance of the petitioner's statutory duties and (*b*) abuse of his statutory powers. The respondent therefore in the *bona fide* exercise of the powers vested in him by Section 61 of the Village Communities Ordinance made order removing the petitioner from the office of Chairman of the Village Committee of Ambagamuwa.

Section 61 of the Village Communities Ordinance reads as follows :—

" If at any time the Minister is satisfied that there is sufficient proof of—

(*a*) incompetence and mismanagement, or

(*b*) persistent refusal or wilful neglect to perform the duties imposed by this Ordinance, or

(*c*) misconduct in the performance of those duties, or

(*cc*) persistent disobedience to or disregard of the directions, instructions or recommendations of the Executive Committee, or

(*d*) abuse of the powers conferred by this Ordinance,

on the part of the Chairman of a Village Committee or on the part of the Village Committee, the Minister may by order published in the *Gazette*—

(i) remove the Chairman from office, or

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(ii) dissolve the Committee, and direct the Government Agent either to take steps for the election of a fresh Committee or direct the Assistant Commissioner to administer the affairs of that area for such period as may be specified in the order."

Under Section 42 of the Courts Ordinance a writ of *certiorari* would lie not only against regularly constituted judicial tribunals but also against bodies which while not existing primarily for the discharge of judicial functions yet have to act analogously to a judge in respect of certain of their duties. For that statement of the law we have the authority of the Privy Council in the case of *Nakkuda Ali v. Jayaratne* [1].

The first question to consider is whether in acting under Section 61 of the Village Communities Ordinance the respondent was acting in a judicial or quasi-judicial capacity, or whether he was performing what was a purely administrative or ministerial function. If he was acting in an executive or administrative capacity writ of *certiorari* does not lie.

In *Dankoluwa Estates Co. Ltd. v. The Tea Controller* [2] Soertsz, J., held that an order made by the Tea Controller under Section 15 (1) of the Tea Control Ordinance was one made by him in an administrative or ministerial capacity and the Tea Controller not being under a duty to act judicially when he made the order is not amenable to the writ of *certiorari*.

In *Nakkuda Ali v. Jayaratne* [1] it was held that upon the proper construction of the words "has reasonable grounds to believe" the Controller of Textiles was not amenable to a mandate in the nature of *certiorari* in respect of action taken under Regulation 62 of the Defence (Control of Textiles) Regulations 1946 as he did not act judicially or quasi-judicially.

In *Bandiya v. The Land Commissioner* [3] Gunasekara, J., held that under the Land Redemption Ordinance the Land Commissioner's authority to acquire an agricultural land depended not upon its having been sold or transferred in the circumstances set out in Section 3 (1) but upon his being satisfied that it had been so sold or transferred. If he was so satisfied his acquisition of the land would be an executive and not a judicial act, and could not therefore be the subject of a writ of *certiorari* and prohibition.

On an examination of the Village Communities Ordinance and having regard to the language of Section 61 I would unhesitatingly say that the Minister when he decides to act as empowered by the section is performing an executive function pure and simple. Sir Lalita Rajapakse conceded that it was the Minister who had to be satisfied of the various matters set out in the sub-paragraphs but he argued that the words "*that there is sufficient proof of*" could only mean that he was performing a judicial or quasi-judicial function. I do not think so. One must construe the section as a whole and not emphasize parts of it taken out of their context.

I uphold the preliminary objection. The application is refused with costs.

Applications refused.

[1] *(1950) 51 N. L. R. 457.*

[2] *(1941) 42 N. L. R. 197.*

[3] *(1950) 52 N. L. R. 95.*

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1955 *Present :* **Sansoni, J.**

CAREEM, Appellant, *and* UVAIS, Respondent

S. C. 82—C. R. Colombo, 53,487

Appeal—Security for costs of appeal—Deposit of sum of money—Requirement of hypothecation—Civil Procedure Code, s. 757.

When money is deposited in Court as security for costs of appeal in terms of section 757 of the Civil Procedure Code, failure to hypothecate the money is a fatal irregularity.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Tambiah, with *M. S. M. Nazeem*, for the defendant appellant.

G. P. J. Kurukulasuriya, for the plaintiff respondent.

September 2, 1955. SANSONI, J.—

A preliminary objection has been raised to the hearing of this appeal. It is pointed out that the bond does not provide for hypothecation of the money deposited in Court as security for the costs of appeal as required by section 757 of the Code. Dr. Thambiah points out that the error is due to the appellant's Proctor having been ill. I find, however, that the appellant's Proctor has signed the bond and it is therefore not open to the appellant to say that the bond was executed when he was not able to contact his legal adviser. Whether the respondent will suffer prejudice as a result of this defect in the bond can only be decided when one knows whether other claims by creditors to the money in deposit will be put forward or not. As matters stand, the money in deposit has not been hypothecated in favour of the respondent and he therefore has no preferent right to this money. I must uphold the preliminary objection and reject this appeal with costs.

Appeal rejected.

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1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

WIMALAWATHIE, Appellant, *and* PUNCHI BANDA, Respondent

S. C. 449—D. C. (Final) Kegalla, 8,517

Kandyan Law—Diga *marriage—Death of wife intestate—Husband's rights in respect of wife's acquired property—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 15, 18.*

The law as laid down in *Tikiri Banda v. Appuhamy* (1914) 18 N. L. R. 105 that the surviving husband of a *diga* marriage has a life interest in the acquired property of his deceased wife has not been altered by section 18 of the Kandyan Law Declaration and Amendment Ordinance. The husband's right is unaffected by the fact that there are children by a former marriage of the deceased spouse.

APPEAL from a judgment of the District Court, Kegalla.

C. R. Gunaratne, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant-respondent.

June 24, 1955. BASNAYAKE, A.C.J.—

The only question for determination in this appeal is whether the husband of a *diga* married spouse who dies intestate leaving a child by a former marriage has a life interest over the property acquired by the deceased spouse during coverture.

In the instant case, one B. N. Ukku Etana who had married in *diga* died intestate leaving the plaintiff-appellant, Kottapola Vidanelage Wimalawathie (hereinafter referred to as the appellant), a child by a former marriage ; the defendant, her surviving husband ; and four children of her marriage with the defendant.

The appellant claims title to an undivided one-fifth share of a paddy field acquired by her deceased mother during her second marriage, and disputes her step-father's right to a life interest over that share.

2——J. N. B. 49656-1,592 (11/55)

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Learned counsel on behalf of the appellant argued that the effect of section 18 [1] of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 (hereinafter referred to as the Ordinance), was to wipe out the rights of the surviving husband of a woman married in *diga* to a life interest over the property acquired by her during coverture. He supported his argument by reference to section 15 [2] of that Ordinance wherein it is enacted that the succession of a child to the father's estate is subject to the interests of the surviving spouse. Alternatively he argued that the *diga* husband's life interest over his deceased spouse's property acquired during coverture does not extend to the shares of a child or children by a former marriage of the deceased spouse.

Although prior to the decision in *Tikiri Banda v. Appuhamy* [3] there was some uncertainty as to a *diga* married husband's rights over his deceased wife's property acquired during coverture, that case has put an end to that uncertainty by laying down authoritatively the proposition that the surviving husband of a *diga* marriage has a life interest in the acquired property of his deceased wife even though there are children of the marriage.

We are unable to uphold learned counsel's submission that the law as laid down in that case has been altered by section 18 of the Ordinance. The rule is that statutes are to be construed in reference to the principles

[1] *Section 18 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 :*

" *18. (1) When a woman unmarried, or married in* diga, *or married in* binna *on her mother's property, shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, the estate of the deceased shall devolve in equal shares upon all such children, (the descendant or descendants of any deceased child being entitled to his or their parent's share by representation) whether male or female, legitimate or illegitimate, married or unmarried and, if married, whether the marriage be in* binna *or in* diga :

Provided that if the deceased was married in binna *as aforesaid, an illegitimate child or children shall not be entitled to succeed to the paraveni properiy of the deceased ;*

Provided further that the descendant of a deceased child shall be entitled to that child's share by representation whether or not he or she has been kept apart from the deceased intestate.

(2) When a woman married in binna *on her father's property shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, such child or children, and his or their descendant by representation, shall be entitled to succeed* inter se *in like manner and to the like share as they would have become entitled out of the estate of their father :*

Provided that if the deceased was married in binna *as aforesaid an illegitimate child or children shall not be entitled to succeed to the paraveni property of the deceased.* "

[2] *Section 15 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 :*

" *15. When a man shall die intestate after the commencement of this Ordinance leaving an illegitimate child or illegitimate children—*

(a) such child or children shall have no right of inheritance in respect of the paraveni property of the deceased ;

(b) such child or children shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child or the descendant of a legitimate child of the deceased ;

(c) any such child shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children, as the case may be—

(i) if the deceased intestate had registered himself as the father of that child when registering the birth of that child ; or

(ii) if the deceased intestate had in his lifetime been adjudged by any competent court to be the father of that child. "

[3] *(1914) 18 N. L. R. 105.*

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of the common law. It is not to be presumed that the Legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the statute did not intend to make any alteration, other than what is specified, and besides what has been plainly expressed. It would be wrong to construe the enactment by instituting a textual comparison of the sections 15 and 18 and inferring from the fact that, while in the former the life interest of the surviving spouse is expressly preserved and in the latter it is not, the Legislature intended to take away the rights of a *diga* husband to his life interest over the wife's property acquired during coverture. Such an interpretation would be contrary to the accepted rule of interpretation of statutes of this nature.

Learned counsel's alternative argument is not supported by any authority, nor is he able to give any sound reason why the *diga* husband's rights to the life interest over the deceased wife's acquired property should be diminished by the fact that she has left offspring by a former marriage.

We are of opinion that the rule as formulated in the case of *Tikiri Banda v. Appuhamy* (*supra*) admits of no such exception.

The appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

1955 *Present :* **Gratiaen, J., and Sansoni, J.**

SOWDOONA, Appellant, *and* ABDUL MUEES, Respondent

S. C. 35 of 1953—D. C. Matara, 21,473

Jurisdiction—Muslim Law—Kaikuli—*Action for repayment of it—Court where the action may be instituted—Civil Procedure Code, s. 9.*

A Muslim husband's obligation to return the *kaikuli* to his wife on demand is first undertaken by him at the place where he marries her.

A Muslim husband who had deserted his wife was sued by the wife for the recovery of Rs. 1,500 that had been paid to him as *kaikuli* at Galle a few days before they were married. The marriage was celebrated at Matara. The plaintiff resided at Matara, and the defendant at Galle, when the action commenced.

Held, that the District Court of Matara had jurisdiction to hear the case.

Scope of the rule that " the creditor must seek out the debtor " examined.

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, Q.C., with *M. I. M. Haniffa*, *M. I. M. Cassim* and *A. C. M. Uvais*, for the plaintiff appellant.

A. M. Ameen, for the defendant respondent.

Cur. adv. vult.

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March 4, 1955. GRATIAEN, J.—

The plaintiff, who is a Muslim lady, sued the defendant (her husband) in this case for the payment of Rs. 1,500 paid to him as *kaikuli* a few days before they were married. The marriage was celebrated at Matara and still subsists although the parties have separated. She resided at Matara, and he at Galle, when this action commenced. The money had been received by him from her parents at Galle.

The only ground on which the plaintiff's claim was dismissed was that, in the learned Judge's opinion, the cause of action arose at Galle (where the defendant resided) because, under the Roman-Dutch law, it is " the duty of the creditor to seek out the debtor ". With great respect, the rule is not quite so rigid. Performance of a contractual obligation must *prima facie* be made where the obligation was contracted, unless another place of performance has been expressly or impliedly agreed. *Lee's Roman-Dutch Law* (5th ed.) p. 258 ; *Haniffa v. Ocean Accident and Guarantee Corporation Ltd.* [1] I should be very surprised indeed if the principles of a civilised system of jurisprudence would automatically entitle a Muslim husband who had deserted his wife to insist that she must seek him out in order to obtain satisfaction of her just demands.

But apart from these considerations, I am satisfied that the District Court of Galle did not have exclusive jurisdiction to try this case. *Kaikuli* is a sum of money given by the parents of a Muslim bride to her intended husband. Once the marriage has taken place, he owns it but is nevertheless liable to pay it over to the wife if she demands it, even during the subsistence of the marriage. *Vanderstraaten's Reports 162.* This is an incident of a Muslim marriage according to a well-recognised custom in Ceylon. Sampayo, J., took the view that the money is held in trust by the husband for the wife—*Pathumma v. Cassim* [2], and this opinion was adopted by the judges who decided *Pathumma v. Idroos* [3], and *Zainabu Natchia v. Usoof Mohamadu* [4]. Perhaps an equally acceptable theory is that the husband undertakes, *upon his marriage*, an implied contractual obligation to pay the money to his wife whenever she demands it or, if she dies, to her heirs. But in either view, it seems clear to me that the obligation to pay the money *to the wife* is not finally imposed until the marriage has actually taken place ; until then, the intended husband holds it in trust *for her parents* to whom he must return it if the marriage, for whatsoever reason, should not take place.

I therefore conclude that the defendant's obligation to pay the *kaikuli* to the plaintiff on demand was first undertaken at Matara where he married her. If the obligation be equated to an obligation in the nature of a trust, the English law applies, and the trustee debtor must seek out the beneficiary in order to discharge the trust. Alternatively, there was a breach of a contractual obligation undertaken at Matara. In that event, the action was properly instituted in the Court within whose jurisdiction " the contract sought to be enforced was made ". Section 9 of the Civil Procedure Code. For either reason, the learned District

[1] (*1933*) *35 N. L. R. 216.*
[2] (*1919*) *21 N. L. R. 221.*
[3] (*1929*) *31 N. L. R. 230.*
[4] (*1936*) *38 N. L. R. 37 at 45.*

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Judge should, in accordance with his findings on the merits of the dispute, have entered a decree for the plaintiff. I would therefore allow the appeal and enter judgment in her favour as prayed for with costs in both Courts.

SANSONI, J.—I agree.

Appeal allowed.

1955 *Present :* **Rose, C.J.**

FERNANDO, Appellant, *and* APPADURAI, Respondent

S. C. 103—M. C. Kandy, 3,209

Wages Boards Ordinance, No. 27 of 1941—Sections 50 and 52 (b)—" Hindering an officer in the exercise of his powers ".

The accused-appellant prevented an Inspector of Labour from asking routine questions as to wages and holidays from a labourer in a tea factory while the labourer was in charge of certain noisy machinery.

Held, that the conduct of the accused did not amount to hindering an officer in the exercise of his powers within the meaning of section 52 (*b*) of the Wages Boards Ordinance.

APPEAL from a judgment of the Magistrate's Court, Kandy.

H. V. Perera, Q.C., with *Sir Ukwatte Jayasundera, Q.C.*, and *M. M. Kumarakulasingham*, for the accused-appellant.

Vincent T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 25, 1955. ROSE, C.J.—

In this matter the appellant was convicted of having on 8th June, 1953, hindered an Inspector of Labour, a prescribed officer under the Wages Boards Ordinance, in the exercise of his powers under Section 52 (*b*) of the Ordinance. The allegation was that the appellant prevented this said officer from questioning persons in the Tea Factory on Palagalla Estate.

It is to be noted that the questions which were sought to be asked from the labourer in question who was engaged in the actual operation of the machinery at that time did not relate to such matters as the safety conditions applicable in the factory during working hours but concerned questions as to the rate of wages that the worker in question was receiving and whether or not he had been awarded an annual holiday with full pay.

The history of the matter discloses that on a previous occasion the appellant and the Inspector of Labour in question had had a difference of opinion, the Inspector stating that the appellant had been obstructive

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and the appellant contending that the Inspector had asked for a gratification. Whatever the true position as to that may be, the fact remains that on the present occasion at about 10.30 in the morning this machinery, which according to the uncontradicted evidence was extremely noisy in operation, was in full blast. The Inspector of Labour accompanied by another official entered the factory and carried on a shouted conversation with a labourer in charge of the machine. The appellant objected to this—quite possibly in heated tones—and it is that objection on his part that is alleged to be the " hindering " in question.

It is, of course, obvious that on the part of a factory owner or manager obstructive tactics against officials carrying out their functions under the Ordinance cannot be tolerated. On the other hand, the officials themselves must take every precaution to see that their conduct is reasonable and does not verge upon the provocative. After a careful consideration of all the factors in the present matter, I have come to the conclusion that the questioning of the labourer at the time when this noisy machinery was operating, in order to ask him perfectly routine questions as to wages and holidays, was unreasonable and that therefore the appellant in objecting to the official's conduct did not bring himself within the scope of the Ordinance.

I would refer to one answer in cross-examination that was given not by the Inspector of Labour but by his companion Appadurai, Assistant Commissioner of Labour, Kandy. This witness when asked whether it was not a dangerous thing to question a factory worker who was actually in charge of the machinery in operation answered, " when workers are actually working it is the best time to question them ".

Had the question related to safety conditions—adequate fencing and so on—such an answer might be correct. When, however, the questions relate to such purely routine matters as wages and holidays with pay, it seems to me that the answer discloses an ignorance of the proper functions of the officials under the Ordinance.

The appeal is therefore allowed and the conviction quashed. If the fine has been paid it must be remitted.

Appeal allowed.

1954 *Present :* **Sansoni, J., and Fernando, A.J.**

D. C. WIJEWARDENA, Appellant, *and* THE PUBLIC TRUSTEE, Respondent

S. C. 318—D. C. Colombo, 246/Special

Buddhist Ecclesiastical Law—Sripadasthana—Nomination of Trustee by Viharadhipathi—Public Trustee's refusal to issue letter of appointment to Trustee—Dispute as to person entitled to be Viharadhipathi—Remedy of Trustee— Mandamus *or regular action ?—Procedure for election of Viharadhipathi—Buddhist Temporalities Ordinance (Cap. 222), ss. 2, 10 (1), 11, 33, 41—Public Trustee Ordinance (Cap. 73), s. 3—Civil Procedure Code (Cap. 86), s. 217 (E) and (G).*

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Sub-section 2 of section 11 of the Buddhist Temporalities Ordinance provides :—

> Whenever a nomination is duly made under sections 9 or 10 and reported to the Public Trustee it shall be the duty of the Public Trustee to forthwith issue a letter of appointment to the person so nominated unless such appointment would contravene the provisions of this Ordinance.

Sub-section 3 (*b*) further provides :—

> Whenever by reason of any disputes as to the person entitled to make such nomination more than one person is reported to the Public Trustee as having been duly nominated trustee of any temple, the Public Trustee shall, pending a legal nomination, ... if he thinks fit provisionally appoint as trustee any person duly qualified.

Defendant, the Public Trustee, refused to issue a letter of appointment to the plaintiff when the latter was nominated as Trustee of Sripadasthana by D. who was duly elected on February 18, 1934, as Viharadhipathi of Sripadasthana. He alleged, on clearly untenable ground, that the office of Viharadhipathi had been duly filled by the election of one R. on February 14, 1934, and that R. had made his own nomination to the trusteeship. In these circumstances plaintiff sued the Public Trustee asking (1) for a declaration that he was the duly appointed Trustee of Sripadasthana, and (2) that the Public Trustee be directed to issue to him a letter of appointment as such Trustee.

Held, (FERNANDO, A.J., *dubitante*), that it was wrong to refuse the plaintiff relief on the ground that he should have applied for a writ of *Mandamus ;* the District Court had jurisdiction to grant in a regular action the relief for which the plaintiff prayed, if it found that D. was the properly elected Viharadhipathi.

Custom and procedure relating to the election of the Viharadhipathi of Sripadasthana in the Ratnapura District of the Province of Sabaragamuwa reviewed.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera*, *M. L. de Silva* and *C. E. Jayewardene*, for the plaintiff appellant.

H. A. Wijemanne, Crown Counsel, with *V. Tennekoon*, Crown Counsel, for the defendant respondent.

Cur. adv. vult.

December 15, 1954. SANSONI, J.—

The plaintiff-appellant sued the Public Trustee (the defendant-respondent) asking (1) for a declaration that he is the duly appointed Trustee of Sripadasthana in the Ratnapura District of Sabaragamuwa Province and (2) that the Public Trustee be directed to issue to him a letter of appointment as such Trustee. The plaintiff claimed that on the 9th March, 1947, he was nominated as Trustee by Morontuduwe Sri Dhammananda Nayaka Thera, the duly appointed Nayaka Thera of Sripadasthana, who reported such nomination to the Public Trustee but the Public Trustee refused to issue

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a letter of appointment to him. The Public Trustee in his answer denied that Dhammananda Thera had any legal right to the office of Nayaka Thera of Sripadasthana, and the legal capacity to nominate the plaintiff as Trustee. He denied that the refusal by him to issue a letter of appointment was wrongful. Another defence raised was that the District Court had no jurisdiction to entertain this action in the absence of any provision in the Buddhist Temporalities Ordinance (Cap. 222), conferring jurisdiction on such Court in a case where the Public Trustee has refused to issue a letter of appointment in terms of section 11 of that Ordinance.

It is common ground that according to custom the right to appoint the Nayaka Thera of Sripadasthana is vested in the priests of the Malwatta Branch of the Siamese Sect resident in the Ratnapura District (as it was then called) or Sabaragamuwa Province (as it is now called) who elect one of their number; a further qualification is that the priests exercising this right must be ordained priests. The judgment of this Court in *Vanderstraaten's Reports, page 215*, provides a useful starting point for a review of the early history of this office. The judgment of 1871 decided that Hikkaduwa Sri Sumangala Thero had been duly elected, and he continued in office till he died in 1911. There then arose a dispute between the Karaka Maha Sangha Sabhawa and the Malwatta priests of the Ratnapura District as to how his successor should be chosen. A settlement of the dispute, known as the Vaughan Settlement, was arrived at on 7th December, 1911. It purports to be a decision of the Karaka Maha Sangha Sabhawa in the following terms :—

> " That the High Priests appointed by our Maha Sangha Sabhawa for the Sabaragamuwa Disaweny or the District of Ratnapura do hold a meeting of our section of the Siamese sect resident in Ratnapura District at a suitable place in the District for the election of a high priest for Adam's Peak and that the signatures of those present at the meeting in favour of the different applicants be obtained and forwarded with the respective applications and the list of signatures; they be carefully examined by us and the candidates for whom a majority of votes has been given be duly appointed High Priest of Adam's Peak and that an Act of Appointment be issued by us and the Government be informed of such appointment. "

It was signed by the Mahanayake Thera and two Anu Nayaka Theras of Malwatta Vihara before the Government Agent, Central Province. An election was held on 21st January, 1912, at which Paragala Sobitha Thera was elected. It would appear that a list of the priests qualified to vote was sent to the Mahanayaka Thera some days before the election so as to obviate subsequent objections to the qualifications of electors, and he had the list printed after perusal. The Mahanayaka Thera had informed the Government Agent, Central Province, that if a priest with the necessary qualifications attended the election his name would be added to the list of voters after inquiry into his claims. It was also agreed between the Government Agent, Central Province, and the Mahanayake Thera that the election should be by ballot, a list of voters being sent to the latter together with the result of the election. On receipt of the report

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of the election the Sabhawa met and appointed Sobita Thera and asked the Government Agent to accept him. He functioned as Nayake Thera until he died on 29th November, 1912.

The election of his successor took place on 9th February, 1913, and Rambukpotha Pannasara Thera was elected. A report of the proceedings was sent to the Mahanayake Thera by the Government Agent, Sabaragamuwa, and it disclosed that a dispute had arisen at the election over the qualification of certain priests. Apparently the presiding High Priest had gone beyond considering whether they had the minimum qualifications required of an elector, and disqualified twenty priests. The Government Agent asked the Sabhawa to inquire into the question of the rights of these priests and to decide whether the election should stand or be set aside. The Sangha Sabhawa accordingly considered the matter and reported to the Government Agent that they had appointed Rambukpotha Pannasara Thera as Nayaka Thera of Sripadasthana and asked the Government Agent to accept him, which the Government Agent did. Rambukpotha died in 1925.

The compilation of a list of voters preparatory to the election of a successor seems to have engaged the attention of certain priests. Urapola Ratnajothi Thera who contested the election with Morontuduwe Dhammananda Thera forwarded a list to the Mahanayake Thera in 1925, stating that he tried in three ways to make a correct list, viz., by informing the likely candidates, by informing the Ratemahatmayas, and by inviting the voters (through notices in the Press) to send in their names. He suggested that if any names have been omitted they can be added after reference has been made to the Lekam Mitiya. His letters show that he was endeavouring to conform to the wishes of the Maha Sangha Sabhawa. But difficulties seem to have existed in regard to holding a meeting to elect a Nayaka Thera and the Government Agent, Sabaragamuwa, wrote to the Mahanayaka Thera in 1929 suggesting that they might be overcome if the latter would call the meeting and preside over it. No election was held that year. Even in 1931 there still seems to have been some difficulty about the preparation of the list of voters. Dhammarakitta Thera, a witness called by the Public Trustee, wrote in that year to Morontuduwe Sri Dhammananda Thera pointing out that " a list devoid of defects such as omissions and additions is a work of the utmost necessity ". He also gave expression to certain views as to how the eligibility of a voter should be decided.

On 1st November, 1931, the Buddhist Temporalities Ordinance, (Cap. 222), came into operation. It contained provisions for the compulsory registration of Buddhist priests. According to the amended form set out in the Schedule, applications for registration had to be sent in duplicate to the Registrar-General, countersigned by the Mahanayake Thera (or Nayake Thera in the case of a sect which had no Mahanayake Thera) of the Nikaya or the District Nayake of the Nikaya. The Registrar-General was expected to retain a copy and send the other to the Mahanayake Thera or Nayake Thera, as the case may be. The countersignature was obviously intended to ensure that a responsible person had scrutinised the application before it was filed by the Registrar-General and entered in a register to be kept by him. It was with this object that the Schedule as originally

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enacted was amended on 11th March, 1932, for according to the form as originally enacted it was sufficient if the application was countersigned by the Robing or Ordaining Tutor. But in spite of the clear provisions of the Ordinance the Registrar-General, with the concurrence of the Minister of Home Affairs, seemed intent on countenancing a contravention of the requirements of the Ordinance by permitting priests who were not authorised to do so to countersign the applications for registration. He persisted in accepting applications which did not comply with the statutory requirements. On 6th November, 1932, the Mahanayake Thera wrote to the Registrar-General :—

Uposhita Pasparamaya,
Kandy,
6th November, 1932.

The Registrar-General,
Colombo.

Sir,

List of Registered Bhikkus

I have the honour to request you to be good enough as to furnish me or the Government Agent, Sabaragamuwa, with an accurate list of Upasampada Bhikkus resident in the Ratnapura District whose names have been duly registered under Ordinance No. 19 of 1931.

The absence of this list has now become the only obstacle in the way of electing a Nayake Thero for Adam's Peak which post has been vacant for several years and cannot be kept vacant any longer as there is a popular clamour for an early appointment.

I use the words accurate and duly in paragraph 1 deliberately as a copy of a list purported to have been sent by you to the Government Agent, Sabaragamuwa, has reached me through Nayake Thero of Sabaragamuwa, and this list is a curious one as apart from seven names appearing twice each I also see therein the names of a large number of Bhikkus whose applications for registration have not been countersigned either by the Nayake Thero of Sabaragamuwa or by me although I made it quite clear to the Bhikkus of my sect by notification in the papers and otherwise that all applications for registration should be countersigned either by me or by the District Nayaka Thero of the District in which the applicant resides. I may mention incidentally that it is not only because of the considerable amount of error and discrepancy which may creep into the register by your acceptance of application forms not correctly countersigned (the intention of the Ordinance being obvious from the provision at the end of the 2nd page of the printed application form) but also in the interests of discipline and proper administration of my large sect that I insisted and do insist now that all applications should be countersigned as aforesaid.

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I would therefore specially point out that a list you will be good enough to furnish should include the names of only those Bhikkus whose applications have been countersigned either by the Chief High Priest of Sabaragamuwa or by me.

I am, Sir,
Yours faithfully,
(Sgd.) Pahamunne Sri Sumangala
(In Sinhalese)
Maha Nayake Thero of Malwatte.

I quote this letter in full as it shows plainly with what intention the Mahanayake Thera was insisting on strict compliance with the Ordinance. There followed further correspondence between the Registrar-General and the Mahanayake Thera which indicates clearly that while the Mahanayake Thera was insisting on registration according to the provisions of the Ordinance the Registrar-General did not think such compliance was an essential requisite of registration.

The Mahanayake Thera caused a notice to be published in the issue of the *Sinhala Bauddhaya* of 28th January, 1933, headed "Voters concerning the Nayakeship of Sripadasthana". It draws attention to an order made by him with regard to the certifying of the declaration forms and requires those who have not complied with the order to send certain particulars about themselves for comparison with the Lekam Mitiya ; it states that those whose claims are established will have their names entered in the list of voters, while those who do not comply with the requirements set out in the notice by the 10th February, 1933, will not be permitted to take part in any acts connected with Sripadasthana "as the permanent residents of Ratnapura District belonging to our Nikaya". It will thus be seen that those priests who had failed to comply with the earlier order of the Mahanayake Thera were as a last opportunity given two weeks within which to have themselves included in the list of voters by sending the required particulars and proving themselves to be eligible. Bearing in mind what had happened earlier I do not consider this too short a time for the purpose, nor has any witness been called to say that he was not aware of these requirements. On the 28th April, 1933, the Mahanayake Thera again appealed to the Registrar-General to remove from his register the declarations which had been improperly countersigned. In his letter he quotes instances of declarations which had not been countersigned correctly and contained incorrect entries. He pointed out that "otherwise there will be serious litigations and troubles among the Bhikkus of the (Ratnapura) District and thereby we will also have to face innumerable troubles" and concludes "Therefore we wish to remind you again that it is your duty according to law to return those declaration papers to the respective Bhikkus". On 7th October, 1933, a resolution was passed by the Karaka Maha Sangha Sabhawa in the following terms :—

"In accordance with the Order of Sangha issued on the decision of our Karaka Maha Sangha Sabha in connection with the registration of

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Bhikkus under the Section 41 of the New Buddhist Temporalities Ordinance, the Bhikkus hitherto registered as belonging to our Malwatte Vihara section and permanently resident in the Ratnapura District and who had obtained the certification of the Chief High Priest of the Sabaragamuwa Province or that of the Mahanayake Thero should be recognised as voters regarding the Nayakaship of Sripadasthana or as our Bhikkus resident in Ratnapura District. Anyone who does not accept the Order of Sangha does not possess any claim, power, right or responsibility as one of our Bhikkus of Ratnapura District. Therefore, the list of Bhikkus who were registered as above, should be sent to the Chief High Priest of Sabaragamuwa Province, certified as the list of voters regarding the Nayakaship of Sripadasthana."

The list of voters prepared in accordance with this resolution has been produced. It is document D 1 dated 9th October, 1933, which was published in the issue of the *Sinhala Bauddhaya* of 13th January, 1934. It was certified as correct by the Mahanayake Thera. By his letter to the Editor of the *Dinamina* and published in the issue of 16th January, 1934, the Mahanayake Thera explained that the list of voters compiled in accordance with the resolution of the Sabhawa was sent to the Chief Priest of the Ratnapura District for the purpose of summoning a meeting to elect a Viharadhipathi for Sripada. He stated further that it must be considered the final list, and that no priests who failed to comply with the resolution referred to would have any right to interfere in any matter connected with the administration of Sripada, nor would anyone elected by the votes of such priests be recognised by him as Viharadhipathi of Sripada. The need for such a letter obviously arose from the move on the part of certain priests and laymen to hold a meeting—which was in fact held on 14th February, 1934—independently of the Sabhawa, for the very purpose of electing a Viharadhipathi.

A meeting to elect a Viharadhipathi of Sripadasthana was fixed to be held at Kiriella Pahala Pansala on 18th February, 1934, at 8.30 a.m. and notices of that meeting were published in the *Dinamina* newspaper of 22nd January and 2nd February, and in the *Sinhala Bauddhaya* of 3rd February, by Morontuduwe Dhammananda Thera as Chief High Priest of Ratnapura District. It was stated in the notices that it would be " a public meeting of priests having the qualifications and right to vote ". When read in the light of the Mahanayake's letter of 16th January, 1934, and the earlier notice of 28th January, 1933, the plain meaning of these notices is that only those whose names appeared in the list published on 13th January, 1934, need attend that meeting as voters.

For the Public Trustee it was urged before us that as a result of these notices having been published in those terms priests who had the right to vote were deprived of that right by the Sabhawa, which had no right to prepare a list or impose conditions to be satisfied before a name was inserted in the list ; so long as a priest possessed the qualifications laid down in the Adam's Peak judgment of 1871, he should have been permitted to vote and the notices convening the meeting of 18th February, 1934, should have stated so in clear terms. For the plaintiff it was submitted that a list of voters is a necessary prerequisite of an election, and the

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Sabhawa was the proper authority to decide how the list should be compiled. The Sabhawa resolution only declared that priests who claimed a right to vote should submit their claims in a certain way and by a certain date, and no priest who claimed to be a member of the Malwatte sect should object to such a rule laid down by the governing body of that sect. The learned District Judge took the view that the preparation of a list was not necessary ; he held that the effect of the publication of the notices and letters I have referred to was to disfranchise several priests merely because they did not conform to the orders of the Sabhawa with regard to the manner of getting their registration forms countersigned, and that the Sabhawa had no power to prevent them from voting. He also held that several priests whose names appeared in the register kept by the Registrar-General would have been deprived of their votes. He accordingly decided that the election of Morontuduwe Sri Dhammananda Thera was bad and the nomination made by him could not be regarded as having been duly made as required by the Ordinance.

The previous history of the matter seems to indicat that the Sabhawa was recognised, at any rate from the time of the Vaughan Settlement, as the proper body to conduct the election of a Viharadhipathi. It had inquired into the qualifications of certain priest. when a dispute arose in 1913, the Mahanayake Thera wa. sent a list of voters in 1911 so as to obviate subsequent objections to the qualifications of the electors, and he decided in 1912 that only Upasampada priests were entitled to vote and that only their names should be included in the list of voters. It is true that the Mahanayake Thera informed the Government Agent, Central Province, in 1912 that he had no objection to the register or list being amended even just before the election by adding to it any suitable priest who may attend the meeting, but this was a course which lay in the discretion of the Mahanayake Thera and may well have been permitted at that time because there was no register of priests such as came into existence under the Ordinance. The preparation of a regi ter of voters at that time seems to have been a difficult matter. I have already pointed out how Ratnajothi Thera wa trying in 1925 to compile a correct and complete list, and that in 1931 the witness Dharmarakitte Thera was insisting on a complete list. It seems to me that a list of voters was not only customary but even necessary, seeing how desirable it is to eliminate uncertainty and confusion in regard to those who should vote at the meeting ; it also seems to me that the obvious authority to prescribe how intending voters should apply to have their names included in such a list, and the date by which such applications should be made, was the Sabhawa. Can it be said that the procedure directed to be followed by those who applied for registration was unreasonable, or imposed too heavy a burden on eligible voters ? It was at this period that the recently enacted Ordinance would have come to the knowledge of all Bhikkus; they would undoubtedly have become aware of its provisions and the need to comply with them. The Sabhawa was merely requiring them, more than a year after the Ordinance came into operation, to do what the Ordinance required. I cannot see why any priest should complain that he was asked to obey the law. It is no argument to say that a beneficed

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priest had a right to vote and the procedure laid down interfered with that right. The right was open to all who had the qualifications, but they were not entitled to disregard the authority of the Sabhawa so long as they claimed to belong to the Malwatta sect. It is not alleged that a priest who accepted the authority of the Sabhawa was improperly excluded from voting. There is no question of the priests who did not comply with this order being expelled, for no order of expulsion was made nor was one necessary. If the Sabhawa has the right to expel a priest from the priesthood it surely has the right to impose the lesser penalty of depriving him of the right to vote for failure to observe such a reasonable requirement as due registration. It is unfortunately true that some priests called to give evidence for the Public Trustee denied the supreme authority of the Sabhawa, but the decisions of this Court have repeatedly held that it is the highest ecclesiastical court to whose decisions all priests claiming to belong to the Malwatta sect must bow. Priests who doubted the authority of the Sabhawa and violated the rules it laid down must expect to lose the privileges which only a recognized member of the sect can enjoy. I hold, therefore, that the meeting of 18th February, 1934, at which Morontuduwe Sri Dhammananda Thera was unanimously elected was a duly constituted one. Crown Counsel did not, very properly in my opinion, seek to support the validity of the earlier meeting at which Ratnajothi Thera was elected. It was clearly unauthorised, in that it had been summoned by priests and laymen who had no authority whatsoever to conduct such an election. They were obviously acting in intentional defiance of the authority of the Malwatta Chapter. Yet, strange to say, one of the defences put forward by the Public Trustee to the plaintiff's claim was that the vacancy in the office of Viharadhipathi had been duly filled by the election of Ratnajoti Thera, at a properly constituted meeting held on 14th February, 1934. Such a position is clearly untenable in the face of the evidence as to how previous meetings for the election of a Viharadhipathi were summoned and conducted, and the learned District Judge quite rightly held that the meeting of 14th February, 1934, was not a properly constituted one.

The election of Morontuduwe Sri Dhammananda Thera was reported to the Public Trustee by the Mahanayake Thera on 20th February, 1934 ; he asked the Public Trustee to recognise the successful candidate as the Viharadhipathi of Sripadasthana. On 24th February, 1934, the Public Trustee wrote to Morontuduwe Sri Dhammananda Thero inviting him to nominate a trustee, and the latter did so. But though three such nominations were made at various times the Public Trustee consistently refused to issue letters of appointment to the nominees on the ground that Ratnajothi Thera had also claimed to have been elected and had also nominated a trustee. In 1943 Ratnajothi Thera died, and when Morontuduwe Sri Dhammananda Thera again nominated a trustee he was asked by the Public Trustee whether he could establish his claim to be Viharadhipathi ; he was also asked to submit a statement of the grounds of his claim. This request was complied with, but the Public Trustee did not change his attitude. Eventually Morontuduwe Sri Dhammananda Thera nominated the plaintiff as trustee in 1947 and the Public Trustee asked Morontuduwe Sri Dhammananda Thera to interview

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him, stating :—" This is a matter which has given me considerable anxiety and concern for a long period. I feel that the time is now ripe for any action that may be possible with a view to arriving at a satisfactory finality ". Nothing, however, came of the interview and this action was therefore filed.

On the first day of the hearing Crown Counsel appearing for the Public Trustee stated that he did not press his legal objections with regard to the jurisdiction of the Court and no issue was suggested on this point. When the trial was resumed some months later he took the objection with regard to jurisdiction and an issue was framed in the terms I have set out at the beginning of this judgment. The plaintiff's counsel objected to the issue being framed on the ground that the objection to jurisdiction had been abandoned, but I do not think it could have been rejected on this ground since the parties had not even begun to lead evidence at that stage. The objection, as I understand it, is that assuming the plaintiff to have a remedy for the failure of the Public Trustee to issue a letter of appointment he should not have filed a regular action but should have sought relief by an application to this Court for a writ of Mandamus.

The plaintiff's complaint is founded on the provisions of section 11 of the Ordinance which reads :—

(1) Whenever a person is entitled to nominate a trustee under sections 9 or 10 it shall be lawful for him to nominate himself as such trustee unless he has been removed from the office of trustee under section 15 (2) or is disqualified from being a trustee by reason of section 14 :

Provided that the head of the Nuwarawewa family may nominate himself a member of the Atamasthana Committee notwithstanding that he is in the Government Service.

(2) Whenever a nomination is duly made under sections 9 or 10 and reported to the Public Trustee it shall be the duty of the Public Trustee to forthwith issue a letter of appointment to the person so nominated unless such appointment would contravene the provisions of this Ordinance.

(3) (*a*) Whenever no nomination is duly made under sections 9 and 10 within the periods specified in the said sections or within any further period that the Public Trustee may allow for such purpose, or

(*b*) whenever by reason of any disputes as to the person entitled to make such nomination more than one person is reported to the Public Trustee as having been duly nominated trustee of any temple, the Public Trustee shall, pending a legal nomination, make any arrangement he thinks necessary for the safe management of the property of such temple, and if he thinks fit provisionally appoint as trustee any person duly qualified.

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This section introduced a change, because under the previous Ordinance No. 8 of 1905 a person who was duly elected trustee became *de jure* trustee and no formal act of appointment was necessary—*Appuhamy v. Tinanhami* [1]. The argument for the plaintiff is that he is the duly nominated trustee and he therefore has a statutory right to the grant of a letter of appointment by the Public Trustee, and the Public Trustee has a corresponding statutory duty to issue such a letter to him ; the plaintiff has undertaken in this action to prove his claim to be the duly nominated trustee, which means that the duly elected Viharadhipathi has duly nominated him. It is submitted that if he has established these grounds of his claim it is not open to the Public Trustee to refuse to perform the duty cast upon him by the Ordinance. As against this, it was submitted for the Public Trustee that the validity of the election of Morontuduwe Dhammananda Thera cannot be decided in this action since the principal contestants are not before the Court ; and even if it can, the plaintiff should have applied for a writ of Mandamus. But a Mandamus is not granted as of right, its grant is purely discretionary, and it is only available when there is no other remedy equally convenient, beneficial and effectual open to the applicant. The writ was invented for the purpose of supplying defects of justice, as Bowen L.J. said in *R. v. Commissioners of Inland Revenue* [2], and the learned Lord Justice went on to say :—" By Magna Charta the Crown is bound not to delay or prevent any one from obtaining justice. If there is no other means of obtaining justice a Mandamus is granted. But the procedure is cumbrous and expensive ; and from time immemorial the Courts have never granted the writ when there is another more feasible remedy ". So here, when it is well known that a regular action is the normal mode of proceeding I cannot see why the plaintiff should be referred to an extraordinary procedure. The fate which overtook similar earlier applications made to this Court indicate quite plainly that if the plaintiff had asked for a Mandamus on the Public Trustee the latter would, in all probability, have resisted it on the ground that there existed a substantial doubt as to who the *de jure* Viharadhipathi was, which he could not resolve, and that he could not therefore be compelled to issue a letter of appointment until the doubt was resolved. Such an objection would also, in all probability, have been upheld. Notwithstanding the obvious objection to an application for a Mandamus, Crown Counsel submitted that the plaintiff could not sue in a regular action. His argument was, as I understand it, that a public officer such as the Public Trustee could not be sued in such an action for having refused to perform a statutory duty even though the Public Trustee Ordinance, (Cap. 73), provides in section 3 that " the Public Trustee shall be a corporation sole under that name, with perpetual succession and an official seal, and may sue and be sued under the above name like any other corporation sole ". I think his position was that if this action was upheld the door would be opened to innumerable actions for declarations against public officers. Such an argument appears to have been dealt with by Farwell, L.J., in *Dyson v. Attorney-General* [3], when he said " If inconvenience is a

[1] *(1919) 21 N. L. R. 239.* [2] *(1884) 12 Q. B. D. 473.*

[3] *(1911) 1 K. B. 410.*

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legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Court for any of His Majesty's subjects who have any real cause of complaint against the exercising of statutory powers by Government departments and Government officials, having regard to the growing tendency to claim the right to act without regard to legal principle and without appeal to any Court ". To refuse the plaintiff relief on the ground that he should have applied for a Mandamus seems to me therefore a wrong thing to do. Has the plaintiff then a right to bring this action, in which he can claim a remedy as of right ? His claim as duly nominated trustee, assuming he can establish it, is a claim to a status which confers civil rights and duties. He will as trustee have vested in him the temporalities of Sripadasthana and he will have the duty of managing them. The refusal of the Public Trustee to issue a letter of appointment, and his denial that the plaintiff is the duly nominated trustee, gave the plaintiff a cause of action, which entitled him to come into the District Court. It could, I think, be argued with force that the Public Trustee was not bound to issue a letter of appointment if he had a genuine doubt as to the claim made by the plaintiff, but his is not the last word on the matter. He was entitled to ask the plaintiff to establish his claim in a court of law since " Courts of law exist for the settlement of concrete controversies and actual infringements of rights ". I think the Public Trustee was acting within his rights in putting the plaintiff to the proof of his claim and as he is the defendant he is entitled to resist that claim to such extent as he considers proper, for while so resisting the claim he is also justifying his earlier refusal to issue a letter of appointment. But I entertain no doubt also that the plaintiff is entitled to seek his legal remedy by regular action against the Public Trustee, for to hold otherwise would be to tell him that the statutory provisions of section 11 are an empty thing, and that the Public Trustee can bring them to nought by a bare assertion that there is a dispute. The Ordinance provides no special remedy, tribunal or procedure and when a statutory duty is prescribed but no remedy for its breach is imposed it can be assumed that a right of civil action accrues to the person who is damnified by the breach. In *Cutler v. Wandsworth Standium* [1], Lord Simonds said, repeating the words of Lord Kinnear in *Butler v. Fife Coal Co.* [2], " We are to consider the scope and purpose of the statute and, in particular, for whose benefit it is intended ". It is also relevant to quote the words of Romer, L.J., in *Barnard v. National Dock Labour Board* [3], " Prima facie, it is the right of everyone in this country who is involved in a legal dispute to have that dispute determined by Her Majesty's Courts. That right can be taken away ; sometimes it can be taken away by contract, subject to certain safeguards, and it certainly may be taken away by statute ; but except to the extent to which it is taken away (and here we are only concerned with parliamentary intervention) then prima facie that right remains ". In this case the District Court was the proper forum to which the plaintiff should have gone to seek redress of his grievances. When one considers that the dispute arose in this case because of the palpably insupportable claim to

[1] *(1949) A. C. 398.* [2] *(1912) A. C. 165.*

[3] *(1953) 2 Q. B. 18.*

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the office of Viharadhipathi put forward by Ratnajoti Thera—which the Public Trustee went so far as to support against the claim of Morontuduwe Sri Dhammananda Thera until this appeal came before this Court—the need for affording the plaintiff a remedy is overwhelming. In seeking to establish his right the plaintiff must, of course, establish the right of Morontuduwe Sri Dhammananda Thera, for if the latter had no right the former can have none. But I see no objection to the right of the Viharadhipathi being investigated in these proceedings, and a very thorough investigation it has been. If we were not satisfied that Morontuduwe Sri Dhammananda Thera's right as Viharadhipathi has been established, the plaintiff would necessarily fail. Section 217 of the Civil Procedure Code classifies the different kinds of decrees which a Court may enter and provides *inter alia* that a decree " may, without affording any substantive relief or remedy, declare a right or status ". The plaintiff is asking for a declaration of his right or status as the duly nominated trustee and the consequential relief he claims is the issue of a letter of appointment which is also a matter contemplated by section 217 (*e*) of the Code for a decree may command the person against whom it operates " to do any act not falling under any one of the foregoing heads ". It really matters not whether the plaintiff is only granted his declaration or also granted the consequential relief, for I can hardly believe that the Public Trustee would refuse to pay heed to a declaration of a Court. But the consequential relief sought is one which I think the District Court can grant. There may be cases where a person claims a declaration of a right which he is technically entitled to claim, but a Court may refuse to grant it on the ground that there has been no interference with the right sought to be declared. *Geldenhuys & Neethling v. Benthim* [1]. I do not regard this case as one of those cases, because there is more than a mere dispute of the plaintiff's claim. The plaintiff is effectually prevented from exercising his rights as trustee which he would have been entitled to exercise if the Public Trustee did not refuse to issue to him a letter of appointment. Granting, then, that the power to make a declaration is discretionary I consider this to be a suitable case for the exercise of that power in favour of the plaintiff. For over twenty years there has been only a provisional trustee managing the temporalities of Sripadasthana and I consider that the time has come to make an end of the uncertainty which has shrouded an election which, it seems to me, was in all respects valid. I therefore allow this appeal and set aside the judgment of the learned District Judge. The plaintiff is entitled to a decree as prayed for in his plaint.

With regard to costs, I consider that the Public Trustee put forward certain defences which were unsustainable ; they unduly prolonged the proceedings in the lower Court ; although he was entitled to ask that the plaintiff should establish his claim to the satisfaction of the District Judge, he put the plaintiff to unnecessary expense by raising certain issues for which there was little justification. I would therefore, under these circumstances, allow the plaintiff his costs in this Court and in the trial Court.

[1] *(1912) A. D. 426.*

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FERNANDO, A.J.—

I have had the benefit of reading the judgment proposed by my brother, and only think fit to set out the reasons for my concurrence because the case is one of more than ordinary interest and has been keenly contested in both Courts.

Upon the question whether the Public Trustee rightly refused to accept the nominations to the trusteeship of Sripadasthana which were made successively by Dhammananda Thera in 1934, 1943 and 1947, the case for the Public Trustee, at its highest, is founded on the provisions of section 11 (3) (*b*) of the Buddhist Temporalities Ordinance :—" Whenever by reason of any disputes as to the person entitled to make such nomination more than one person is reported to the Public Trustee as being duly nominated trustee of any temple, the Public Trustee shall, pending a legal nomination, ... if he thinks fit provisionally appoint as trustee any person duly qualified ". The Public Trustee must deny recognition to each nominee when two or more priests, each disputing the right to the incumbency in question, purport to make separate nominations. When, therefore, such a dispute exists, the Legislature imposes as it were a doubt in the mind of the Public Trustee which cannot be resolved until the dispute itself is settled. Once there has been such a dispute between two priests it seems to me that the doubt is not removed upon the death of one of them ; in other words, the Legislature could not have intended that the question whether Dhammananda Thera or else Ratnajothi Thera was validly elected as Incumbent would be resolved automatically in favour of the survivor of the two claimants.

A dispute of the nature contemplated by the section would undoubtedly compel the Public Trustee to decline acceptance of a nomination pending a determination binding on each priest who is a party to the dispute. But in my opinion the Legislature cannot have contemplated that any rival claim, however arbitrary or frivolous, was sufficient to constitute such a dispute. If that were so, a farcical situation can be created by a succession of priests merely notifying the Public Trustee of a claim to the incumbency in question.

In this instance, Ratnajothi Thera's claim was based upon an election which in no respect conformed with the customs and formalities which were adopted in the two previous cases and recognised by the Government officers then responsible for the functions which later devolved on the Public Trustee. The three conditions of the " Vaughan Settlement " were (*a*) the election meeting to be convened by the Chief Priest of the Malwatte Chapter for the District, (*b*) the Sangha Sabhawa to scrutinize the voting lists, and (*c*) the Sabhawa to approve and appoint the successful candidate as Viharadhipathi. Ratnajothi Thera's alleged " election " satisfied none of these conditions and gave him no shadow of a claim to nominate a trustee, and there was accordingly no dispute of the nature contemplated by the Statute.

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The remaining ground of appeal was that Dhammananda Thera's election was rendered invalid by the alleged irregularities in the preparation of the voters' lists. In the absence of any rules binding on the Sangha Sabhawa, it was in my opinion only reasonable for it, as the authority responsible for the preparation of the list, to require those claiming to be voters to make their claims by means of applications countersigned by the District Maha Nayake of the sect. But for this countersignature, the Sangha Sabhawa would have experienced great difficulty in deciding whether or not a prospective voter did in fact possess the qualification of permanent residence in the Ratnapura District; and much confusion would have arisen on the election day if claims as to the qualifications were left to be decided at that late stage. The decisions and notices published by the Sangha Sabhawa amounted in my view to no more than a reasonable and proper mode of avoiding such difficulty and confusion. I entirely agree with the conclusion reached by my brother that Dhammananda Thera was duly elected the Viharadipathi of Sripadasthana, and was accordingly entitled to make a due nomination of the plaintiff as trustee.

We have then to decide whether the District Court has jurisdiction to grant a declaration that the plaintiff is entitled to a letter of appointment from the Public Trustee and to order the Public Trustee to issue the letter of appointment. The learned District Judge thought that he did have jurisdiction, for the reason that section 33 of the Buddhist Temporalities Ordinance empowers the Court to order a person to discharge a duty imposed upon him by the Ordinance, upon an application made by any trustee. But the definition of "trustee" in section 2, read with sections 10 (1) and 11, includes only a person who is nominated by the Viharadipathi and holds the requisite letter of appointment as trustee issued by the Public Trustee. The plaintiff holds no such letter and is not yet a "trustee" entitled to make an application to the Court under section 33. The source of the Court's jurisdiction has therefore to be sought elsewhere.

It is argued for the plaintiff that under section 217 of the Civil Procedure Code an order of a District Court—

(1) may enjoin a person to do any act (Head E),

(2) may, without affording any substantial relief or remedy, declare a right or status (Head G).

In the present case, the plaintiff seeks orders under both these heads, and if it is clear that the Court had jurisdiction to make a mandatory order directing the issue of a letter of appointment (referable to Head E) then the declaration (referable to Head G) would be merely formal or even unnecessary. The difficult question, to my mind, is whether the District Court has jurisdiction to make a mandatory order directing a public officer to perform a duty imposed by statute, or whether, on the contrary, the only remedy is by way of prerogative writ.

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In England the Common Law Procedure Act (1854) and section 25 of the Judicature Act (1873) provides for an action for mandamus "to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested". In regard, however, to this remedy, which is additional to that by way of an application for the prerogative writ of mandamus, views have been expressed indicating that its scope is somewhat limited. *Baxter v. London County Council* [1] was a case in which a coroner sued for a declaration of right that he was entitled to a certain salary or to a Mandamus to enforce those rights. The Court appeared to be quite satisfied that the coroner was entitled to the salary he claimed but was not being paid it. Nevertheless Day J. thought his only remedy was by a Prerogative writ and he said "But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which a statutable mandamus will be applicable, because no action would lie, and a mandamus is only granted as an ancillary to the action, and for the purpose of enforcing the private right." Also in *Reg. v. The Vestry of St. George, Southwark* [2], which was an application for the prerogative writ of mandamus, it was argued that the appropriate remedy was an action for a mandamus. Wright J. there said "I think it is very doubtful whether the provision for a mandamus given either by the Common Law Procedure Act or the Judicature Act extends at all to any relief that could not have been claimed in an action before the Common Law Procedure Act, and whether the remedy given is not intended there as an additional mode of enforcing judgment which the Court has power to give."

So far as our law is concerned it is worthy of note that there is no *express provision* as in England for an action for mandamus as distinct from the prerogative writ. Even in regard to the declaratory action it was pointed out by Gratiaen J. in *Hewavitharna v. Chandrawathie et al.* [3] that, unlike in England and South Africa, the Common Law Jurisdiction of the Court to grant declaratory decrees has not been enlarged by Statute ; and he referred to Order 25, Rule 5 of the Rules of the Supreme Court (England).

I therefore entertain some doubts on the question whether the District Court had jurisdiction to grant the declaration and to make the order prayed for in the present case. The point, however, was not strenuously argued for the respondent in this appeal, and I have not been convinced that the District Court lacks the requisite jurisdiction. Agreeing as I do so completely with my brother as to the merits of the plaintiff's case, I feel disposed only to express some hesitation in concurring with the order proposed by him allowing the appeal.

Appeal allowed.

[1] *(1890) 63 L. T. (N. S.) 767.*

[2] *(1892) 67 L. T. (N. S.) 412.*

[3] *(1951) 53 N. L. R. 169 at 176.*

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1954 *Present :* **Gunasekara, J., and Fernando, A.J.**

ISMAIL, Appellant, *and* MARIKAIR, Respondent

S. C. 146 (Inty.)—D. C. Batticaloa, 536L

Execution—Decree for possession of immovable property—Issue of writ of possession—Obstruction by a transferee pendente lite*—Application for re-issue of writ—Power of Court to grant it—Civil Procedure Code, ss. 324 to 328.*

In an action for declaration of title to a certain land the plaintiff obtained decree against the defendant. Writ of possession in favour of the plaintiff was issued, but was later returned unexecuted by the Fiscal for the reason that a person who was not a party to the action claimed the land under a deed which was executed in his favour by the judgment-debtor during the pendency of the action and after the *lis pendens* had already been registered.

Held, that the claimant, being a transferee *pendente lite*, was a person bound by the decree and liable to be removed by re-issue of writ under section 324 of the Civil Procedure Code. Section 327A of the Civil Procedure Code is not applicable in such a case.

APPEAL from an order of the District Court, Batticaloa.

C. Ranganathan, for the petitioner-appellant.

No appearance for the respondent.

Cur. adv. vult.

August 6, 1954. FERNANDO, A.J.—

The plaintiff instituted this action on 11th November 1949 for a declaration of title to a certain land and for the ejectment of the defendant therefrom. Decree nisi was entered against the defendant on 19th September 1950 and was made absolute on 17th April 1951. Writ of possession in favour of the plaintiff was issued on 29th September 1951, but was returned unexecuted by the Fiscal for the reason that the respondent to this appeal (who was not a party to the action) claimed the land under a deed executed in his favour by the defendant on 20th June 1950. In October 1952, the plaintiff applied to the Court by petition and affidavit for a direction to the Fiscal to remove the respondent and any person bound by the decree from the land. Notice of this application was served on the present respondent who filed his objections to the plaintiff's application ; the only claim made in the statement of objections was that the claimant had purchased the land from the defendant on 20th June 1950.

The plaintiff having registered the *lis pendens* of his action on 24th November 1949, the respondent who acquired title from the defendant *pendente lite*, would *prima facie* appear to be a person bound by the decree and therefore properly removable under the writ of possession in

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pursuance of s. 324 of the Civil Procedure Code. The learned District Judge refused, however, to issue the direction prayed for and this appeal is against that refusal.

The opinion of the learned Judge was that the proper procedure applicable in such a case is that prescribed by ss. 325 to 328 of the Civil Procedure Code, and that the plaintiff may not otherwise establish that the respondent is a person bound by the decree. An examination of ss. 325 to 328 demonstrates that, until 1949 at any rate, those sections were of no avail whatever to a plaintiff in a case where resistance was offered by a person claiming title on a document executed *pendente lite* by the judgment-debtor. S. 326 applies only where the resistance is offered *by the judgment-debtor or some person at his instigation;* and sections 327 and 328 are expressly declared (by s. 328 (3)) to be inapplicable in the case of a transfer *pendente lite* by the judgment-debtor. S. 327A was introduced by the amending Act No. 7 of 1949 and would seem to be applicable (if at all) on the basis that a claim by a transferee *pendente lite* would necessarily be regarded by the Court as *frivolous* or *vexatious*. The Judge does not expressly refer to s. 327A as affording support for his opinion, but, having taken that section into consideration, I cannot think that its introduction into the Code in 1949 had the effect of converting a procedure, which was formerly inapplicable to cases of a particular class, into one which can be said, not merely to be applicable to such cases but also to be the only proper and available procedure. On its face s. 327A purports only to discourage to a greater extent than before resistance on frivolous or vexatious grounds; and it cannot be construed as having the effect of depriving a judgment-creditor of other means of redress which the Code already gave him.

There is yet another reason which impels me to disagree with the view taken by the learned Judge. If the mere fact that the Legislature's provision in 1949 of a new remedy (under S. 327A) available against a transferee *pendente lite* can be construed to deprive a plaintiff of any alternative remedy previously available to him against such a transferee, then, equally or *a fortiori*, s. 326 (which expressly provides a most efficacious mode of ejecting *an obstructive judgment-debtor*) must be held to have always precluded a plaintiff from seeking redress by the less vindictive course of applying for a re-issue of the writ against the judgment-debtor. But it is clear that s. 326 has no such effect, for it has been held (*Nanayakkara v. Nanayakkara*) [1] that the Courts can only act under s. 326 if the case merits so extreme a punishment; accordingly it is open to the plaintiff (and in an appropriate case even obligatory on him) to allow the judgment-debtor a second or third chance to see reason, before seeking to rely on the obstruction.

What has to be decided therefore is whether the Code prior to 1949 contemplated any procedure by which effect could be given to the requirement in s. 324 that the Fiscal " shall deliver possession . . . . if need be *by removing any person bound by the decree* who refuses to vacate the property ". Counsel could not refer us to any judgment of this Court, but to my mind the simplicity of the point at issue explains the absence

[1] *(1925) 6 C. L. Rec. 98.*

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of authority. The Fiscal is under s. 324 entitled (and perhaps even required) to remove a person who is in law bound by the decree. But if the Fiscal declines to do so, his ignorance of the law or his fear of the consequences of error cannot deprive the plaintiff of the rights which s. 324 confers on him. These rights must be secured to him by the Court if he can satisfy the Court that the person offering resistance is a person bound by the decree, and an application in that behalf by way of petition and affidavit, with notice to the respondent, seems perfectly appropriate for the purpose. I would refer in this connection to a comment in Chitaley and Annaji Rao (2nd. Edn. Vol. 2 p. 1804) upon the corresponding Order 21, Rule 35 of the Indian Code :— " Therefore, if the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub-R. (1) must be given to the decree-holder, by removing, if necessary, the person bound by the decree and who refuses to vacate the property ".

In the case before us, the plaintiff adduced evidence that the *lis pendens* of his action was duly registered on 24th November 1949, and the respondent in his objections admitted that his claim was upon a subsequent transfer from the defendant. The respondent, being a transferee *pendente lite*, is clearly a person bound by the decree and liable to be removed under s. 324.

I would accordingly set aside the order appealed from, and remit the case to the District Court which will order the re-issue of the writ of possession with the requisite direction to the Fiscal as prayed for in the plaintiff's petition of 14th October 1952. The plaintiff will be entitled to the costs of this appeal and the costs of the proceedings in the District Court on that petition.

GUNASEKARA, J.—I agree.

Order set aside.

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1955 *Present :* **Gratiaen, J., and K. D. de Silva, J.**

S. THAMBIPILLAI *et al.*, Appellants, *and* A. MUTHUCUMARASWAMY *et al.*, Respondents

S. C. Application 298—D. C. Jaffna, 5,752

Civil Procedure Code—Section 189—Amendment of judgments and decrees—" Accidental slip or omission ".

Where, in an appeal preferred by the contesting defendants in an action, the plaintiff's claim was dismissed, but the Supreme Court inadvertently omitted to make a formal order that a decree granting the defendants' counterclaim for delivery of possession of the property in dispute should be entered in addition to the decree for the dismissal of the plaintiff's claim—

Held, that as the omission was an accidental one within the meaning of section 189 of the Civil Procedure Code the judgment and decree could be duly amended.

APPLICATION to amend a judgment and decree of the Supreme Court.

C. Thiagalingam, with *A. Nagendra*, for the 1st and 2nd defendant-appellants, petitioners.

H. W. Tambiah, with *C. Shanmuganayagam*, for the plaintiff-respondent.

S. Sharvananda, for the 5th defendant-respondent.

Cur. adv. vult.

October 14, 1955. GRATIAEN, J.—

This is an application for the amendment in certain respects of the judgment and decree of this Court dated 9th March, 1955.

A woman named Sellammah and her husband the 5th defendant had by a deed P2 dated 1st February, 1947, conveyed the land in dispute to the 1st and 2nd defendants. Sellammah died shortly thereafter leaving as her heirs the plaintiff and the 3rd, 4th, and 5th defendants. The deed provided *inter alia* (1) that the 1st and 2nd defendants must reconvey the property to Sellammah and the 5th defendant on payment of an agreed sum as consideration within a stipulated period and (2) that in the meantime the right of the 1st and 2nd defendants to obtain delivery of possession of the property should be postponed.

Notwithstanding the expiry of the stipulated period the plaintiff sued the 1st and 2nd defendants for a reconveyance. The 1st and 2nd defendants disputed their liability to part with their title at that stage and counterclaimed (1) a declaration that they were the owners of the property, (2) accrued damages and continuing damages until they were placed in vacant possession as purchasers under the deed P2.

2——J. N. B 50323-1,592 (11/55)

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The learned trial Judge held that the transaction was in reality a mortgage, so that the right to a reconveyance was not barred by lapse of time. Accordingly, he entered a decree in favour of the plaintiff (subject to certain conditions which are no longer material) and dismissed the claim in reconvention. On appeal, however, the Court took a different view of the transaction. In my judgment, with which Sansoni J. agreed, I held that P 2 operated as an absolute sale of the property subject only to the conditions previously mentioned. Accordingly, the judgment under appeal was set aside and the plaintiff's action was dismissed with costs in both Courts. A decree was passed in strict conformity with the terms of my judgment.

It has now been brought to our notice that through inadvertence, and for no other reason, my judgment, with which Sansoni J. expressed concurrence, had omitted to make any order in respect of the claim in reconvention of the 1st and 2nd defendants—that is to say, in respect of their prayer for a declaration of title and consequential relief on the basis that, as alleged in paragraph 13 of the answer, " the plaintiff and the 3rd, 4th, and 5th defendants were in wrongful possession of the property ". It must also be observed that, although the prayer to the answer did not expressly ask for a writ of ejectment, certain issues had by consent been raised at the trial inviting a decision whether, in the circumstances of the case, the 1st and 2nd defendants were entitled to this relief as well. This disposes of Dr. Thambiah's argument that this Court had in any event no power on appeal to grant the 1st and 2nd defendants anything more than a bare declaration of title and a decree for accrued and continuing damages.

My judgment dated 9th March, 1955, with which Sansoni J. agreed, expressly held that the 1st and 2nd defendants were the absolute owners of the property by right of purchase and also that their right to delivery of possession (which had been postponed by agreement for a period of 2½ years) had since accrued to them. Unfortunately, we " accidentally " omitted to make a formal order that a decree to this effect should be entered in addition to the decree for the dismissal of the plaintiff's claim. We certainly did not intend to reserve the important question of the 1st and 2nd defendants' rights for determination in any other proceedings. Sansoni J. has authorised me to confirm that, in his case too, the " omission " or " slip " was " accidental ".

Dr. Thambiah has submitted that this Court has no power under section 189 of the Civil Procedure Code to grant the relief asked for. He relied on *Deonis v. Samarasinghe* [1], but that judgment was pronounced at a time when the Court's powers under section 189 (in its original form) were strictly limited to the correction of variations between the judgment and the decree and clerical and arithmetical errors. Indeed, it was to meet such a situation as has now arisen that the language of the section was extended by Ordinance No. 26 of 1930 to cases where an error *in any judgment or order* had arisen " from any

[1] *(1911) 15 N. L. R. 39.*

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accidental slip or omission". The powers now invoked by the 1st and 2nd defendants are co-extensive with those vested in the Courts in England by virtue of Order 28 Rule 11 of the Rules of the Supreme Court. As Lord Watson explained in *Hatton v. Harris* [1]:

> "When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which renders it inexpedient or inequitable to do so, to correct the record *in order to bring it into harmony with the order which the Judge obviously meant to pronounce.*"

With regard to the decisions explaining the scope of section 189 after it was amended in 1930, *Wanigasekara v. Kirihamy* [2] merely decided that the section cannot, after judgment, be invoked for the purpose of granting a party relief which through his own inadvertence he had omitted to claim at the trial. In such a case there was clearly no slip or omission on the part of the Court itself. *Mapalatham v. Elayavan* [3] is equally inapplicable, because there the Court had been misled into entering a judgment which it did intend to enter, but which was later discovered to be wrong in law. Section 189 does not empower a Court to correct mistakes of its own in law or otherwise, even though apparent on the face of the order. *Bright v. Sellar* [4]. The limited jurisdiction of a Judge to correct decisions which he subsequently discovers to be wrong was recently explained in *Harrison v. Harrison* [5]. Having pronounced judgment, he still retained control over the case until the order giving effect to his judgment is formally completed—i.e., until, in Ceylon, a decree or order has passed the seal of the Court. Roxburgh, J., accordingly was held to have the power to recall an order which, before it was formally drawn up, passed and entered, was discovered to be contrary to a decision pronounced during the interval by the House of Lords. But that jurisdiction is quite independent of section 189 or of Order 28 Rule 11.

Piyaratana Unnanse v. Wahareke Unnanse [6] is not material to the present problem; in that case there was no variance in fact between the particular decree and the judgment on which it was based. The Judicial Committee was satisfied that the trial Judge had "deliberately refrained from deciding the title to a certain allotment of land".

In the present case we have the power, and we are clearly under a duty, to grant the first and second defendants relief against the error which has arisen from an accidental omission or slip for which I was primarily responsible. The judgment dated 9th March, 1955, must now be corrected so as to bring it into harmony with the order which Sansoni, J., and I obviously intended to pronounce on the earlier occasion. Accordingly, let the judgment be amended so as

(1) to declare the 1st and 2nd defendants entitled as against the plaintiff, and the 3rd, 4th, and 5th defendants to the land described in the Schedule to the plaint, and

[1] (*1892*) *A. C. 547, at 560.*
[2] (*1937*) *7 C. L. W. 134.*
[3] (*1934*) *41 N. L. R. 115.*
[4] (*1904*) *1 K. B. 6.*
[5] (*1955*) *W. L. R. 256.*
[6] (*1950*) *51 N. L. R. 313* (*P. C.*).

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(2) to order that the plaintiff and the 3rd, 4th, and 5th defendants be ejected forthwith from the said land, and that the 1st and 2nd defendants be placed in vacant possession thereafter.

Let the decree dated 9th March, 1955, also be brought into conformity with the judgment so amended. Mr. Thiagalingam states that the 1st and 2nd defendants do not press their counterclaim for damages provided that their application for a writ of ejectment is allowed. I would therefore make no order in respect of damages.

The plaintiff and the 3rd, 4th, and 5th defendants must pay to the 1st and 2nd defendants the costs of this application.

SWAN, J.—I agree.

Application allowed.

[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Pulle, J. (President), K. D. de Silva, J., and Sansoni, J.**

REGINA *v.* E. W. BATCHO

APPEAL 21 OF 1955, WITH APPLICATION 32

S. C. 31—M. C. Colombo, 9,899

Confession—Right of Crown to cross-examine accused on it—Evidence Ordinance, s. 25.

Penal Code—Section 294—Proviso 1 to Exception 1—Burden of proof—Evidence Ordinance, ss. 103, 105.

(1) It is contrary to the provisions of section 25 of the Evidence Ordinance to cross-examine an accused person on what are, in effect, the contents of a confessional statement made by him to the Police.

In a prosecution for murder the accused gave evidence and sought to bring his case within Exception 1 to section 294 of the Penal Code which provides that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. His story was that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter. He stated that after killing the deceased he went to the Police Station and gave himself up. In cross-examination he answered in the affirmative a question whether he had stated to a single police officer that he was insulted by the deceased. Further, after the close

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of the defence, the prosecuting Counsel moved to call in rebuttal the police officer to whom the accused alleged he had made the statement, and the trial Judge disallowed the application.

Held, that the question put to the accused in cross-examination coupled with the application made by the prosecuting Counsel, in the presence of the Jury, to lead evidence in rebuttal amounted to a contravention of section 25 of the Evidence Ordinance.

(2) Exception 1 to section 294 of the Penal Code is subject to the proviso :

" That the provocation is not sought or voluntarily provoked as an excuse for killing or doing harm to any person. "

Held, that the proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as and no higher than that resting on an accused person who claims the benefit of the Exception to which section 105 of the Evidence Ordinance applies.

Held further, that where the evidence led for the defence requires a direction to the jury that the burden is on the Crown to bring itself within the proviso, the failure so to direct amounts to a misdirection.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *Daya Vithanage* and *G. F. Sethukavaler*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 31, 1955. PULLE, J.—

The appellant was convicted on the charge that he did on the 6th October, 1954, commit murder by causing the death of one Marlene Ludowyke and was sentenced to death. There can be no doubt, indeed, it is admitted by the appellant, that on the evening of the 6th October, he inflicted with a pointed knife as many as nine stab wounds on the deceased which cumulatively were necessarily fatal. The evidence called for the prosecution left no room for doubt that unless the appellant could prove the existence of mitigatory circumstances the jury had no alternative but to convict him of murder.

The appellant gave evidence and sought to bring his case within Exception 1 to section 294 of the Penal Code which provides that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. Stated shortly, the appellant's story was that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter.

The first point taken on behalf of the appellant is that the learned Commissioner permitted the Crown, contrary to the provisions of

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section 25 of the Evidence Ordinance, to cross-examine the appellant on what were, in effect, the contents of a confessional statement made by him to the Police. In the course of his evidence in cross-examination the appellant, after he had repeated what he had stated in the course of his examination in chief, namely, that after killing the deceased he went to the Police Station and gave himself up, was questioned as follows :

" *Q :* Did you tell a single Police Officer that the deceased had insulted you in this way ?

" *A :* Yes, to Mr. Nathan. I told him that this girl had insulted me very badly at the well and also that she spat at me at the well.

" *Q :* I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness ?

" *A :* I told him. "

The cross-examination proceeded and at the end of the re-examination the appellant's counsel closed the defence. Whereupon, *in the presence of the jury*, the prosecuting counsel moved to call Mr. Nathan to give evidence in rebuttal. These proceedings are recorded as follows :

" *Crown Counsel :* I move under section 237 to call Inspector Nathan in rebuttal. That is a matter which I specifically cross-examined the witness on. It arose, I submit, in circumstances which entitle me to lead evidence in rebuttal.

" *Court :* That is with regard to what ?

" *Crown Counsel :* The accused's statement that he told the Inspector that the deceased girl had insulted him and spat at him when near the well. "

At this stage, on the suggestion of counsel for the appellant, the jury retired and the argument was continued at the end of which it was ruled that the prosecution was not entitled to call the Inspector to contradict the appellant.

It is manifest, when one has regard to the state of the evidence at the point of time when the appellant was asked whether he stated to a single police officer that he was insulted by the deceased, the jury must have received the impression that the Crown was seeking to prove that the appellant, in the course of a narrative in which he admitted to the Police that he killed the deceased, did not state the circumstances of mitigation on which he relied at the trial to avoid a verdict of murder. It is true that the prosecution did not in terms prove the confession as was done in *Rex v. Seyadu* [1] but that is not essential in order to give effect to the prohibition contained in section 25 of the Evidence Ordinance. In *Reg. v. Obiyas Appuhamy* [2] evidence was led to the effect that the prisoner volunteered a statement to a police officer, who, thereupon, immediately handcuffed him and took him to the scene of the offence.

[1] *(1951) 53 N. L. R. 251.* [2] *(1952) 54 N. L. R. 32.*

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The Court of Criminal Appeal held that evidence was inadmissible on the ground that, if it had been accepted, it would have led to the inference that the prisoner had made a confession to a police officer.

In the present case, although the Police Officer to whom the appellant made a statement was not allowed to be called, yet from what was said by the prosecuting counsel during the cross-examination—" I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness "—and at the time he moved to lead the evidence of Mr. Nathan in rebuttal, the jury may well have come to the conclusion, especially in the absence of a caution by the trial judge, that the appellant's story in mitigation of the crime committed by him ought not to be believed. Viewed in this light the present case is hardly distinguishable from *King v. Kalu Banda* [1]. The observations of Lascelles, C. J., at p. 426 are particularly apposite :

" For so far as the probative effect of the evidence is concerned, there is little difference between a police officer giving the particulars of a statement which is inconsistent with the defence and his stating in general terms that the accused, in his statement to him, did not mention the defence which he afterwards set up. The evidence in either case tells heavily against the accused. In many cases it will turn the scale against him. "

In our opinion the appellant succeeds on the submission that the questions put to him in cross-examination to which exception has been taken coupled with what was said by Counsel when he moved, in the presence of the jury, to lead evidence in rebuttal, amounted to a contravention of section 25 of the Evidence Ordinance.

The second point taken on behalf of the appellant arises out of an alleged non-direction as to the party on whom lies the burden of proving the matters contained in the first proviso to Exception 1 and the extent of that burden. Section 294 states that Exception 1 is subject to the proviso,

" That the provocation is not sought or voluntarily provoked as an excuse for killing or doing harm to any person. "

There were broadly speaking three major facts on which the prosecution was able to rely in order to prove that when the appellant went to the house of the deceased he had already formed the intention of killing her and putting an end to his own life.

The appellant had cause to resent the conduct of the deceased in transferring her affections to one Ivor Martinez after encouraging the appellant to believe that she would marry him. Secondly, on the day in question, he paid a visit to the house of the deceased armed with a dangerous lethal weapon which was actually used in killing her, and thirdly, in the letter P2 he had set down his alleged grievances against the deceased and virtually pronounced a sentence of death against her.

[1] *(1912) 15 N. L. R. 422.*

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The position taken up by the appellant was that at the time he went to the house of the deceased he did not have the slightest intention of killing her and that the letter was meant merely to frighten her. Admittedly the appellant was in the house for a considerable time, from 1.30 p.m. till about 4 p.m., when the stabbing occurred. He returned a pair of ear studs belonging to the witness Miss M. C. Klyn, then living in the same house as the deceased. The pair of ear studs had by mistake been left behind by Miss Klyn on a visit to the house of the appellant the previous evening. The appellant stated in evidence that the deceased threw a cup of tea at him and that later when he attempted to speak to her in the corridor of the house she burnt him with an iron which she was carrying. On neither occasion did he do anything in retaliation. The letter P2 was delivered to the deceased after she had finished washing her face at the well preparatory to attending a service at Church. According to the appellant when she had read the letter half way she turned to run away with it and he asked her to return it lest if it fell into the hands of the Police he would have to go to jail. There was in the evidence called for the prosecution support for the statement of the appellant that he was burnt in the arm and that after he delivered the letter P2 to the deceased he requested her to return it for fear that he might fall into trouble.

In the earlier portions of the summing up the trial Judge explained to the jury the extent of the burden resting on an accused person who seeks to avail himself of Exception 1. He did not then refer to the first proviso to the Exception. Having reviewed the evidence in considerable detail he again referred to the Exception but this time he added that it was subject to the proviso which he then read out and continued his charge as follows :

" Even if the deceased used those words and they amounted to grave and sudden provocation, and even if the accused was deprived of the power of self-control, still if you find that that provocation had been sought by the accused or voluntarily provoked as an excuse for killing or doing harm to any person, then the accused cannot have the benefit of this Exception, that is, his offence cannot be reduced from murder to culpable homicide not amounting to murder.

" There, again, you will have to consider his letter. Consider that paragraph which I read to you earlier, ' The more I see you the more you appear in my eyes an object of contempt. ' The accused says he did not mean all this, but he gave the letter to this girl, and if the girl read this and if she used those words, the question is if there was any provocation whether that provocation was sought by the accused or voluntarily provoked by the accused. By voluntarily is meant this : ' A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, by means which at the time of employing those means he knew or had reason to believe to be likely to cause it. '

" The accused has written this letter and given it to this girl to read it, but he told you he did not intend all this. Are you going to believe

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all this ? Again, if this was going to bring about some sort of reaction on the girl can you say that the accused did not know that that sort of reaction would be likely to result or not, or can you say he had no reason to believe that that would result ? "

It was contended on behalf of the appellant that it was the duty of the trial Judge to have directed the jury that the burden was on the Crown to prove the facts necessary for the application of the proviso and that that burden could only be discharged by proof of those facts beyond all reasonable doubt. Learned Counsel on both sides have told us that they have not been able to find any discussion of this topic in any text book or decided case. We have, therefore, in the absence of any guidance, to apply the ordinary rule enunciated in section 103 of the Evidence Ordinance that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. We hold that once an accused person has adduced evidence which, if believed, would entitle him to ask for a verdict of culpable homicide not amounting to murder under Exception 1 (read without the provisos), he can be deprived of that verdict only upon proof, the burden being on the Crown, of positive averments which would justify the application of the proviso. There is no burden on an accused person to prove the *absence* of circumstances that would render the proviso inapplicable. We are fortified in this view by a consideration of the second and third provisos. We are unable to accept the submission that the Crown has to prove beyond reasonable doubt the facts necessary for the application of the proviso, because proof of that high standard is only required of the ingredients which constitute *prima facie* the offence of murder. The proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as and no higher than that resting on an accused person who claims the benefit of the Exception to which section 105 of the Evidence Ordinance applies.

In our opinion the evidence, especially that of the appellant, required a direction to the jury that the burden was on the Crown to bring itself within the first proviso. The failure so to direct amounted to a misdirection.

The result of the improper questioning of the appellant in regard to what he is alleged not to have told the Police and the non-direction to which we have just adverted would compel us to set aside the conviction and sentence, unless we act under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, and dismiss the appeal. The Crown argues that this is a proper case for applying the proviso and dismissing the appeal and the appellant asks us to alter the conviction to one of culpable homicide not amounting to murder. We are unable to accede to either request. Upon a consideration of the entirety of the admissible evidence we cannot say in the words of Viscount Simon in *Stirland v. Director of Public Prosecutions* [1] that "a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict." On the other hand the fact that the appellant went to the house of the deceased specially armed with a

[1] (*1944*) *A. C. 315.*

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knife after putting down in writing that his intention was to to kill the deceased and that Miss Klyn, who must be regarded as a disinterested witness, was unable to speak to any abuse or insult or other provocative act on the part of the deceased immediately preceding the attack on her and also the number and severity of the injuries inflicted are sufficient grounds for directing a new trial.

Accordingly we set aside the conviction and sentence and direct a new trial.

Sent back for a new trial.

1955 *Present :* **Gratiaen, J.**

MARTIN FERNANDO, Appellant, *and* ELIZABETH FERNANDO, Respondent

S. C. 708 of 1955—Workmen's Compensation C 3/191/51

Workmen's Compensation Ordinance (Cap. 117)—Claim thereunder—Failure to institute it in due time—Effect of delay thereafter—"Sufficient cause"—Section 16 (1) and (2).

Where a claim for compensation in respect of the death by accident of a workman was made nearly three years after the date of the death—

Held, that the Commissioner's jurisdiction under section 16 (2) of the Workmen's Compensation Ordinance to admit and decide a claim for compensation after the expiry of the period of six months specified in section 16 (1) is regulated by the question whether the failure to institute the claim *within that period* has been sufficiently excused ; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance. The reasons for the subsequent delay would, however, be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim.

APPEAL against a decision under the Workmen's Compensation Ordinance.

L. G. Weeramantry, for the respondent-appellant.

C. V. Munasinghe, for the applicant-respondent.

Cur. adv. vult.

September 20, 1955. GRATIAEN, J.—

This is an appeal against a decision under the Workmen's Compensation Ordinance ordering the appellant to pay to the widow of P. John Fernando (the deceased) a sum of Rs. 2,400 as compensation ; the deceased had died in consequence of an accident arising out of, and in the course of his employment under the appellant. The appellant disputed liability on the ground, *inter alia*, that the claim for compensation was not preferred until the 13th September, 1954—that is to say, until very nearly three years after the date of death. *Prima facie*, therefore, the widow's failure to make her claim within the period of six months fixed by section 16 (1)

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would operate as a bar to the maintenance of the proceedings. The Commissioner was satisfied, however, that she was protected by section 16 (2) the relevant provisions of which are as follows :—

> " The Commissioner may admit and decide any claim to compensation in any case notwithstanding that . . . . the claim has not been instituted in due time as required by sub-section (1) if he is satisfied that the failure so to institute the claim was . . . . due to *sufficient cause.* "

The Commissioner accepted the widow's evidence to the effect that, shortly after the death of the deceased, the appellant promised to convey to her a land by way of compensation, and that it was only after this promise, the implementation of which was postponed on varicus pretexts, proved to be completely lacking in sincerity, that she sought relief under the Ordinance. In these circumstances there is clearly " sufficient cause " for the delay in instituting her claim within the statutory period of six months specified by section 16 (1).

Learned counsel for the appellant conceded that, on the proved facts, the delay in instituting the claim in six months was sufficiently excused. He argued, however, that the further delay of over two years was quite unreasonable and therefore operated as a statutory bar to the proceedings. In support of this argument he relied on certain *obiter dicta* of Duke L. J. in *Prophet v. Roberts* [1] and of Eve J. in *Hillman v. London, Brighton and South Eastern Railway* [2].

It is certainly correct to say that Duke L. J. and Eve J. suggested (although the particular cases referred to were decided on other grounds) that the length of time which has elapsed since the expiry of the six month period provided by the English Act was equally relevant to the issue whether there was reasonable cause for failure to make a claim within time. This suggested interpretation was, however, unanimously rejected by the Court of Appeal in *Lingley v. Firth* [3], where the meaning of the following words of proviso (*b*) to section 2 (1) of the English Act, which are analogous to section 16 (2) of our Ordinance, directly arose for consideration :

> " provided always that . . . . the failure to make a claim within the period above *specified shall not be a bar to* the maintenance of such proceedings if it is found that the failure was excused by mistake, absence from the United Kingdom, or other reasonable cause. "

The Court decided that, if there was reasonable cause for not making a claim within six months, no subsequent lapse of time without reasonable cause could operate as a bar to proceedings for compensation unless the claim had become prescribed under some other provision of the law. Similarly, I respectfully take the view that in Ceylon the Commissioner's jurisdiction under section 16 (2) of the Ordinance to admit and decide a claim for compensation after the expiry of the six month period is regulated by the question whether the failure to institute the claim

[1] *(1919) 88 L. J., K. B. 957.* [2] *(1920) 1 K. B. 284.*

[3] *(1921) 1 K. B. 655.*

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within that period has been sufficiently excused ; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance.

Learned counsel pointed out, alternatively, that under section 16 (2) the Commissioner " *may* admit and decide a claim " whereas the English Act unequivocally declares that the delay in making a claim within six months, if reasonably explained, " *shall not be a bar* to the maintenance of such proceedings ". I agree that the difference of language is significant having regard to the circumstance that the English Act had manifestly served as a model for the draftsman of our Ordinance. Accordingly I am prepared to assume that the word " may " is used in section 16 (2) in a discretionary rather than a compulsory sense. Even in that view, the delay in instituting a claim for compensation after expiry of the statutory period does not operate automatically as a bar to the claim ; but the reasons for the further delay would be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim. In this particular case the Commissioner accepted the widow's explanation that the appellant continued, even after the six month period had expired, to hold out promises from time to time that he would compensate her without the necessity for invoking the machinery of the Ordinance. In these circumstances the Commissioner was perfectly justified in exercising his discretion in favour of the widow ; the appellant was himself responsible for the delay which he now calls to his aid.

Learned counsel concedes that, even if the Prescription Ordinance applies to proceedings under the Workmen's Compensation Ordinance, the present claim is not barred by limitation. I dismiss the appeal with costs.

Appeal dismissed.

1955 *Present :* **K. D. de Silva, J.**

M. D. MUNIDASA, Appellant, *and* G. D. RICHARD APPUHAMY, Respondent

S. C. 111—C. R. Colombo, 40,133

Rent Restriction Act, No. 29 of 1948—Sections 13 (1) (a) and 15—Overpaid rents—Set-off against rent in arrear—Appropriation of the overpayments—Prescription Ordinance (Cap. 55), s. 10.

Under section 15 of the Rent Restriction Act any rent paid in excess of the authorised rent must be appropriated by the landlord in the way which is most favourable to the tenant for the purposes of prescription. Therefore, if overpayments of rent were made by the tenant during a period of three years immediately preceding the date when he fails to pay rent for a particular month, the sum due as rent for such month should be deducted from the earliest overpayment in the hands of the landlord.

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APPEAL from a judgment of the Court of Requests, Colombo.

S. J. V. Chelvanayakam, Q.C., with *K. Rajaratnam*, for the defendant-appellant.

H. W. Tambiah, with *Felix R. Dias*, for the plaintiff-respondent.

Cur. adv. vult.

July 22, 1955. DE SILVA, J.—

The plaintiff who is the landlord of premises bearing assessment No. 102, Armour Street, Colombo, instituted this action on 23.7.'52 to eject the defendant his tenant from the said premises and to recover arrears of rent. The ejectment was claimed on two grounds, namely, (1) that the rent had been in arrear for one month after it became due, and (2) that the premises were reasonably required for his use and occupation as a place of business within the meaning of Section 13 (1) (*c*) of the Rent Restriction Act of 1948 (hereinafter referred to as the Act). The defendant filed answer on 29.9.'52 denying the plaintiff's right to eject him on either ground. The learned Commissioner held that the plaintiff had failed to establish his claim to eject the defendant on the second ground. He has given valid and cogent reasons for his decision on that point, and it must be upheld. In fact, his finding on this point was not canvassed in appeal. The learned Commissioner however held that the defendant was in arrear of rent for a month after it became due and entered judgment for plaintiff as prayed for. The defendant has appealed from that judgment.

That he failed to pay any rent after the end of February, 1950, is admitted by him. So that at the institution of the action he owed the plaintiff a sum of Rs. 386·10 as rent. The authorized rent for the premises for the whole of the year 1948 was Rs. 15·60 a month, and from 1949 onwards it was Rs. 14·30. The plaintiff however recovered rent from the defendant at the rate of Rs. 40 a month from 1.1.'48 to 28.2.'50. Thus between 1.1.'48 and 28.2.'50 there had been an overpayment of Rs. 652·60. The defendant in his answer averred, *inter alia*, that in view of the fact that the plaintiff had recovered from him a sum of Rs. 652·60 in excess of the authorized rent he was not in arrear at the time of the institution of the action. The learned Commissioner, however, held that the defendant was entitled to set-off only overpayments made during a period of three years immediately preceding the date on which the deduction was claimed. He further held that the defendant claimed the deduction for the first time in his answer which was filed on 29.9.'52. Consequently he was entitled to credit only in respect of the overpayments from September, 1949, to February, 1950, that is to say, for a period of six months. The excess payment during that period amounts to only Rs. 154·20 but as the arrears amounted to Rs. 386·10 the learned Commissioner decided that the defendant was in arrear within the meaning of Section 13 (1) (*a*) of the Act. It was argued on behalf of the defendant

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that the learned Commissioner had erred in holding that the three-year period during which the overpayments can be recovered should be reckoned from the date that the deduction is claimed. The learned Commissioner's view however finds support in the judgment of Pulle, J., in *Wijesekera v. Kanapathipillai* [1]. In that case it was held that any overpayment made prior to three years of claiming the deduction was barred by prescription. Section 15 of the Act enacts " where any tenant of any premises to which this Act applies has paid by way of rent to the landlord, in respect of any period commencing on or after the appointed date, any amount in excess of the authorized rent of those premises, such tenant shall be entitled to recover the excess amount from the landlord, and may without prejudice to any other method of recovery, deduct such excess amount from the rent payable to the landlord ". This Act came into operation in December, 1948, but Section 9 of the corresponding Ordinance of 1942 was identical with Section 15 of this Act. The Act itself does not set out the period within which overpaid rent can be recovered or deducted. In the English Act however the period during which that can be done is fixed at two years. The learned Counsel for the defendant was not prepared to concede that the Prescription Ordinance (Cap. 55) applied in the matter of recovery or deduction of overpaid rent. But, he argued that even if Section 10 of that Ordinance did apply his client was entitled to deduct the excess rent paid during the period of three years immediately preceding 1.3.'50. If that argument is sound the defendant could not have been in arrear at the time of the institution of this action. The judgment of Soertsz, J., in *Wijemanne & Co. Ltd. v. Fernando* [2] lends support to that contention. In that case too it was argued on behalf of the landlord that as the tenant had not pleaded a set-off or a counter claim he was not entitled to credit in respect of overpaid rent. That argument the learned Judge summarily rejected in the following words :—" But the answer to that 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. " There is no reason why this principle enunciated by Soertsz, S. P. J., should not apply to the facts in the instant case. Here too the defendant made the overpayment of Rs. 652·60 to the plaintiff as rent and not for any other purpose. Therefore, the defendant in March, 1950, was entitled to deduct any overpayment in the hands of the landlord which had not been prescribed. That is to say the defendant was entitled to the benefit of the overpayments made by him in the way of rent during a period of three years immediately preceding 1.3.'50. The appropriation of the overpaid rent must be made by the landlord in the way which is most favourable to the tenant. That is to say, when the defendant failed to pay rent for March, 1950, that amount should have been deducted from the earliest overpayment in the hands of the plaintiff and likewise in the case of rent which fell due during the subsequent months. Appropriation of overpayments would take effect on that principle. This principle is referred to by Megarry in his book " The Rent Acts " at page 299, as

[1] (*1954*) *55 N. L. R. 575.* [2] (*1946*) *47 N. L. R. 62.*

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follows :—" In a case of deduction, any overpayment may be set against any sums due for rent within the following two years. So that, by setting the earliest of such overpayments against the next payment due for rent, the tenant may leave the liability for later payments for rent available for satisfaction by the later overpayments." This statement is based on the English case *Gokee v. Burgener*[1]. Therefore if the overpayments of rent made by the defendant during the three years immediately preceding 1.3.'50 were appropriated by the landlord on the principles set out above, the defendant would not have been in arrear of rent at the time of the institution of the action. Accordingly the plaintiff's action must fail. Therefore, I set aside the judgment of the learned Commissioner and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.

1955 *Present :* **Sansoni, J., and Fernando, J.**

FAKRUDEEN, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 858—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—Section 6 (2) (ii) as amended by Act No. 45 of 1952—Difference between " non-residence " and " occasional absence "—Residence of wife or child—Need not necessarily commence prior to the period exempted owing to war conditions.

The failure of a wife or child of an applicant for citizenship to commence residence in Ceylon within twelve months of marriage or birth, as required by section 6 (2) (ii) of the Indian and Pakistani Residents (Citizenship) Act, if shown to have been attributable to the war conditions mentioned in the clause added to that section by Act No. 45 of 1952, comes within the scope of the exception granted by that clause. In that clause the Legislature had in mind, not merely interruptions of residence, but *non-residence*, which includes a failure to commence residence within the stipulated time.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act.

S. Sharvananda, for the applicant-appellant.

R. S. Wanasundera, Crown Counsel, for the respondent.

Cur. adv. vult.

[1] *(1925) 69 S. J. 311 K. B.*

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September 8, 1955. FERNANDO, J.—

The appellant is an applicant for registration as a citizen under the Indian and Pakistani Residents (Citizenship) Act. His application has been refused on the ground that he failed to prove :—

(*a*) that his wife was resident in Ceylon, without absence exceeding 12 months on any single occasion, during the period January 1, 1939 to September 1950 ;

(*b*) that his child Luchmanjee was resident in Ceylon during the period November 1942 to September 1950 ; and

(*c*) that his child Esufally was resident in Ceylon during the period May 1946 to March 1950.

The appellant married in 1927 ; according to him, his wife made a visit to Ceylon in 1929 returning to India in 1932 and again came to Ceylon in 1938 and returned to India in 1941. Thereafter the wife returned again to Ceylon in January 1946, having remained in India until then owing to difficulties arising from war conditions. The elder child was born in India on November 29, 1941, and the younger child on May 17, 1945, also in India : both children came to Ceylon in 1946 with their mother.

In regard to the residence of the wife the Deputy Commissioner did not believe " that the wife came to Ceylon on 1st January 1939 and left Ceylon for India in June or July 1941 ". Dr. Subramaniam, retired Provincial Surgeon, Jaffna, issued a certificate to the effect that the applicant's family were treated by him between 1938 and 1941, but, in giving evidence, he stated that he could not say that the family received treatment from him continuously during that period and could not be precise about their visits to his Dispensary. But he clearly remembered that the wife had been in Ceylon before 1941 and " went to India for her first confinement "—a piece of evidence which entirely escaped the notice of the Deputy Commissioner. An Accountant and Auditor, Mr. Ram Moorthy, vouched for the presence of the applicant's wife in Jaffna during the years 1939 to 1941, but his evidence is not even referred to by the respondent. In the circumstances, Crown Counsel could make no attempt to support the finding that the wife was not resident during the qualifying period.

In so far as the children are concerned, there is nothing to contradict the applicant's evidence that they first came to Ceylon in January 1946 and that they have been in Ceylon " uninterruptedly " since then. But Crown Counsel has argued that, in the case of the elder child, the fact that he did not commence to reside in Ceylon on a date earlier than November 29, 1942, is fatal to the application. The point thus raised is apparently of first instance, and requires considered examination.

Paragraph (ii) of sub-section 2 of Section 6 of the Act (as amended in 1952) requires the applicant to prove that " each minor child was uninterruptedly resident in Ceylon from a date not later than the first anniversary of his birth ", and the requirement was clearly not satisfied in the case of the elder child of the applicant. But this paragraph

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has to be read together with the relevant interpretation clauses in the same section :—

> " For the purposes of the preceding paragraph (2) (ii), the continuity of residence of the wife or a minor child of an applicant shall notwithstanding her or his occasional absence from Ceylon be deemed to have been uninterrupted if such absence did not on any one occasion exceed twelve months in duration.
>
> For the purposes of the preceding paragraph (2) (ii), the continuity of residence of the wife or a minor child of an applicant shall not be deemed to have been interrupted by reason that she or he was not resident in Ceylon during the period commencing on December 1, 1941, and ending on December 31, 1945, or during any part of that period, if the Commissioner is satisfied that she or he did not reside in Ceylon during that period or part thereof owing to apprehension of enemy action in or against Ceylon or owing to special difficulties caused by the existence of a state of war."

The contention of Crown Counsel is that these two clauses are intended only to excuse interruptions of a period of residence which has already commenced and provide no excuse for any delay in commencing residence at or before the beginning of the qualifying period : hence, in the case of the elder child, there is no excuse under sub-section (3) for the failure to commence a residence on or before November 29, 1942. Crown Counsel's contention is clearly correct in regard to the availability of the first of these clauses. Section 6 (2) (ii) postulates commencement of residence within twelve months of marriage (in the case of a wife) and within twelve months of birth (in the case of a child). Since an interval of twelve months is already allowed in that section during which the wife or child should have arrived in Ceylon, it would be unreasonable for the Legislature to permit further delay in arrival without there being some special reason for the further delay. The first of the " interpretation " clauses which I have set out above contains a concession for which no reason is assigned, and does not afford an excuse for delay additional to the delay permitted in the substantive requirement. The language of the first provision makes the matter clear : the continuity of residence shall be deemed to be uninterrupted notwithstanding *occasional absence* " if such *absence* did not on any occasion exceed twelve months in duration ". While an interruption of residence by a visit to India would clearly be " occasional absence " from Ceylon, the circumstance that a wife or child did not arrive in Ceylon and commence residence before the stipulated date cannot properly be referred to as *absence*, and still less as *occasional absence*.

To turn now to the second " interpretation " clause :—" The continuity of residence . . . . of a minor child shall not be deemed to have been interrupted by reason that he *was not resident* in Ceylon during . . . . (the war period) if the Commissioner is satisfied that he *did not reside* in Ceylon during that period owing to (war conditions) ". The legislature here has in mind not *occasional absence* or mere interruptions of a period of residence, but *non-residence*

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during the war period, an expression which can fairly include *any* failure to reside attributable to war conditions, *whether or not* the period of non-residence constituted an interruption of a period of residence.

The matter can in my opinion be expressed in another way. In order that the requirement in Section 6 (2) (ii) can operate against the present applicant, the Commissioner has to say to him " your child was not uninterruptedly resident during the period November 1942 to September 1950, *for the reason that the child did not reside in Ceylon from November 1942 until January 1946* ". But the second interpretation clause prevents the Commissioner from assigning such a reason, because it expressly provides that *for the purposes of Section 6 (2) (ii)* that is not a reason on account of which the continuity of residence can be treated as interrupted. I am therefore of opinion that the concession granted by the second interpretation clause set out above is available in the case of a wife or child where the failure to commence residence before the first anniversary of marriage or birth is to be excused on the grounds set out in that clause.

The appeal has therefore to be allowed, and the case remitted to the Commissioner solely for the purpose of satisfying himself whether the non-residence of the wife and minor child of the applicant between 1941 and 1946 was due to circumstances specified in the second interpretation clause. If he is so satisfied, the Commissioner will make the necessary order under Section 10 of the Act.

The applicant is entitled to costs fixed at Rs. 105.

SANSONI, J.—I agree.

Appeal allowed.

1955 *Present :* **Sansoni, J.**

SIMON, Appellant, *and* CHIEF PREVENTIVE OFFICER, EXCISE FORCE, Respondent

S. C. 408—M. C. Kegalle, 5,537

Excise Ordinance—Sections 12 and 16—Unlawful transport or possession of Government arrack—Proof of quality of arrack.

In a prosecution for unlawful transport or possession of Government arrack it is sufficient for the complainant to make out a prima facie case that the contents of the bottles in question were Government arrack.

APPEAL from a judgment of the Magistrate's Court, Kegalle.

J. C. Thurairatnam, for the accused appellant.

Ian Wikramanayake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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August 24, 1955. SANSONI, J.—

The accused in this case was charged on two counts : (1) With having transported an excisable article, to wit, 16 drams of Government arrack, which is 8 drams in excess of the prescribed quantity, without a permit from the proper authorities in breach of S. 12 of the Excise Ordinance. (2) With having possessed an excisable article, to wit, 16 drams of Government arrack, which is 8 drams in excess of the prescribed quantity, without a permit from the proper authorities in breach of S. 16 of the Ordinance.

The learned Magistrate convicted the accused on both counts and the only point taken in appeal on behalf of the accused is that it has not been proved by the prosecution that the article in question was Government arrack.

It was proved that the accused transported and possessed two bottles bearing labels which described the contents as Government arrack : it was also proved that the capsules on the bottles were intact at the time of detection, and they were also intact when they were produced in Court : it was also proved that the seals on the capsules were the proper seals and they were intact. No suggestion was made to the prosecution witnesses, nor was any evidence led on behalf of the accused, to the effect that the contents of the bottles had been tampered with at any time after the capsules had been placed in the bottles and duly sealed.

It would seem that the question of the contents of the bottles was only raised after the case for the prosecution had been closed.

Under these circumstances I think the prosecution had made out a prima facie case that the contents of the two bottles were Government arrack. That seems to me to be the only commonsense view of the matter. I think the learned Magistrate was entirely justified in finding that no further proof of the character of the contents of the bottles was necessary. The appeal is therefore dismissed.

Appeal dismissed.

1954 *Present :* **Gunasekara, J., and Fernando, A.J.**

P. KANDASAMY, Appellant, *and* S. R. KANDIAH *et al.*, Respondents

S. C. 53—D. C. Jaffna, 5,896/M

Contract—Prohibitory statute—Illegality—Construction—Excise Ordinance (Cap. 42) —Sections 17, 24, 43, 45.

Where an agreement does not expressly contemplate the commission of a breach of any statutory provision, it can be held to be unlawful only if its performance would necessarily involve such a breach or if extrinsic evidence indicates the intention or the need to commit such a breach.

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The 1st and 2nd defendants who possessed exclusive and non-transferable licences for the sale of arrack entered into an agreement of " partnership " with the plaintiff and the 3rd defendant. The agreement did not envisage that any one but the actual licensees would be responsible for the sale of arrack at taverns, and the object of the partnership was only to contribute capital and to share the profits and losses. When the plaintiff sued for an accounting and to recover his share of the profits, the trial Judge dismissed the action on the preliminary issue that the agreement was illegal and contrary to public policy and could not therefore be enforced.

Held, that the contract did not contravene any relevant provision of the Excise Ordinance and was not illegal.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *C. Chellappah* and *Sivagurunathan*, for the plaintiff appellant.

S. Nadesan, Q.C., with *S. Sharvananda*, for the 1st defendant respondent.

Cur. adv. vult.

September 28, 1954. FERNANDO, A.J.—

The 1st defendant in this action was the holder of the exclusive privilege (granted under the Excise Ordinance) of selling arrack by retail in taverns in a certain area during the period October 1948 to September 1949, and the 2nd defendant was the holder of a similar privilege in respect of taverns in certain other areas for the same period. The conditions for the exercise of the privilege which are laid down by virtue of powers conferred by s. 24 of the Ordinance, include the following :—*Non transferability of Licence*. Manager to be approved. No privilege of manufacture, supply or sale or any interest therein shall be sold, transferred or sub-rented without the Government Agent's previous permission nor if the G. A. so orders, shall any agent be appointed for the management of any such privilege without his previous approval.

Shortly after the privilege had been granted, those two defendants and the plaintiff and 3rd defendant entered into an agreement which commenced with a recital that the 1st and 2nd defendants " having taken " the plaintiff and 3rd defendant " as partners shareholders *we are desirous of carrying on the said business of purchase and sale of arrack* with a capital of Rs. 120,000/- ", and that each party would contribute a specified part of the amount.

The agreement itself contains provisions which are substantially as follows :—

(1) that each party would have certain shares (proportionate to his contribution of capital) ;

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(2) that moneys already deposited with the Government as security for certain purposes connected with the privileges would be regarded as being contributed by the parties according to their respective shares and that when the deposits became due for refund they would be divided proportionately between the parties ;

(3) *that the 1st defendant and the 2nd defendant shall carry on and manage the said business* and deposit monthly money due for arrack purchased (from the Government) and pay for all expenses ;

(4) *that the 1st defendant and 2nd defendant shall keep proper accounts* which shall be in the custody of the 1st defendant, and that moneys not actually required for the business shall be in the custody of the 1st defendant ;

(5) that the parties shall meet monthly and ascertain the correctness of the accounts, and that profits or losses shall be paid or borne proportionately every six months ;

(6) that additional capital if required shall be contributed proportionately.

The plaint in this action recites that the 1st defendant and the 2nd defendant were the holders of the privileges and that the 1st defendant and the 2nd defendant agreed to take the other two parties as partners and to share the profits in the specified proportions, and the plaintiff sues for an accounting and to recover his share of the profits for the period. The learned District Judge has dismissed the action on the preliminary issue that the agreement was illegal and contrary to public policy and cannot therefore be enforced.

The provisions of law relevant to the determination of the preliminary issue are condition 13 which has already been set out, as well as S. 17 of the Ordinance (which prohibits the sale of an excisable article without a licence), S. 43 (which declares a person who sells an excisable article in contravention of the Ordinance to be guilty of an offence), and S. 45 (which renders a breach of a condition an offence).

" The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. We have in each case to ask, does the Act mean to forbid this agreement or not ? And in each case, the language of the particular Act must be considered on its own footing." (*Pollock, Principles of Contract, 13th Ed. p. 274*). The learned author cites in this connection a dictum of Field J. (*4 Q. B. D. at p. 224*) :— " Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it be so."

The two questions we have to decide in this case are, what is the nature and effect of the agreement entered into between the parties, and did the Legislature intend to prohibit and render unlawful an agreement of such a nature and effect ?

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With respect to the first of these questions, Mr. Nadesan (for the respondents) contended that the effect of the agreement was to constitute a partnership having as its object the carrying on of the business which was the subject of the exclusive privileges. He maintained that all the assets of the business including arrack purchased for the purposes of sale would be the property, not of the 1st or 2nd defendant, but of the partnership, and would be treated as such in the event of a dissolution, that the sales of arrack at each tavern must be held to be sales, not by the holder of the appropriate privilege in respect of the tavern, but by the four partners, and that each of them who did not actually hold the appropriate privilege would be contravening the prohibition of unlicensed sale. Mr. Nadesan relied in this connection on the principle that partners are the agents of each other and that each would therefore be responsible for the acts of the others. In this view the object of the agreement was to vest in the partnership the rights conferred by the exclusive privileges granted to the 1st and 2nd defendants, an object prohibited by Condition 13 and in addition contrary to the policy of the Ordinance forbidding sales of arrack by unlicensed persons. He further contended that at the least the agreement was contrary to Condition 13 in that it purported to transfer to unauthorised persons an *interest in the exclusive privileges.*

Mr. Perera argued that the object of the agreement was nothing more than the contribution of capital, and the sharing in the profits or losses, of the business which the 1st and 2nd defendants respectively were entitled to carry on by virtue of the privileges they had secured. He pointed to the fact that the operative clauses expressly preserve to those defendants the right and the duty to carry on the business of the purchase and sale of arrack and do not authorise the other parties to carry on or manage the business ; in addition to that, they merely effect an arrangement for the financing of the business and for the sharing of profits and losses in proportion to the sums contributed by each of the parties. Mr. Perera also argued that the agreement does not purport to relieve the 1st and 2nd defendants of any of the responsibility attaching to them as holders of the privileges, and that despite the agreement they would remain answerable to the Government for the due observance of the conditions governing the exercise of the privilege. There being nothing in the operative clauses which contemplated any breach of the Excise law or which effected a transfer prohibited by the relevant condition, the mere expression in the recitals *of a desire to carry on the business as partners* cannot, he said, be construed as indicating that such was the real object of the agreement.

Considering the matter apart from authority I am much inclined to the view put forward by Mr. Perera. Where an agreement does not expressly contemplate the commission of a breach of any statutory provision, it can be held to be unlawful only if its performance would necessarily involve such a breach or if extrinsic evidence indicates the intention or the need to commit such a breach ; and where on the face of the agreement it appears that performance is possible, either in a lawful manner or else in an unlawful manner, it should be assumed until the contrary is shown that the parties contemplated a lawful means of performance.

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In the present case, even without such an assumption, the better construction of the agreement is that the 1st and 2nd defendants were to carry on and manage the respective businesses authorised by the privileges granted to them and that " the partners " as such had no concern in the businesses, but were " interested " in the lay sense of that term in that they contributed capital and were to share the profits or losses. I can see nothing strange in an arrangement whereby a number of persons become " interested " in that sense in a venture to be carried on solely by one of their number or even by a person who is not himself a partner. The object of the partnership would not then be to carry on the venture, but to finance the actual operator and to recover or bear the profits made or losses incurred by the operator.

Chief Justice Wood-Renton, in his dissenting judgment in *Fernando v. Ramanathan* [1], was of opinion that an agreement, in many respects similar to the one before us, constituted a partnership to carry on the business of selling opium, and found support in the earlier decision in *Meyappa Chetty v. Ramanathan* [2] and in certain Indian cases, including *Padmanabhan v. Sarda* [3]. The learned Chief Justice was of opinion that " each partner " was engaged in " selling " opium, whether he did so directly or through the agency " of a co-partner ". This opinion involves also the view that each partner would be selling opium without a licence, in contravention of the Opium Ordinance. If that be so, then, in a case like that before us, an " unlicensed " partner could have been convicted of selling arrack without a licence even though the physical transaction of sale was actually carried out at the tavern by another partner who held the privilege in respect of that tavern. We have had on this point the advantage of considering an argument which was not apparently adduced in the earlier cases. Mr. Perera contends that the principle that a partner is liable for the acts of his co-partners, as also the general principle of liability for the acts of an agent, applies purely for the purposes of the civil law and cannot be availed of in order to impute penal liability. To take, for example, s. 123 (1) (*a*) of the Motor Traffic Act, will an owner be guilty of the offence of *driving* a motor vehicle without a licence if in fact his vehicle is driven by an unlicensed driver? It is evident that the *Legislature did not contemplate any such vicarious liability for the act of driving*, since it proceeds immediately to make it an offence for a person to *employ* an unlicensed person to drive a vehicle. There are numerous instances in our statute law where employers and owners can be punished for contravention committed by their agents, but in all of them the vicarious liability attaches by reason of explicit provision in that behalf and not of the application of any implicit principle. With very great respect I take the view that since the agreement under consideration does not envisage that any one but the holder of the appropriate privilege would be responsible for the sales of arrack at taverns, neither the parties nor any "unlicensed" partner could have been convicted of selling arrack without a licence. Ennis J. (who wrote one of the majority judgments in *Fernando v. Ramanathan* (*supra*)) said at p. 351, " Nothing in the terms of the Ordinance or in the conditions of the licence prohibit, in my opinion, a person

[1] (*1913*) *16 N. L. R. 337.* [2] (*1913*) *16 N. L. R. 33.*
[3] *35 Madras 582.*

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carrying on the business of selling opium through persons duly licensed to sell ; and the object of the Ordinance, which is to control the possession and sale of opium, would, it seems to me, be attained without extending the prohibition on sale contained in S. 6 to the partners in a business carried on through duly licensed persons who have the control and management of the shops." Even therefore on the assumption that the agreement in the present case constituted a partnership to carry on the business of selling arrack it would not involve a contravention of the Excise Ordinance.

As to the principal question, namely the nature and effect of the agreement, I would adopt with respect the opinion of Pereira J. in the same case (at p. 349). " Clearly, the duties and liabilities of the licensees with respect to their own respective licences remain untouched. The agreement is no more than one to pool the profits, and there is no stipulation whatever allowing or requiring a partner to do anything forbidden by the Ordinance. That is the most important feature of the agreement. " I accordingly hold that here too the object of the partnership was to contribute capital and to share the profits and losses, but not to carry on the business of selling arrack.

Mr. Nadesan made one further submission, namely that this case must be distinguished from that of *Fernando v. Ramanathan* (supra) in that in the latter case there was no condition which prohibited the transfer of the privilege or of any interest therein. In fact Ennis J. refers to this feature in attempting to distinguish one of the Indian cases where the agreement in question had been held to be unlawful. This submission would be decisive *only if it can be held that the partnership agreement constitutes a transfer of the privilege of sale or of an interest therein*, and that the 1st and 2nd defendants have by entering into the agreement committed a breach of the relevant condition punishable under s. 45 of the Ordinance. There would be such a breach if they purported to assign to the partnership an interest in the right of selling arrack in the taverns, but as I have already indicated, the agreement left unimpaired the exclusive rights granted to them and only created an interest in the profits derived by them through the exercise of those rights. The Legislature has nowhere in the Ordinance or in the prescribed conditions attempted to regulate such matters as the source from which the holder of the privilege obtains funds in order to carry on the undertakings or the destination of the profits gained from the undertakings ; and an agreement with respect to such matters cannot be construed as falling with the class of transactions discouraged by the relevant condition unless it in addition purports to create an interest in the management and control of the business authorised by the privilege.

For these reasons, I would set aside the decree entered by the learned District Judge, and remit the case for trial on the basis that the agreement was valid and enforceable. The appeal is allowed with costs. The costs of the proceedings in the District Court will be costs in the cause.

GUNASEKARA, J.—I agree.

Appeal allowed.

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1955 *Present :* **Basnayake, A.C.J., and Weerasooriya, J.**

THE ATTORNEY-GENERAL, Applicant, *and* H. N. DE SILVA, Respondent

S. C. 457—Application in Revision in D. C., Kandy, No. 602/7467

Sentence—Assessment of it—Governing considerations—Conditional release of offenders—Applicability to grave offences—Criminal Procedure Code, s. 325 (2).

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender.

The accused-respondent, a clerk in the Food Control Department, pleaded guilty to charges of forging certain documents. He had forged the documents in order to enable two non-citizens to obtain residence permits. Having regard to the age, antecedents, and previous good character of the accused, the trial Judge, purporting to act under section 325 of the Criminal Procedure Code, ordered the accused to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years.

Held, that the offence was far too grave to be dealt with under section 325 of the Criminal Procedure Code.

Per BASNAYAKE, A.C.J.—" A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

APPLICATION to revise an order of the District Court, Kandy.

J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

G. G. Ponnambalam, Q.C., with *Cecil Goonewardene*, for Accused-Respondent.

Cur. adv. vult.

November 8, 1955. BASNAYAKE, A.C.J.—

This is an application by the Attorney-General for the revision of the order made by the learned District Judge in respect of the first accused, a clerk in the Food Control Branch of the Kandy Kachcheri (hereinafter referred to as the respondent). He pleaded guilty to two out of three charges of forgery made against him along with another (hereinafter referred to as the second accused) who was indicted with abetting the respondent.

2——J. N. R. 4644—1,592 (12/55)

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The learned District Judge, instead of inflicting any punishment on the respondent, ordered him to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years purporting to act under section 325 (2) of the Criminal Procedure Code. The second accused was acquitted as there was no evidence against him.

It is submitted by learned Crown Counsel on behalf of the Attorney-General that the learned District Judge should have punished the offender, and that, in the circumstances of this case, the course adopted by him was wrong.

The evidence established the charges of forgery of surrender certificates in respect of a barber of Indian nationality holding an Indian passport named V. Manickavasagam and an Indian Muslim named Mohamed Ibrahim Saibo. Of the persons who received forged certificates of surrender, only V. Manickavasagam gave evidence at the trial. He made an application on 16th February, 1953, for the extension of his Temporary Residence Permit which was due to expire on 19th February, 1953, and was asked to furnish further proof of his having been in Ceylon in the years 1944 and 1945. In order to furnish the further proof he was required to provide, he applied to the Deputy Food Controller, Kandy, for a certificate of the fact that he had surrendered his rice ration books in those years. He was requested to call over at the Office of the Deputy Food Controller, and the respondent handed him two certificates, one for 1944 and another for 1945. These certificates were forwarded by Manickavasagam to the Assistant Controller of Immigration and Emigration. One of those certificates referred to in the proceedings as P5 was sent by the Assistant Controller of Immigration and Emigration to the Deputy Food Controller for verification. The Deputy Food Controller, Kandy, replied that P5 was a forgery. After this and other forgeries had been detected, the respondent went to the residence of Mr. Kodikara, Assistant Food Controller, and confessed his crime and asked for his intercession. He also requested that the matter be hushed up, and even suggested that Mr. Kodikara should destroy the Register by reference to which the forgery had been detected. He was naturally turned out of the house by Mr. Kodikara who resented the suggestion. The next day he formally called upon the respondent to explain the irregularity, and he admitted that he had no explanation to give and that he had issued extracts which were not genuine. He said :

" I confess that I have issued an extract for 1944 for which there is no entry in the Register ".

The evidence of the Assistant Controller of Immigration and Emigration and of the Examiner of Questioned Documents, reveals that other forged documents were received from the source from which P5 came including the document referred to in the third charge. The evidence disclosed a very serious offence. The respondent had forged very important documents in order to enable non-citizens of this country to obtain residence permits. What is more, when the crime was detected he had the audacity to suggest to his superior officer that he should destroy all evidence of his crime and save him.

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I cannot escape the conclusion that the respondent has been too leniently treated by the learned trial Judge. The offence is far too grave to be dealt with under section 325 (2) of the Criminal Procedure Code. That section was never intended to be applied to grave offences involving deliberation[1]. When in 1919 the Legislature introduced these provisions based on the Probation of Offenders Act, 1907, it was intended that they should be applied to the class of offence to which the corresponding provisions of the English Act were applied. Such lenient treatment of an offender for so serious a crime is bound to defeat the main object of punishment, which is the prevention of crime. Other persons, similarly placed, will not be deterred from acting in the same way. The learned District Judge has indicated the considerations that influenced him. Here are his very words :

> " As regards the 1st accused he is about 22 years old and has lost his job as a temporary clerk, and although he has passed the General Clerical Examination he will not be taken in. ' Seeing that he is a young man, I do not wish to send him to jail. "

It is clear that the learned District Judge has only looked at one side of the picture, the side of the respondent : his age, his youth, his previous good character, that he has lost his employment, and will not be taken into the Clerical Service even though he has passed the qualifying examination. These are certainly matters to be taken into account ; but not to the exclusion of others which are of greater importance. He has failed to take into consideration the gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved in it, the trusted position which the respondent held, the punishment provided by the Code for the offence, the difficulty of detection of this kind of offence, and the reprehensible conduct of the respondent after the offence was detected showing his criminal mind. These are all matters which far outweigh the considerations on the offender's side.

This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly.

It may not always appear as in this case how the Court below has reached its decision, but, if upon the facts the appellate Court may reasonably infer that in some way there has been a failure properly

[1] *Gardner v. James* (*1948*) *2 All E. R. 1069 ; Pickett v. Fesq.* (*1949*) *2 All E.R.705.*

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to exercise the discretion which the law reposes in the Court of first instance, the exercise of the discretion may be reviewed.

The rules that should be observed by an appellate tribunal in interfering with the discretion of the Judge below are the same whether it be in a question of sentence or in any other matter. They have been stated over and over again and it is unnecessary to repeat them here. On the material before me I am satisfied in this case that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to the relevant considerations enumerated above. The order made by the learned trial Judge in respect of the respondent is therefore one that falls properly to be revised.

The all too frequent use of section 325 of the Criminal Procedure Code in cases to which it should not be applied requires that the considerations that Judges of first instance should take into account in the imposition of punishments on offenders should be laid down by this Court. Primarily the punishment for crime is for the good of the State and the safety of society[1]. It is also intended to be a deterrent to others from committing similar crimes[2]. There must always be a right proportion between the punishment imposed and the gravity of the offence.

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty[3] and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.

A Government servant would invariably be a person of good character for he would not be in the service if he were not so. The fact that a Government or other servant would lose his employment by the conviction is not a sound reason for not imposing a term of imprisonment where his offence merits it. It is of vital importance that the confidence of the public in the services managed by the State should be preserved.

[1] *Rex v. Nash (1950) 1 D. L. R. 543 ; Kenneth John Ball (1951) 35 Cr. A. R. 164.*

[2] *Rex v. Dash (1948) 91 Can. C. C. 187 at 191.*

[3] *Rex v. Boyd (1908) 1 Cr. App. Rep. 64.*

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In the same way in the case of a professional man the fact that the conviction would deprive him of membership of the professional body to which he belongs affords no valid ground for not sentencing him to imprisonment for a grave crime involving his honesty or integrity.

It should be remembered that the public are entitled to place their trust in professional men by virtue of the fact that they belong to honourable professions which enjoy public confidence. It would be extremely detrimental to the public interest that the betrayal of that trust should not be met with such punishment as will safeguard the interests of the public and the honour of the profession to which the offender belongs. The reformation of the offender in so far as it appears as a matter of practical consideration and such extenuating circumstances as appear from the evidence, though proper considerations in the assessment of punishment, are not overriding considerations.

It is not out of place to state here that in England, the provisions of the Probation of Offenders Act (1907)—(since repealed and replaced by the Criminal Justice Act 1948)—from which section 325 of the Criminal Procedure Code is derived, were rarely applied to cases of offenders in positions of trust who betray their trust.

Offences committed in the course of their duties by post office officials [1], by those who defraud the Post Office Savings Bank [2], by police officers [3], bank clerks [4], solicitors [5], and other persons, whether professional men or not, in positions of trust are invariably, on grounds of public policy, dealt with severely. Age, previous good character and antecedents are of little avail in such cases.

Another matter that should be borne in mind by Judges of first instance is that a heavy fine is not a substitute for a term of imprisonment when the appropriate punishment for the offence is imprisonment. Heavy fines are generally meant for such offences as profiteering, etc. where such fines are specially prescribed partly for the purpose of depriving the offender of his ill-gotton gains.

Applying to this case the considerations governing punishment above enumerated, the respondent should, in my opinion, despite his age, antecedents, and previous good character, be sentenced to a term of one year's rigorous imprisonment on each count of the indictment, the sentences to run concurrently. I accordingly set aside the order of the learned District Judge under section 325 (2) of the Criminal Procedure Code and sentence the respondent to undergo a term of one year's rigorous imprisonment in respect of each charge to which he has pleaded guilty, the sentences to run concurrently.

WEERASOORIYA, J.—I agree.

Sentence enhanced.

[1] *Henry Charles Victor Turner* (1947) 32 *Cr. App. Rep.* 45.
[2] *Thomas Elliott* 32 *Cr. App. R.* 36 (1947).
[3] *Ernest Moore* (1910) 4 *Cr. App. Rep.* 135.
[4] [5] *R. C. Mason & J. J. A. Soper* (1908) 1 *Cr. App. Rep.* 73 at 77.

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[In the Court of Criminal Appeal]

1955 *Present :* **Basnayake, A.C.J. (President), Gratiaen, J., and Weerasooriya, J.**

THE QUEEN *v.* K. G. GUNAWARDENE

Application 147 of 1955

S. C. 6—M. C. Avissawella, 14,785

Court of Criminal Appeal—Conviction for murder—Appeal therefrom—Grounds of appeal other than those raised in the petition of appeal—Power of Court to consider them.

Charge of murder—Burden of proof—Misdirection.

(1) Although, in the case of a conviction involving sentence of death, the prisoner cannot claim as of right to make submissions in the Court of Criminal Appeal except on grounds specified in his petition of appeal or application for leave to appeal, the Court itself may set aside the conviction on any other ground which is sufficiently substantial to justify a decision that the verdict should not be allowed to stand.

Per Curiam—" Let it be said in conclusion that it is quite proper (and that it is indeed his duty) for an Advocate (whether he represents the defence or the Crown) to bring to the notice of this Court any substantial matter which, though not formally raised within the prescribed limit of time, nevertheless merits consideration in a pending appeal or application. The assistance which the Court of Criminal Appeal expects in such a situation must, of course, be given with a due sense of responsibility. "

(2) The issues involved in a prosecution for murder were of such nature that the accused could only have been convicted of murder if, at the end of the whole case, the jury were perfectly satisfied that he was the person who had stabbed the deceased, and that he had thereby caused her death with a " murderous intention ". In the course of the summing-up, however, the Judge stated that the jury could not acquit the accused unless they were convinced that the story for the prosecution was improbable and that they should consider the whole case by applying the " test of probability ".

Held, that the conviction must be quashed for misdirection as to the burden of proof.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *I. Perera* (Assigned), for the Accused-Applicant.

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

Cur. adv. vult.

November 15, 1955. Gratiaen, J.—

The applicant was convicted at the Avissawella Assizes of the murder of a young woman named Jane Nona. When the deceased woman and her husband Pinhamy were walking in the direction of her mother's house

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shortly after 8.30 p.m. on 27th November 1954 a man suddenly emerged from the darkness and, having stabbed her once in the chest, ran away. The blade of the knife had cut through her second left rib and, according to Dr. Sella, injured the large blood vessels at the base of the heart. In the doctor's opinion, she must have died within a few minutes.

The applicant pleaded not guilty to the charge, and the issues which arose for the jury's decision were (1) whether his identification had been established beyond reasonable doubt, and if so (2) whether the circumstances pointed irresistibly to the inference that the injury resulting in Jane Nona's death had been inflicted by him with the requisite criminal intention which is an element of the offence of murder, or, alternatively, with guilty knowledge so as to form the basis of a conviction for culpable homicide not amounting to murder. No evidence was led or relied on which could support any special pleas of justification or mitigation. If the issue as to identification was answered against the applicant, the jury could not but return a verdict against him either of murder or of culpable homicide not amounting to murder or of grievous hurt.

With regard to the issue of identification, the Crown relied on the evidence of Pinhamy who claimed that, although he had previosusly met the applicant only once, he clearly saw the applicant stab Jane Nona on the night in question. Pinhamy was cross-examined for the purpose of raising doubts as to the reliability of his purported identification. The Crown also relied on a statement, admissible under section 32 (1) of the Evidence Ordinance, alleged to have been made by Jane Nona to Pinhamy immediately before she died to the effect that " Gunawardene " had stabbed her—" Gunawardene " being the name by which the applicant was known to her. The witnesses Ran Ethana and Sirisena also claimed to have heard Jane Nona's shouts to the same effect although they were some distance away from the scene of the crime. The evidence of Pinhamy, Ran Ethana and Sirisena with regard to this dying declaration was attacked by the defence as unreliable.

Finally, the Crown relied on the presence of human blood stains on the applicant's sarong when he was arrested within a few hours of the incident, and on the discovery of a pointed knife (P2) which had been concealed by someone near a stream not far from his home.

Mr. Kumarakulasingham who appeared for the applicant very frankly informed us that he could not support the argument that the verdict could not reasonably have been returned by a jury upon proper and adequate direction from the presiding Judge. As a complaint of " unreasonableness " can only be entertained upon the assumption that the summing-up was not tainted by misdirection, the ground of appeal relied on in the application necessarily fails.

Mr. Kumarakulasingham then referred us to certain passages in the summing-up which might well have been relied on as a separate ground of appeal against the conviction. Mr. Kumarakulasingham explained that, in view of the judgment recently pronounced in *Reg. v. Pintheris et al*[1], he could not claim the right to make a submission that the verdict

[1] *(1955) 57 N. L. R. 49.*

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must be quashed on grounds not specified in the notice of application for leave to appeal. Nevertheless, he said, he considered it to be his duty to bring this matter to our notice in order that we might consider whether or not the verdict of the jury ought to be allowed to stand.

In *Pintheris' case* (supra) the convictions of two accused persons at the Matara Assizes were quashed on certain grounds which had not been specified in their notice of appeal. The majority of the Court pronounced, however, that in future cases argument would be " limited only to matters of law raised within the prescribed limit of fourteen days ".

Although no appellant or applicant for leave to appeal may claim *as of right* to make submissions except on grounds particularised in compliance with the terms of the Ordinance, this does not mean that the Court itself is powerless, when disposing of an appeal or application, to set aside a conviction on any other ground which is sufficiently substantial to justify a decision that the verdict under appeal should not be allowed to stand. Indeed the orders of acquittal made in *Pintheris' case* (supra) are themselves notable precedents for the exercise of these powers. We therefore agreed to examine the questions raised by Mr. Kumarakulasingham as *amicus curiae*.

The passages in the summing-up to which our attention was drawn all relate to the burden of proof of guilt. In this particular case, the onus was clearly on the Crown to establish beyond reasonable doubt against the applicant every fact which was material and necessary to constitute the offence of murder or alternatively of a lesser offence of which he could properly have been convicted on the indictment. The applicant could only have been convicted of murder if, at the end of the whole case, the jury were perfectly satisfied that he was the person who had stabbed Jane Nona, and that he had thereby caused her death with a " murderous intention ". It is therefore a pity that the learned Judge did not confine his direction as to the burden of proof to his preliminary observation that " if (the jury) had any reasonable doubt in weighing the evidence, (they) were bound to give the benefit of such reasonable doubt to the accused ". Unfortunately, however, he made certain later observations which could not be reconciled with his earlier elucidation of the true principle. For instance he said :

> " In this particular case the position taken up by the Proctor who has appeared for the accused is that he has let loose upon you a bundle of reasonable doubts and you would have no alternative but to acquit him. He has also commented upon what he has considered to be improbabilities. In considering the defence, gentlemen, to which I shall refer later, you must know that the law does not demand the same high standard of proof which is required to sustain the prosecution. *It is sufficient for the accused or his lawyer to raise such questions on the evidence already led with a view to convincing you that it is an improbable story. You have to be satisfied, before you acquit the accused, that the story for the prosecution is improbable. In considering that aspect of the matter you only take into account a mere balance of probabilities.*"

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Again, in dealing with an item of evidence relied on by the Crown with reference to the issue of identification, he said :

> " As I said to you, gentlemen, in considering the defence you have to consider it on a balance of probabilities. "

and,

> "You have to consider the whole case by applying the test of probability. "

These directions were entirely inappropriate in the context of the issues which actually called for decision by the jury in the case. No evidence was led upon which the defence could call in aid any of the general exceptions to criminal liability laid down in Chapter 4 of the Penal Code ; nor was there evidence of mitigating circumstances which could bring the applicant's case within one or other of the exceptions to section 294. It was therefore quite wrong to leave the jury with the impression that any issue of fact could be decided against the applicant on a mere balance of probability or by applying a " test of improbability ". The proposition that the jury could not acquit the applicant unless they were " convinced " or " satisfied " that " the story for the prosecution was improbable " constitutes a very serious misdirection in law.

It might be asked whether the preliminary directions in which the burden of proof had been correctly explained were not so clear as to have removed the risk of the jury being confused, if not completely misled, by the later misdirections. In our opinion, it would be unsafe to assume that the jury would have paid regard to the general proposition that an accused person's guilt must be proved beyond reasonable doubt when they were subsequently led to believe, in the particular context of the issue of identification, that the applicant must establish on a balance of probability that (for instance) a mishap which allegedly occurred when he was opening a tin of sardines explained the presence of human blood on his sarong.

Learned Crown Counsel very fairly conceded that these misdirections were of so fundamental a character as to vitiate the verdict, and we were satisfied that justice required us to quash the conviction upon a ground not specified in the notice of appeal and we ordered a re-trial.

Let it be said in conclusion that it is quite proper (and that it is indeed his duty) for an Advocate (whether he represents the defence or the Crown) to bring to the notice of this Court any substantial matter which, though not formally raised within the prescribed limit of time, nevertheless merits consideration in a pending appeal or application. The assistance which the Court of Criminal Appeal expects in such a situation must, of course, be given with a due sense of responsibility.

There is one further observation which might usefully be made for the assistance of the Judge who will preside at the re-trial of the applicant. It relates to the dying declaration alleged to have been made by Jane Nona as to the circumstances resulting in her death.

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When a dying declaration is relied on by the Crown, it is imperative that the jury should be adequately cautioned as to the weight to be attached to unsworn statements implicating an accused person who had no opportunity of cross-examining the declarant. *R. v. Asirvadam* [1].

Re-trial ordered.

1955 *Present :* **Gunasekara, J., and Sansoni, J.**

K. SUBRAMANIAM, Petitioner, *and* K. KUMARASWAMY *et al.*, Respondents

S. C. 403—Application for Conditional leave to appeal to the Privy Council in D. C. Point Pedro 4,329

Res adjudicata—*Point of law—Erroneous decision thereon—Right of parties to raise same point of law in another suit.*

Appeals (Privy Council) Ordinance (Cap. 85)—Rule 1 (a) and (b) of Schedule—"Directly or indirectly"—"General or public importance".

An erroneous decision on a pure question of law will operate as *res adjudicata* in regard only to the subject-matter of the suit in which it is given. It does not prevent the Court from subsequently deciding the same question correctly in another suit between the same parties when the subject-matter of the suit is different. Therefore, if the subject-matter of a suit is a land of the value of less than Rs. 5,000, the aggrieved party seeking to appeal to the Privy Council on a point of law is not entitled to claim that the appeal involves "indirectly" a question respecting property of the value of over Rs. 5,000 within the meaning of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance merely because a dispute between the same parties regarding other lands of over Rs. 5,000 in value will involve the same point of law.

Held further, that the discretion vested in the Supreme Court under Rule 1 (*b*) of the Schedule to the Appeals (Privy Council) Ordinance will not be exercised in favour of a party when his only ground for invoking the Rule is that he is dissatisfied with the decision of the Supreme Court.

APPLICATION for conditional leave to appeal to the Privy Council.

S. J. V. Chelvanayakam, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the 1st defendant petitioner.

C. Renganathan, with *T. Arulanandhan*, for the 8th, 10th and 11th defendants respondents.

Cur. adv. vult.

May 2, 1955. SANSONI, J.—

This is an application by the 1st defendant for conditional leave to appeal to the Privy Council against the judgment of this Court which is reported in *56 N. L. R. 44*. The application is based on two grounds : (1) that the question of law decided in that judgment affects the 1st

[1] *(1950) 51 N. L. R. 322.*

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defendant's rights in other properties valued at over Rs. 100,000, and therefore " the appeal involves directly or indirectly a question respecting property of the value of Rs. 5000 or upwards " within the meaning of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance, Cap. 85 ; (2) that " the question involved in the appeal is one which, by reason of its great general or public importance ought to be submitted to Her Majesty in Council for decision " under Rule 1 (*b*) of that Schedule. The 8th, 10th and 11th defendants object to the application being granted on either ground.

The question of law involved, and I should add that it is a pure question of law and nothing else, is the correct interpretation of certain provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) and Ordinance No. 58 of 1947, by which it was amended. The 1st defendant by deed acquired several allotments of land from time to time during the subsistence of his marriage with one Rasammah. She has died leaving her husband (the 1st defendant) and four children (8th to 11th defendants). The judgment against which it is sought to appeal decided the rights of the 1st, 8th, 9th, 10th and 11th defendants in respect of one land so acquired.

Mr. Chelvanayakam submits that as this judgment is *res adjudicata* as regards the rights of these parties in respect of all the other lands which were similarly acquired by the 1st defendant, it is necessary to have the decision considered by the Privy Council. If this submission were correct it would be a strong reason for allowing this application. But Mr. Renganathan challenges its correctness and he relies on the judgment in *Katiritamby v. Parupathipillai* [1]. It was there decided that an erroneous decision on a pure question of law will operate as *res adjudicata quoad* the subject matter of the suit in which it is given, and no further. Unlike a decision on a question of fact or of mixed law and fact, an erroneous decision on the law does not prevent the Court from deciding the same question arising between the same parties in a subsequent suit according to law. Caspersz on Estoppel was cited as an authority by Garvin, A. J., in his judgment (de Sampayo, J., agreeing). This judgment was followed in *Gunaratne v. Punchi Banda* [2] by Schneider, J., (Maartensz, A.J., agreeing). In view of these two decisions of this Court I do not consider it necessary to discuss the other authorities cited in the course of the argument. Assuming, then, that the other lands which were purchased upon other deeds by the 1st defendant during the subsistence of his marriage with Rasammah were purchased under circumstances which were exactly similar to those under which the land now in dispute was purchased, the rights of the parties under those deeds and the manner of devolution of those lands upon the death of Rasammah raise pure questions of law to which the rule already enunciated would apply. It should, therefore, be open to the 1st defendant, if he is so advised, to canvass the correctness of the judgment already given when those questions arise for decision. The first ground of his application therefore fails.

[1] *(1921) 23 N. L. R. 209.*

[2] *(1927) 29 N. L. R. 249.*

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With regard to the second ground, Rule 1 (*b*) vests a discretion in this Court. Now seeing that the value of the interest in dispute in this action is less than Rs. 1000, the expense involved in an appeal to the Privy Council seems to me to be out of all proportion to that interest. The respondents will suffer serious prejudice for they do not appear to be able to bear the expense involved in retaining Counsel to represent them. This is not a case where there are conflicting decisions of this Court on the particular question of law involved. The only point which can be urged in support of the second ground seems to be that the 1st defendant-petitioner is dissatisfied with the decision of this Court : but this is no reason for allowing the application. I do not consider this a case in which our discretion should be exercised in favour of the applicant.

I would refuse this application with costs.

GUNASEKARA, J.—I agree.

Application refused.

1955 *Present :* **Weerasooriya, J.**

PERERA, Appellant, *and* INSPECTOR OF POLICE, GALAGEDERA, Respondent

S. C. 954 of 1953—M. C. Kandy, 18,971

Evidence Ordinance—Section 24—Confession caused by inducement or threat—Burden of proof.

When the question whether a confession had been caused in the circumstances of any inducement, threat or promise referred to in Section 24 of the Evidence Ordinance arises, the Court would have to decide that question on the basis that the burden is on the prosecution to satisfy Court that it was not so caused.

If objection is taken to the admission of a confessional statement it is the duty of the party who takes the objection to formulate the grounds of objection so that the Court may consider the grounds and adjudicate on them.

APPEAL from a judgment of the Magistrate's Court, Kandy.

Colvin R. de Silva, with *L. F. Ekanayake*, for the accused-appellant.

N. T. D. Kanakaratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 24, 1955. WEERASOORIYA, J.—

In this case learned counsel for the accused strenuously argued that the Magistrate had been under a misconception as regards the burden of proof when he admitted in evidence the document P13 which as held

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by him amounted to a confession. In this connection learned counsel pointed out to the observations of the Magistrate, when the question of the admission of the document first arose, which read as follows : " The accused appears to me to be an educated young man and till such time as I can be convinced that the confession was not made perfectly voluntarily without any semblance of inducement, threat or promise held out either by the Superintendent or by the proprietor I will permit evidence on it being led. " Learned counsel submitted that these observations indicate that the Magistrate took the view that the document would be admissible unless he was convinced that it was not a voluntary statement and it had not been the result of any inducement, threat or promise. It seems to me that these observations of the learned Magistrate do indicate that he thought that the burden of proving that the confession was inadmissible was on the defence.

There are several decisions which hold that in regard to a confession which the prosecution seeks to put in the burden is on the prosecution to show that it is an admissible one, vide the cases reported in *1 N. L. R. page 209, 42 N. L. R. page 368 at page 370*, and *page 553 at pages 556 and 557* ; also *18 Cox's Criminal Cases page 717*. In this case when the question of the admissibility of this document first arose, the Court very properly asked defending counsel whether the defence objected to the document. Counsel for the defence was contented to state that he " formally " objected to it, an objection which I have come across on more than one occasion but is the kind of objection which passes my comprehension. If an objection is taken to the admission of a document, I think it is for counsel who takes the objection to formulate the grounds of objection so that the Court may consider the grounds and adjudicate on them. Having regard to the fact that counsel for the defence only " formally " objected to the document but did not formulate the grounds of objection, the burden that rested on the prosecution at that stage to show that the document was admissible could have been regarded as readily discharged, and I do not think it would have been open to counsel for the appellant to have made much of what the learned Magistrate had stated with regard to the admissibility of this document at that stage had nothing further happened, but in the course of the trial the accused gave evidence and made various allegations as to the circumstances in which P13 was obtained from him which it was the duty of the Magistrate to consider, and in the learned Magistrate's judgment when he reverted to the question of the admissibility of P13 he says, " I allowed P13 to go in. P 13 is in point of fact a confession of guilt and when I permitted its being led in evidence I did inform the defence that if at any time I was satisfied that it should not have been admitted I would have ruled it out. "

This statement leads one to conclude that the document having been admitted, the learned Magistrate was of the view that it could be used as evidence against the accused unless and until he was satisfied that it should not have been admitted in the first instance. I do not think this is the legal position. Even if a confession has been admitted, and in the subsequent course of the trial as a result of further evidence that may be

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elicited the question whether the confession had been caused in the circumstances referred to in Section 24 of the Evidence Ordinance arises, the Court would have to decide that question on the basis that the burden is on the prosecution to satisfy Court that it was not so caused.

It is not possible for me to state what view the learned Magistrate would have taken of document P13 had he directed his attention to it on the basis of the burden of proof as indicated above, and it is also not possible for me to state what view he would have taken of the other evidence against the accused, particularly the oral testimony of the witnesses, had he on a proper consideration of the question of the admissibility of P13 come to the conclusion that it should be rejected. In these circumstances it seems to me that I cannot avoid the course which I somewhat reluctantly adopt of setting aside the conviction and sentences and sending the case back for a fresh trial before another Magistrate on the three counts on which the accused has already been convicted.

Sent back for fresh trial.

1955 *Present :* **de Silva, J., and Fernando, J.**

HEEN BANDA, Appellant, *and* SINNIAH *et al.*, Respondents

S. C. 419—D. C. Kandy, 2,827L

Donation—Gift made by way of dowry—Right of donor to recover it if marriage does not take place.

Where a man makes a gift of land to his prospective bride in contemplation of marriage, the gift must be returned if the marriage does not take place even through the fault of the donor.

APPEAL from a judgment of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the 2nd defendant appellant.

Cyril E. S. Perera, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

September 26, 1955. FERNANDO, J.—

The plaintiff in this action seeks a reconveyance of certain land which he conveyed to the 1st defendant by a deed No. 1371 executed in April, 1947. The deed clearly recites that the plaintiff had arranged to marry the 1st defendant and that the land was being donated to her in consideration of the marriage. The operative clause of the deed purports to make a gift absolute and irrevocable.

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The contemplated marriage did not take place and each of the parties places on the other the blame for the failure to carry out the undertaking to marry. The responsibility for the failure was not however placed in issue at the trial, the plaintiff only raising the issue "Was there a failure of the consideration in that there was no such marriage?" and the defendant the issue whether "such marriage did in fact take place".

The 1st defendant attempted to show that the parties had lived together as husband and wife for a few days, but the learned Judge was properly unable to hold on that evidence that the contemplated marriage had in fact taken place. The point which Mr. Weerasooria has argued in appeal is that since the donation was made in contemplation of marriage, the plaintiff cannot claim a reconveyance without proving that the 1st defendant refused to carry out her agreement to marry the plaintiff, or in other words, that a gift made in contemplation of marriage does not become inoperative merely because the marriage does not take place but only becomes so if the donee refuses to contract the marriage.

De Sampayo J. in *John Singho v. Weerawardene*[1] appears to express a contrary view, relying on a passage in Grotius (3, 2, 20) :— "A donation made in contemplation of marriage *must be returned in case the marriage does not take place*". In that case it was clear that the plaintiff who sought to recover the gift had been deceived by a representation of the defendant into giving his consent to his daughter's marriage and making the gift in question. He subsequently withheld his consent upon discovering that he had been so deceived and it could therefore have been said that, constructively at least, the contemplated marriage did fail owing to the fault of the defendant. In those circumstances it would have been quite sufficient for de Sampayo J. to have laid down the principle that the gift could only be recalled when the donee was at fault. But he chose to state the principle in much wider terms.

There are many passages in the judgment of Macardie J. in the case of *Cohen v. Sellar*[2] which imply that in English Law a gift made in contemplation of marriage need only be returned if the donee refuses to carry out the promise of marriage. But Macardie J. was there dealing with the case of an engagement ring and referring to earlier cases affecting gifts of similar articles such as jewellery &c., and not with a gift made by way of dowry which was the subject of the dispute in *John Singho v. Weerawardene* (supra). In so far as gifts of the former description are concerned, it might well be the case that they are returnable only if the donee refuses to fulfil the promise to marry, or even that (as in the case of a gift of perfume, flowers or other consumable articles) some donations to a prospective bride or bridegroom can be held to be absolute. But it would seem clear that where a man makes a gift of land to his prospective bride in contemplation of marriage, the intention of the parties would be that the gift shall be returned if the marriage fails to take place even through the fault of the donor. Nathan (The Common Law of South Africa, Vol. 2, p. 1155) distinguishes between *donatio propria* which in no case reverts to the donor, the motive for it being pure beneficence, and *donatio impropria* which is only to become the receiver's property

[1] *(1922) 24 N. L. R. 277.* [2] *135 L. T. 21.*

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if some certain event takes place; and he places the *donatio propter nuptias* in the category of *donatio impropria*. I would therefore hold that the principle as laid down by Grotius (3, 2, 20) is applicable without qualification in the present case.

The 2nd defendant obtained a conveyance of the land in question from the 1st defendant and the learned Judge has quite rightly held that he had notice of the defeasible nature of the title.

For these reasons the decree in favour of the plaintiff is affirmed and the appeal is dismissed with costs.

DE SILVA, J.—I agree.

Appeal dismissed.

1955 *Present:* **K. D. de Silva, J.**

J. A. BAHARAN, Petitioner, *and* D. G. OBEYSEKERA (Assistant Commissioner of Income Tax), Respondent

S. C. 690 of 1954—Application for a Mandate in the nature of a Writ of Mandamus

Income Tax Ordinance (Cap. 188)—Appeal against assessment—Notice of objection—Conditions which such notice must satisfy—Failure to furnish return of income—Requirements necessary then—Sections 64 (3), 69 (1) (2) (3), 80 (1) (3).

Where an assessee fails to state precisely his grounds of objection against the assessment and merely lodges "an emphatic protest", such protest is not a notice of objection within the meaning of section 69 (1) of the Income Tax Ordinance. Nor is it within the power of the Commissioner to waive the requirements which are set out in section 69 (1) in regard to notice of objection.

Further, under the second proviso to section 69 (1) of the Income Tax Ordinance, if the assessment appealed against was made in the absence of a return of income, the return of income must be tendered within the period allowed for filing the notice of objection. Failure to tender the return of income would render the notice of objection invalid.

APPLICATION for a writ of *mandamus*.

S. Ambalavanar, with *E. B. Vannitamby*, for the petitioner.

J. W. Subasinghe, Crown Counsel, for the respondent.

Cur. adv. vult.

September 22, 1955. DE SILVA, J.—

The petitioner complains, firstly, that the respondent who is the Assistant Commissioner of Income Tax, Unit 3, wrongly refused to admit his appeals and make his order in terms of Section 69 (2) of the Income

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Tax Ordinance (Cap. 188) and secondly, the respondent refused to consider his objections before issuing a Certificate under Section 80 (3). He therefore seeks to obtain from this Court a Mandate in the nature of a Writ of Mandamus directing the respondent (1) to admit the appeals and make his order in terms of Section 69 (3) or (2) to consider the objections, make his decision thereon, and issue a Certificate to the Magistrate's Court, Colombo South, in terms of Section 80 (3). The respondent opposes this application.

Although the petitioner originally made this application in respect of the years of assessment 1948/1949, 1949/1950, 1950/1951, 1951/1952 and 1952/1953 his Counsel, at the hearing, restricted the matter to the last mentioned 3 years of assessment.

The petitioner did not furnish returns of income in respect of these 3 years to the Commissioner of Income Tax. Accordingly, the Assessor in terms of Section 64 (3) estimated the petitioner's assessable income and assessed him accordingly, and notices of assessment dated 17th August, 1953, were sent by registered post to the petitioner to his address at No. 22, Gorakapola, Panadura. These notices of assessment called upon the petitioner to pay Rs. 1,585, Rs. 1,300 and Rs. 2,475 respectively. Section 69 (1) provides that any person aggrieved by the amount of assessment made under this Ordinance is entitled to appeal to the Commissioner against the assessment by giving notice of objection in writing within 21 days of the date of notice of the assessment. Section 63 (3) enacts that any notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. So that these notices should be deemed to have been served on the petitioner on the 19th August, 1955. The petitioner did not appeal to the Commissioner within 21 days from that date. He however addressed the letter R1 dated 31st October, 1953, to the Commissioner stating that he received the notices of assessment only two days earlier. He also in that letter objected to the assessments in the following terms :—

> "I hereby lodge an emphatic protest at your assessment of my income for these years. Details of these particulars will be forwarded to you shortly."

That the petitioner received the notices only on the 29th October, 1953, is not denied by the Commissioner. Therefore the period of 21 days contemplated by Section 69 (1) has to be calculated from 30th October, 1953. The petitioner did not take any further steps within 21 days from 30th October, 1953, although in R1 he had undertaken to furnish the particulars shortly. The Commissioner thereafter on 3rd September, 1954, issued in terms of Section 80 (1) the Certificate R2 to the Magistrate, Colombo South, certifying that a sum of Rs. 8,115 was due as income tax. The Magistrate on receipt of this Certificate issued summons on the respondent who appeared in Court on 10th October, 1954, and obtained an adjournment till 13.11.'54, under Section 80 (2) to enable him to submit objections to the Commissioner. Nothing appears to have been done

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during this period of adjournment. When the petitioner appeared in Court on 13.11.'54 the Magistrate made the following order :—

"Amount confirmed. I call upon him to pay. Time till 4/12."

On 4.12.'54 the petitioner's Counsel submitted to Court that his client was not liable to pay the full amount and moved for another adjournment. The learned Magistrate refused this application and sentenced the petitioner to 3 months' simple imprisonment. On the same day the petitioner filed an appeal against that order and also paid an instalment of Rs. 100 out of the amount due. Certain other payments were also made on subsequent dates. The petitioner filed the present application for a Writ of Mandamus on 17.12.'54.

It is contended on behalf of the petitioner that the letter R1 is a notice of objection contemplated by Section 69 (1) and that by that notice the petitioner preferred an appeal to the Commissioner. It is also submitted on his behalf that on R1 being filed, the Commissioner should have proceeded under Section 69 (2) and, if no agreement was reached between parties, he should have in terms of Section 69 (3) fixed a time and place for the hearing of the appeal. The learned Crown Counsel argued that R1 cannot be regarded as a valid notice of objection contemplated by Section 69 (1) and that even if it was so regarded it ceased to be valid because the relevant returns of income were not filed by the petitioner within 21 days from 30.10.'53. As this argument involves the interpretation of Sub-Sections 1 and 2 of Section 69 I will quote those two Sub-Sections in full :—

> (1) Any person aggrieved by the amount of an assessment made under this Ordinance may within twenty-one days from the date of the notice of such assessment appeal to the Commissioner by notice of objection in writing to review and revise such assessment. Any person so appealing (hereinafter referred to as the appellant) shall state precisely in his notice the grounds of his objection and the notice shall not be valid unless it contains such grounds and is made within the period above mentioned :
>
> Provided that the Commissioner, upon being satisfied that owing to the absence from Ceylon, sickness, or other reasonable cause the appellant was prevented from giving notice of objection within such period, shall grant an extension thereof :
>
> Provided further that, where the assessment appealed against has been made in the absence of a return of income by the appellant, no notice of objection shall be valid unless and until such return has been duly made.
>
> (2) On receipt of a valid notice of objection under sub-section (1), the Commissioner may cause further inquiry to be made by an Assessor, and if in the course of such inquiry an agreement is reached as to the amount at which the appellant is liable to be assessed, any necessary adjustment of the assessment shall be made.

Section 69 (1) enacts that the appellant "shall state precisely the grounds of objection in the notice". The learned Crown Counsel submits that no grounds of objection, whatever, are set out in R1. That submission

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cannot be assailed. By R1 the petitioner merely lodged "an emphatic protest". That surely is not a ground of objection. The Counsel for the petitioner however contends that the respondent is not entitled to take this objection because he did not raise it earlier. According to him, the only ground urged by the respondent against the validity of R1 was that the returns of income were not filed within 21 days as contemplated by proviso 2 Section 69 (1). It is true that in the affidavit filed by the respondent he did not specifically take up the position that R1 was an invalid notice for want of the necessary particulars. However, even if the respondent treated R1 as a valid notice it is clear that he was not entitled in law to treat it as such. Section 69 (1) not only requires that the grounds of objection should be set out precisely in the notice but it proceeds to state further,

> "And the notice shall not be valid unless it contains such grounds and is made within the period above-mentioned."

The Commissioner cannot confer validity on a notice which is intrinsically invalid. It is not within his power to waive the requirements which are unequivocally set out in Section 69 (1) in regard to this notice. Therefore the Commissioner was entitled to ignore R1. On this ground alone the petitioner's application must fail because the petitioner also failed to appear before the Commissioner as required by the latter or to submit his objections to him in terms of Section 80 (2). If R1 cannot be regarded as a valid appeal the petitioner was entitled to claim relief under Section 80 (2). This he has failed to do.

Even if it is assumed that R1 is a valid notice of objection—which I am not prepared to concede—the petitioner is still confronted with another difficulty in that he failed to furnish the returns of income within a period of 21 days calculated from 30.10.'53. Indeed, he furnished these returns only on 19th November, 1954. The Counsel for the petitioner however contends that Section 69 (1) does not require that the returns of income should be filed within 21 days. According to him it is sufficient if the notice of objection alone is filed within that period. His argument is that if the notice of objection is filed within 21 days, it remains in a state of suspense, as if it were, ready to be invested with validity once the return of income is filed. There is no time limit within which the return of income is to be filed, according to him. He also submits that although the 1st proviso of Section 69 (1) empowers the Commissioner to extend the period of 21 days for filing the notice of objection there is no similar provision in regard to the filing of the return of income. I am unable to share his view that the appellant is entitled to file the return of income after the expiry of the period within which the notice of objection has to be filed. Section 69 (1), *inter alia*, enacts that the notice shall not be valid unless it is made within 21 days. The 1st proviso, as I observed earlier, empowers the Commissioner, in certain instances, to extend the period of 21 days. It is only a notice of objection which is filed within the 21 days or within the extended period that is valid. But according to the 2nd proviso to Section 69 (1) even a notice of objection filed within the prescribed time becomes invalid "unless and until" the return of income is duly made. The word

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" until " appearing in this proviso shows that the return of income need not necessarily be filed with the notice of objection. The word " unless " occurring in the same proviso, however, makes it clear that the return of income should be filed within the period allowed to tender the notice of objection. A notice of objection which is otherwise valid loses its validity unless there is a return of income to support it. If no extension of time is granted for filing the statement of objection the last day on which it can be filed is the 21st day from the relevant point of time. If on the 21st day it is found that the notice of objection has been filed within the prescribed period but no return of income has been tendered then the notice of objection is clearly invalid.

A notice of objection to be valid must satisfy the following requirements :—

1. It must be in writing and addressed to the Commissioner.
2. It must be filed within the prescribed time.
3. It must set out the grounds of objection precisely.
4. If the assessment appealed against was made in the absence of a return of income the return of income must be tendered within the period allowed for filing the notice of objection.

It is only a notice of objection which satisfies the above requirements which would constitute a valid appeal against the assessment.

Accordingly, even if R1 is a proper notice of objection, it is invalid for the reason that the petitioner had failed to tender his return of income within 21 days from 30.10.'53. Therefore the respondent was justified in refusing to make an order under Section 69 (2).

For these reasons I dismiss the application with costs.

Application dismissed.

1954 *Present :* **Swan, J., and Sansoni, J.**

PIYARATNE THERO, Appellant, *and* RAHIM, Respondent

S. C. 140—D. C. Kandy 324/ M. S.

Execution—Decree to pay money—" Subsequent order directing the payment of money to be made at a specified date "—Civil Procedure Code s. 337 (1) (b).

Judgment was entered in 1939 for the payment of a sum of Rs. 696. In 1940 an application for execution was made and, on writ being issued, a sum of Rs. 80 only was recovered. In 1943 a subsequent application for execution was made and on February 7, 1944, the Court allowed the defendant to pay the decreed amount in monthly instalments of Rs. 20 and ordered that in case of default the writ could be reissued. Plaintiff applied for execution several times thereafter but nothing was recovered from the defendant. On July 17, 1953, a similar application was made by the plaintiff and, on being noticed, the defendant objected to the reissue of the writ on the ground that over 10 years had expired since the date of the decree.

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Held, that the order of February 7, 1944, was not a "subsequent order directing the payment of money to be made at a specified date" within the meaning of section 337 (1) (*b*) of the Civil Procedure Code. At most it amounted to a concession granted to the defendant as to the manner of settling the amount he had been decreed to pay. The application of July 17, 1953, was therefore time-barred and should be refused.

Muthu Ramen Chetty v. Mohammadu (1919) 21 N. L. R. 97, followed.

Meenatchi Atchy v. Palaniappa Chettiar (1941) 42 N. L. R. 333, distinguished.

APPEAL from a judgment of the District Court, Kandy.

P. Somatilakam, for the defendant appellant.

M. Rafeek, for the plaintiff respondent.

Cur. adv. vult.

November 30, 1954. SANSONI, J.—

In this case a judgment by default was entered against the defendant on 27th November, 1939, for the payment of a sum of Rs. 696 with further interest and costs. On an application for execution made in 1940, writ was issued and a sum of Rs. 80 was recovered from the defendant on that occasion. In 1943 a subsequent application for execution was made and the defendant was noticed. Eventually on 7th February, 1944, the Court allowed the defendant to pay the decreed amount in monthly instalments of Rs. 20 commencing from 1st November, 1944, and ordered that in case of default, the writ may be reissued. The defendant apparently made default in paying the instalments and the plaintiff applied for execution several times thereafter but nothing was recovered from the defendant. On 17th July, 1953, a similar application was made by the plaintiff and on being noticed the defendant objected to the reissue of the writ on the ground that over 10 years had expired since the date of the decree.

After hearing Counsel appearing for the parties the learned Additional District Judge allowed the plaintiff's application on the ground that 10 years had not elapsed since 7th February, 1944, when the Court made order allowing the defendant to pay the decreed amount in monthly instalments.

The defendant has appealed and it is necessary to consider whether the order of 7th February, 1944, is a "subsequent order directing the payment of money to be made at a specified date" within the meaning of section 337 (1) (*b*) of the Civil Procedure Code, for if it is the period of 10 years within which a subsequent application for writ may be granted commences to run only from the date of default in making the payment. It seems to me that the matter is concluded by the judgment of Schneider, A. J., and de Sampayo, J., in *Muttu Ramen Chetty v. Mohammadu* [1]. In that case a mortgage decree was entered in 1902. In 1911

[1] (*1919*) *21 N. L. R. 97.*

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an application for execution was made and on 2nd November, 1911, the defendant consented to the issue of writ and writ was issued. In 1917 the plaintiff applied to issue writ and it was objected that ten years had expired from the date of the decree. The District Judge however allowed the application on the ground that the period of ten years should be reckoned from the order of 2nd November, 1911, and not from the date of the decree of 1902 because the order was a " subsequent order " such as is contemplated by section 337 (1) (*b*). Schneider, A. J., in setting aside the order of the District Judge said : " The subsequent order contemplated in section 337 (*b*) is one which may be made under the provisions of sections 320, 322, 334 and 335 of the Code, for the recovery by execution of a sum of money as damages in default of compliance with the substantial decree, either to deliver movable property or to do or abstain from doing some specified act ". Following that decision I would hold that the order of 7th February, 1944, is not a " subsequent order ". At most it amounts to a concession granted to the defendant as to the manner of settling the amount he had been decreed to pay.

It cannot be contended that the decree of 27th November, 1939, was superseded by a new decree on 7th February, 1944. Such a position arose in *Meenatchi Atchy v. Palaniappa Chettiar* [1] but the facts of that case are widely different from those of the present case, for they clearly indicated that the parties substituted a new decree for the decree originally entered ; they even specifically agreed that the date of the decree was to be reckoned as from the date of the new decree. The plaintiff's Proctor does not seem to have taken the view that a new decree came into being on 7th February, 1944, because in the application for execution the date of the decree sought to be executed appeared as 27th November, 1939. The order of 7th February, 1944, is nothing more than an intermediate arrangement for the payment of the original decree. Although Keuneman, J., in his judgment in *Meenatchy Atchy v. Palaniappa Chettiar* (supra) said that the agreement on which the new decree was entered in that case could be regarded as a " subsequent order " within section 337 (1) (*b*), I think that ruling must be considered in the light of that agreement. The learned Judge makes no reference to the judgment in *Muttu Ramen Chetty v. Mohammadu* (supra) and if there is any conflict between the judgments on the meaning of the words " subsequent order " I would follow the judgment of Schneider, A. J., which, as far as I know, has never been dissented from.

For these reasons it seems clear that the application for execution made by the plaintiff on 17th July, 1953, was time-barred and should have been refused. This appeal is therefore allowed with costs.

SWAN, J.—I agree.

Appeal allowed.

[1] (*1941*) *42 N. L. R. 333.*

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1954 *Present :* **Swan, J., and de Silva, J.**

PELIS SINGHO, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 247—D. C. Colombo, 24,910

Civil Procedure Code—Section 461—Action on contract—Requirement of notice of action—Ingredients of such notice.

Under section 461 of the Civil Procedure Code notice must be given to the Attorney-General before an action can be instituted against him for breach of contract.

Action was instituted against the Crown for Rs. 3,532·50, whereas the notice given under section 461 of the Civil Procedure Code stated the figure to be Rs. 3,192·69.

Held, that the slight variation in the quantum of relief claimed did not render the notice invalid.

APPEAL from a judgment of the District Court, Colombo.

S. W. Jayasuriya, for the plaintiff appellant.

B. C. F. Jayaratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 20, 1954. SWAN, J.—

The appellant instituted this action to recover from the Crown Rs. 3,532 alleged to be due to him as the balance on certain bricks supplied to the Land Development Officer at Polonnaruwa. The respondent filed answer denying liability and pleading that the action was not maintainable as due notice of action as required by section 461 of the Civil Procedure Code was not given. At the trial, among the issues raised was the following :—

6. Has the plaintiff given proper and sufficient notice of this action to the Attorney-General as set out in section 461 of the Code ?

At the suggestion of learned Crown Counsel this was tried as a preliminary issue, was decided against the appellant and the action was dismissed with costs.

At the hearing of the appeal learned counsel for the appellant took a point not raised in the petition of appeal, namely that notice was not necessary in actions based on contract. A reading of the section makes it quite clear that no distinction is drawn between actions on contract and other actions. But the matter is covered by authority. In the case of *Silva v. Jonklaas* [1] Wood Renton A.C.J. held that the notice was not unnecessary in actions founded on contract.

Section 461 of the Civil Procedure Code requires that the notice shall state, " the cause of action, the name and place of the abode of the person

[1] *(1913) 17 N. L. R. 377.*

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intending to institute the action and the relief which he claims ". In this case the first two requirements were fulfilled. The third was fulfilled in part only. The nature of relief was the same as that stated in the notice, but the quantum was slightly more. The action was filed for Rs. 3,532·50, whereas the notice stated the figure to be Rs. 3,192·69. In the case of *Le Mesurier v. Murrah* [1] it was held that a notice under section 461 was not vitiated by the statement of a claim for greater relief than that ultimately demanded in the action. This case was cited to the learned District Judge but while accepting the correctness of it he thought that the converse did not hold good.

I think the learned District Judge has taken too strict a view. The nature of the relief set out in the notice is substantially the same as that claimed in the plaint. In my opinion the slight variation in the quantum of relief would not make the notice bad. I set aside the judgment of the learned District Judge and remit the case to the lower court for adjudication on the other issues. The appellant will be entitled to the costs of appeal.

DE SILVA, J.—I agree.

Appeal allowed.

[1] *(1898) 3 N. L. R. 113.*

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1955 *Present :* **Gratiaen, J., and Fernando, J.**

MARIYA UMMA, Appellant, *and* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD., Respondent

S. C. 278—D. C. Colombo, 23,590

Insurance—Contract of life insurance—Repudiation of liability by insurer—Vagueness of allegations against deceased insured—Framing of issues —Duty of Court to clarify issues—Civil Procedure Code, ss. 77, 146—Proposal Form—Questions appearing therein—Truth of answers—Tests to ascertain it.

(i) The insurer in a contract of life insurance, on being sued for the recovery of Rs. 30,000 due under the policy of insurance, filed answer repudiating liability in general terms alleging that the insured had withheld material information concerning the state of his health. Although the answer was defective for want of precise information as to the grounds on which liability was repudiated, it was not returned for amendment under Section 77 of the Civil Procedure Code. At the same time, the plaintiff, who was the administratrix of the estate of the deceased insured, failed to serve interrogatories on the insurer for the purpose of obtaining clarification of the allegations made against the deceased.

Held, that in the circumstances Section 146 of the Civil Procedure Code imposed a special duty on the Judge himself to order the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself " the propositions of fact or of law " upon which the parties were at variance.

(ii) In the absence of provision to the contrary expressed in the clearest possible terms, a person making a proposal for life insurance is entitled to assume that insurance Companies do not require information frivolously or through pure inquisitiveness on matters which have no conceivable relevancy to the risk which they are invited to undertake. Therefore, in a country like Ceylon where perfectly healthy persons occasionally " suffer " from slight indispositions of brief duration, loosely described as " influenza ", an applicant for insurance cannot be deemed to have given untrue or incorrect information if, although he had once had a mild attack of " influenza " which was speedily cured by a few doses of mixture, he answered in the negative the following questions addressed to him in the proposal form :—

" 1. Have you ever suffered from any of the following ailments—typhoid, *influenza*, filariasis, elephantiasis of leg or scrotum, kala-azar, blackwater or any other fever ?

2. Have you within the past five years *consulted* any medical man for any ailment, not necessarily confining you to your house ? If so, give details and state names and addresses of medical men consulted. "

If the words of a question appearing in the proposal form are ambiguous, they must be construed *contra proferentes* and in favour of the assured.

(iii) One ground on which the insurance Company repudiated liability on the policy was that the insured had given untrue and incorrect answers to the printed questions in the proposal form when those answers would form the " basis of the contract ". The printed questions were, however, addressed

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to the deceased in the English language which he could not understand. They were interpreted by the Company's agent in Malayalam, and the answers given in Malayalam were then translated into English by the Company's agent.

Held, that in the circumstances the Company could not succeed without proof that the questions and the impugned answers were correctly interpreted and recorded by the Company's agent.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *N. Nadarasa*, *S. Sharvananda* and *T. Parathalingam*, for the plaintiff appellant.

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

Cur. adv. vult.

August 3, 1955. GRATIAEN, J.—

The administratrix of the estate of K. Ahamed sued the defendant Company, whose head office is in Bombay, for the recovery of Rs. 30,000 under a policy of insurance payable on his death.

On 30th November 1947 the deceased, who was the proprietor of Pilawoos Hotel, had submitted to the Company's branch office in Colombo a proposal (D1) for the insurance of his life. The business was introduced to the Company's Inspector Sivasubramaniam by a canvassing agent Nair who gave evidence at the trial in support of the plaintiff's claim. The printed proposal form, drafted by the Company in the English language, contained a number of questions which the applicant for insurance was required to answer " fully and distinctly in his own handwriting ". A similar requirement appears with regard to the questions in the " Personal Statement " which was to be answered before his examination by a Medical Referee nominated by the Company.

The deceased could sign his name in English, but was otherwise illiterate in that language. The questions in the proposal form and the Personal Statement were therefore interpreted to him in Malayalam by Sivasubramaniam who also translated his answers into English. At the foot of the proposal form is a declaration printed in English and signed by him in both languages purporting *inter alia* to agree that his statements in the documents " shall be the basis of the contract ". A further declaration, also printed in English in somewhat different terms, was signed by him in both languages in the presence of the Medical Referee, Dr. Sivapragasam, after the medical examination.

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Dr. Sivapragasam's report P4 pronounced that, after a detailed medical examination, he considered the deceased a " first class life ", that is to say, " a life in perfect health and of sound constitution with good personal and family history and with prospects of longevity as good as those of healthy persons generally of the same age ". The Company accepted the proposal on the 15th December 1947 and the terms of the contract are contained in the policy dated 12th January 1948. There is no evidence as to when the policy was forwarded to the deceased.

The deceased died at Cannanore in South India on 21st March 1948, and payment under the policy was claimed shortly afterwards on behalf of his estate. On 8th August 1950, i.e., more than two years later, the Company repudiated liability on the grounds specified in its letter P2. It was alleged, *inter alia*, (1) that the deceased had " withheld material information at the time of effecting the assurance " and (2) that the Company had " indisputable proof to show that the deceased had for some months before he submitted the proposal and even till the date of issue of the Acceptance Letter been suffering from heart trouble and its complications and that he had also been suffering from piles and hernia ". Upon receipt of this letter, the plaintiff instituted the present action in October 1950.

Paragraph 6 of the Company's answer is to the following effect :—

" 6. The defendant Company states that after the death of the said Kalingal Ahamed deceased, it was discovered that he had failed to disclose facts regarding the state of his health and/or about ailments which he had been suffering from at or about the date of the said Personal Statement and of the proposal for insurance, at or about the date of the letter of acceptance or at or about the date of issue of the Policy of Assurance, and that the deceased had either fraudulently or wilfully given false answers or information in the said Personal Statement and/or Proposal for Assurance in regard to his health or ailments or had either fraudulently or wilfully concealed or withheld material information from the defendant Company in regard to his health or ailments. The defendant Company therefore avers that the said policy of insurance effected thereunder ceased and determined and all monies paid thereunder have become forfeited to the defendant Company and the defendant Company is under no liability whatsoever to pay the sum of Rs. 30,000 or any sum whatsoever. "

These allegations (so Counsel appearing for the Company informed us during the argument) were later slightly modified to the extent that the Company did not consider it necessary to pursue the earlier imputation of an express fraud. The modified grounds of repudiation are set out in issues 3 and 4 which (as amended during the trial) read as follows :—

" 3. Had the deceased failed to disclose facts regarding the state of his health and/or about the ailments that he had been suffering

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from on or about the date of the personal statement D1, or date of proposal, acceptance of the proposal or date of issue of the policy of Insurance ?

4. Had the deceased given untrue or incorrect answers and information in the personal statement and proposal for insurance in regard to any one or more of the following particulars :—

(*a*) Date of birth and age—Cage 3 of page 1 of D1.

(*b*) In regard to the question in cage 14 of page 1 of D1.

(*c*) In respect of the personal statement at page 2 of D1, in regard to the answers to questions 3A (1), 3A (2), 3A (3), 3A (4) of page 2 of D1 and 3C, 3D (1, 2) and 9A and 9B ?

Issue 4 (*a*) was withdrawn at an early stage of the trial, and we were informed that the Company did not invite even an incidental finding that the deceased's age in fact exceeded 46 in November, 1947.

Issue 3 raises the question whether the deceased had in fact withheld material information concerning the state of his health, and thus disregarded the duty imposed by law on any person proposing to take out a policy of life insurance. As to issue 4, the Company took up the alternative position that the validity of the policy was by mutual agreement made conditional upon the " truth " and/or " accuracy " of the deceased's answers to the specific questions put to him in the proposal and the Personal Statement. It is common ground that the burden of proving that the contract was either voidable for the reasons alleged in issue 3 or void *ab initio* for the reasons alleged in issue 4 was on the Company.

Issue 3 was framed in terms of the utmost generality, and gave no indication of the ailments from which the deceased allegedly suffered at the relevant dates. Counsel for the plaintiff therefore asked at the commencement of the trial for particulars of these allegations. He claimed that the Company's defence on this issue should be restricted to the grounds of complaint specified in its letter of repudiation P2. The learned Judge over-ruled the objection and said :—

" The answer is no doubt couched in general terms, and in my view should have specifically referred to the various items in the proposal for insurance and the Personal Statement which are alleged to have been made by the deceased. But at the same time one cannot lose sight of the fact that by interrogatories the plaintiff could have clarified the position. This has not been done. I allow the issues. "

The Company's pleadings were certainly defective for want of precise information as to the grounds on which liability was repudiated. The answer should therefore have been returned for amendment under Section 77 of the Civil Procedure Code. I also take the view that, although the plaintiff would have been better advised to serve interrogatories on the

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Company for the purpose of obtaining clarification of allegations made against the deceased, the learned Judge took far too narrow a view of his own powers and duties in such a situation.

No express provision is made in our Code for the salutary machinery of " summons for directions " as in England or for pre-trial proceedings as in America. Nevertheless, and indeed for this very reason, Section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which could arise when the precise nature of the dispute is not clarified before the evidence is recorded. The defendant's pleadings were defective, and the plaintiff (let it be conceded) had not been as vigilant as she should have been to protect herself against surprise. But it was still the Judge's duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself " the propositions of fact or of law " upon which the parties were at variance. This was especially necessary where the administratrix of an estate was confronted with serious allegations against a person who had never had an opportunity, when alive, to answer personally to the charges.

The same observations apply to issue 4. Each printed question in the Personal Statement refers to a formidable catalogue of " ailments ", and, if the Company intended to rely on other charges than those specified in its earlier letter of repudiation (namely heart disease, hernia and piles) it should certainly have specified the additional " ailments " in respect of which the deceased was alleged to have given untrue or incorrect answers.

The trial commenced upon issues which were left far too vague, and, as the learned Judge himself points out in the closing paragraph of his judgment, the proceedings were unduly protracted for a variety of reasons. The advantage which this experienced Judge of first instance enjoyed of seeing and hearing the witnesses was therefore " perhaps not so great " as it would have been if the dates of trial had been less widely separated each from the other.

I now pass on to review some of the facts which came to light in the course of the trial. The Company was clearly entitled to view with some suspicion the fact that a man who was pronounced a " first class life " in November 1947 should have died of heart failure (according to the certificate of death) in March 1948. Indeed, the mystery deepened when this certificate, which originally gave his age as " 55 " and the name of his last medical attendant as " Dr. L. S. Shenoy ", was subsequently amended, first by altering his age to " 46 " and, at a later date, the name of the medical attendant to " Dr. M. Narayanan ".

Dr. Narayanan, a medical practitioner of Tillichery in South India, reported to the Company that he treated the deceased for coronary thrombosis from about 14th March 1948 until he died—first at the residence of the patient's wife's family in the village of Eddakat, and later at Cannanore. He said that he had known the deceased quite well since

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about 1944, and that the deceased had been in good health until the date of his last illness. Dr. Narayanan categorically denied that Dr. Shenoy was consulted at any stage of the deceased's last illness, and his version, if true, left no room for the complaint that the deceased had been guilty in November 1947 of non-disclosure of any material facts concerning the state of his health.

When Dr. Shenoy was contacted by the Company, he wrote a letter (D2) of 5th February 1949 giving a completely different history of the last illness. He said that it was he alone who had been in charge of the patient, first at Eddakat from the middle of February 1948 until about 5th March, and later at Cannanore until he died 16 days later. He also claimed to have called a Dr. Miller (then Civil Surgeon at Sholapur) in consultation on two occasions. According to him, the deceased died of cerebral oedema, and had been suffering for a considerable time from chronic myocarditis, unguinal hernia on both sides, and external piles. These details were elaborated in a further letter to the Company (D3) of 8th June 1949 and clearly forms the basis of the letter of repudiation P2 of October 1950. If Dr. Shenoy's version was substantially correct, the facts would without doubt have established that the deceased, when he was virtually a dying man, had fraudulently, and with the connivance of others, induced the Company to insure his life upon a completely false hypothesis.

Dr. Miller's name was disclosed by Dr. Shenoy in February 1949, but he was not contacted by the Company until about October or November 1951, i.e., after the action had commenced. He was unable at first to recollect the case, but, after his memory had been stimulated (I do not use the word in a sinister sense) by reference to the details of Dr. Shenoy's version, he agreed to give evidence to the effect that he had in fact been consulted in March 1948 concerning a patient answering to the description of the deceased, and that he remembered having agreed with Dr. Shenoy's diagnosis.

One can well appreciate the additional difficulties which the learned Judge encountered in a trial where medical men gave irreconcilable versions on questions of fact. He ultimately found it impossible to accept the evidence of either Dr. Shenoy or Dr. Narayanan " with any degree of confidence ", and decided that the value of Dr. Miller's evidence was greatly reduced because, in attempting to reconstruct what had occurred 3½ years before the Company contacted him, he had been " much influenced " by what Dr. Shenoy had previously stated. The Judge finally concluded that " neither Dr. Shenoy nor Dr. Narayanan had spoken the whole truth ", and that it was " perhaps right " to draw the inference that " both doctors had been called in, Shenoy at the last moment when the relations of the deceased became desperate ".

The Company relied on the evidence of another witness called Kochchakan who had also been contacted for the first time after the trial commenced. His evidence, if true, strongly supported Dr. Shenoy's opinion that the deceased man must have been a " very sick man " in

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November 1947. But he was disbelieved, and certain documents produced by him (alleged to have been written by the deceased during the relevant period) were not accepted as genuine.

As to the plaintiff's witnesses, the learned Judge was much impressed by the evidence of the Company's canvasser Nair who stated that the deceased was in excellent health in November 1947 and earlier. Acting on his evidence and on the medical report of Dr. Sivapragasam (who died on 17th May 1950 before the Company repudiated liability) the learned Judge said " I have no doubt that at that particular time (i.e., in November 1947) the deceased Ahamed was perfectly healthy ". Issue 3 was accordingly answered in favour of the plaintiff.

With regard to issue 4, the Company again relied on the inferences drawn by Dr. Shenoy as to the probable state of the deceased's health in November 1947, and on the evidence of both Dr. Shenoy and Kochchakan as to what the deceased had himself told them in that connection. If this evidence had been accepted, the policy was clearly void because the deceased had given false answers to several questions in the proposal form and the Personal Statement. But here again the learned Judge was not prepared to place reliance on the statements of fact made by either witness, or on the inferences drawn by Dr. Shenoy from the symptoms which he claimed to have observed during the last illness. In the result, there was no evidence adverse to the deceased which the Judge found himself in a position to accept on controversial matters covered by issue 4 up to the stage when the case for the Company had been closed. Nevertheless, the extremely general form in which the issue was framed enabled the Company to rely on a matter incidentally mentioned by Dr. Narayanan when he was called to rebut Dr. Shenoy's version of the deceased's last illness. Let me explain how this anticlimax occurred.

According to Dr. Narayanan, the deceased had not suffered from any serious illness since about 1944, but he had had a mild attack, diagnosed as " influenza ", early in 1945 ; and this indisposition was speedily cured by a few doses of mixture. Upon this isolated item of evidence given by a witness whom the learned Judge otherwise regarded as demonstrably unreliable, issue 4 was answered in favour of the Company—the reason being that the deceased had on 30th November 1947 answered in the negative (1) the question (in the proposal form) whether he had " consulted any medical man for any ailment " within the past five years and (2) the question (in the Personal Statement) whether he had " ever suffered from *any other illness*, accident or injury, *whether considered (by the deceased) to be important or not* ".

It was conceded on behalf of the Company that in any view of the matter, influenza, having already been included specifically in an earlier question No. 3 (*a*) (3) of the Personal Statement, is not caught up by the words " any other illness " in question 3 (*c*). It was also conceded that the words " whether considered to be important or not " qualified the word " injury ", but not necessarily the words preceding it. Mr. Perera argued, however, that the policy ought to have been declared void *ab initio* because question 3 (*a*) (3) was answered in the negative. This

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submission was rejected by the learned trial Judge because in his opinion question 3 (*a*) (3) referred in this context only to ailments, including influenza," of a somewhat serious and severe character ".

For the reasons which follow, I have come to the conclusion that upon the learned Judge's findings of fact, the deceased has not been proved to have given an " untrue " or " incorrect " answer either to question 14 in the proposal form or to question 3 of the Personal Statement. The truth of the impugned answers was made the " basis of the contract ", and it must certainly be conceded that the question of their materiality to the insurance risk does not directly arise. *Dawson v. Bonnin* [1]. But were the answers in fact " untrue " ? As Lord Watson pointed out in *Thomson v. Weems* [2], " the subject matter of the warranty is a point to be determined in each case according to the just construction of the question and answer taken *per se*, and without reference to the warranty given . . . . If the words are ambiguous, they must be construed *contra proferentes* and in favour of the assured ".

An insurance Company is always entitled to stipulate that a policy is void even if the assured gives information which, upon extreme literalism, is incorrect on matters however trivial and immaterial ; but in that event the Company must have the commercial courage to communicate its intention to the other party in the clearest possible terms. " It is a weighty matter that the questions are framed by the insurer, and, if an answer is obtained which is, upon a fair construction, a true answer, it is not open to the insuring Company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. When an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of the question. Otherwise, the ambiguity will be a trap against which the insured should be protected by the Courts of law. " —per Lord Shaw in *Condogianis v. Guardian Assurance Co.* [3].

Let us consider in the first instance the case of an applicant for insurance who was a person of good education and perfectly conversant with the language in which the following questions were addressed to him :—

(1) " Have you ever suffered from any of the following ailments—typhoid, *influenza*, filariasis, elephantiasis of leg or scrotum, kala-azar, blackwater or any other fever ? "

(2) " Have you within the past five years *consulted* any medical man for any ailment, not necessarily confining you to your house ? If so, give details and state names and addresses of medical men consulted ".

How would a reasonable man making a proposal for life insurance fairly read these two questions if he assumed (as he is entitled to assume) that reasonable insurance Companies do not require information

[1] (*1922*) *A. C. 413.* [2] (*1884*) *9 App. Cas. 671 at 687.*
[3] (*1921*) *2 A. C. 125.*

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frivolously or through pure inquisitiveness on matters which have no conceivable relevancy to the risk which they are invited to undertake ? In my opinion, the question as to " influenza " is " one which the Company could hardly reasonably have expected to be answered with strict and literal truth " in a country where perfectly healthy persons occasionally " suffer " from slight indispositions of brief duration, loosely described as " influenza ". It must therefore be read " with some limitation and qualification to make it reasonable ". *Connecticut Mutual Life Insurance Co. v. Moore* [1].

" Influenza " was classified in the Personal Statement as an " ailment " and (leaving aside " Kala-azar " which conveyed no meaning to any of us who heard or argued the appeal) was included in a group of diseases notoriously calculated to reduce longevity. That the term catches up a serious attack of " influenza " which might well be attended by consequences impairing a man's general health is clear enough. But, can it fairly be read as having been intended also to include what a layman would describe colloquially as a " touch of flu " ? One cannot imagine that a reasonable insurance Company negotiating with a person residing in Ceylon would seriously wish to know whether he had never in his life had a slight indisposition of that kind. I therefore agree with the learned Judge's view of what " influenza " meant in the context of question 3 (*a*) (3).

As to question 14 appearing in the proposal form, the purpose of the insurance Company in asking whether the deceased had ever " consulted " any medical man for " any ailment " was to obtain the " means of testing his other answers by reference to the medical gentlemen who had been consulted during the past five years ". *Mutual Life Insurance Co. v. Ontario Metal Products Co.* [2]. But there remains the question as to how the terms " consult " and " ailment " should be construed in the context in which they appear. In the decision of the Judicial Committee to which I have just referred, a similar question required the names of " every physician or practitioner who has *prescribed for* or *treated* you or whom you have *consulted* in the past five years ". This indicates that the three terms are not synonymous in the minds of all insurance Companies. In that particular case, the assured had on several occasions obtained from a doctor a tonic when he was " feeling overworked and run down ". The Judicial Committee considered that the doctor had " prescribed for him " or " treated him ", but did not go so far as to hold that the doctor had also been " consulted ".

It cannot at any rate be said that there is no ambiguity in question 14, and I am not convinced that a person who, when slightly indisposed, was given an influenza mixture on an isolated occasion by his wife's family doctor would be guilty of untruthfulness or even of substantial inaccuracy if he denied that he " consulted " the gentleman concerned " for an ailment ". A reasonable applicant for insurance might well assume that the Company was concerned only to obtain information

[1] (*1881*) *6 App. Cas. 644.* [2] (*1925*) *A. C. 344.*

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as to whether he had during the relevant period sought the professional advice of a medical man in connection with some ailment (real or imagined) of a serious nature. " The question *what medical men have you consulted ?* involves some necessary explanation, and some limit to this question must have been intended ". *Joel v. Law Union and Crown Assurance Co.* [1].

This brings me to another reason for holding that the Company has not discharged the burden of proving that the " basis of the contract " was destroyed on grounds covered by issue 4. The printed questions were addressed to the deceased in a language which (to the knowledge of the Company's agent Sivasubramaniam who attended to the preliminary negotiations) he could not understand. They were interpreted by Sivasubramaniam in Malayalam, and the answers given in Malayalam were then translated into English by Sivasubramaniam. In these circumstances, proof of the accuracy of the translations was, I think, essential to the success of the Company's defence. Moreover, the Medical Referee was himself specially directed to " read over carefully " the answers in the Personal Statement before examining the deceased, and to obtain " fuller information such as will explain the meaning of ambiguous terms like fever, cough, &c. ". There is no evidence as to what was said, or what explanations given, at that stage.

Finally there are the declarations signed by the deceased at the foot of the proposal form and of the Personal Statement. How were these English terms explained in Malayalam to the deceased ? Consider, for instance, the phrase " the foregoing statements are true ". The Muslim hotel-keeper was entitled to elucidation from the Indian insurance agent as to what precisely the Company meant by " truth ". Did Sivasubramaniam explain that, as far as the Company was concerned, the term included " any inaccuracy unaccompanied by moral guilt "? Did he also say that the policy would be void even if statements of honest opinion were subsequently found to be incorrect ? The deceased had no doubt added a statement in Malayalam that what Sivasubramaniam had put down as representing his answers was " written to (his) dictation " and that he " understands the contents ". This does not mean that he pretended to understand anything other than what had been explained to him in the only language with which he was conversant.

Even when the trial was in progress, Sivasubramaniam continued to be entrusted by the Company with responsible duties, but he was not called by the Company. Indeed, strenuous attempts were made to procure his attendance as a witness on the plaintiff's behalf, but they were frustrated because, in the learned Judge's opinion, which I am unable to reject, the Company " kept him out of the witness box ". In these circumstances, we cannot assume that the interpretation which Sivasubramaniam gave to the relevant questions coincided with the meaning for which the Company now contends. And I do not agree that when Counsel for the plaintiff admitted at the commencement of the trial that the deceased had "submitted " the Personal Statement and the proposal for insurance to the Company, he could reasonably

[1] *(1908) 2 K. B. 863.*

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have been understood to concede the accuracy of Sivasubramaniam's translation. This admission was recorded long before the points at issue which later assumed so much importance were brought to the plaintiff's otice.

The principles laid down in *Joel's case* (supra) apply in a very special way when the meaning of questions to answers which form the " basis of the contract " has been explained to an illiterate " assured " by an insurance agent acting within the express or apparent scope of his authority. It was pointed out in *Anderson v. Fitzgerald* [1] that " a policy ought to be so framed that he that runs can read ". How much greater is the obligation imposed on insurance Companies who have constructive knowledge that the applicant cannot read at all ? No doubt an illiterate man, if left to construe the documents for himself, runs the risk of being misled by an interpreter of his own selection. But the position is quite different when the Company's agent volunteers the explanations and, as a step towards securing the business, fills up the form for a person who cannot fill it up for himself. *Keeling v. Pearl Insurance Co.*[2] . In such a situation, he is not " the mere amanuensis " of the illiterate person. Accordingly, the *prima facie* inaccuracy in the English language of an answer given in Malayalam does not avoid the policy unless it is established that the relevant questions were correctly interpreted and explained, and that the answers thereto were correctly inserted by the insurance agent.

This is a very different case from *Biggar v. Rock Life Insurance Co.* [3] and *Newsholme Bros. v. Road Transport and General Insurance Co.* [4], where an assured person, though literate and perfectly competent to understand the documents, was content to adopt, without reading them, answers invented or incorrectly inserted by a dishonest insurance canvasser. Obviously, the assured in those cases " could not escape the consequences of his own negligence ", and the " very distinguished case " of *Bawden v. London, Edinburgh and Glasgow Assurance Co.* [5] did not therefore apply. I respectfully agree with the judgment of the High Court of Madras in *Kulla Ammal's case* [6] that in a situation such as has arisen in the present case, the Company cannot succeed without proof that the questions and the impugned answers were correctly interpreted and recorded by the Company's agent.

In this country, people are becoming increasingly aware of the advantages of making family provision through life insurance, and many honest persons proposing to avail themselves of these benefits are handicapped by their inability to read or write the language in which the preliminary documents are drafted by insurers. The legal relationship of the insurance agent *vis a vis* his employer on the one hand and the illiterate applicant for insurance on the other therefore becomes vitally important. The agent generally has no authority to conclude the contract of insurance, but the illiterate applicant is *prima facie* entitled to assume that the agent has authority at least to explain the meaning of the questions contained in the documents and to put the answers when given into

[1] (*1853*) *4 H. L. C. 484.*
[2] (*1923*) *129 L. T. 573.*
[3] (*1902*) *1 K. B. 516.*
[4] (*1929*) *2 K. B. 356.*
[5] (*1892*) *2 Q. B. 534.*
[6] *A. I. R.* (*1954*) *Mad. 636.*

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proper shape. *Macgillivray's Insurance Law* (4th ed.) paras 925 and 926. If the law does not protect the illiterate man to this extent, the *impar congressus*—condemned by Lord Dunedin in *Glicksman's case* [1]—between an insurance agent and " a wretched little (person) who could neither read nor write " would be fraught with danger to the latter.

In the present case, the completed documents, when received in Bombay, must have made it clear to the Company that the deceased did not understand the language in which the questions were addressed to him ; it must have been equally apparent that their own agent in Ceylon was the person who interpreted the questions, reduced his answers into writing, and explained the stipulation that those answers would form the " basis of the contract ". In these circumstances, the Court should refuse to declare the contract void in the absence of proof that the interpreting agent's functions had been properly discharged. I cannot agree with the argument that, in such a situation, the plaintiff's only remedy was to obtain a rescission of the contract on the basis of some misunderstanding, and to claim a refund of any premia previously paid under the policy. The correct analysis seems to be that the assured and the agent of the insurance Company were in truth *ad idem*, but we do not know what precisely they were *ad idem* about in relation to the special warranties relied on by the Company. Issue 4 must therefore be answered in favour of the plaintiff.

There remains the Company's final contention that we should reverse the learned Judge's conclusions of fact on issues 3 and 4, and to hold that Dr. Shenoy's evidence and Kochchakan's evidence ought to be believed—in which event the deceased's answers in the proposal form and Personal Statement must have been false to his knowledge in many respects. Mr. Nadesan, who argued this part of the Company's case, subjected the judgment under appeal to microscopic analysis. It is certainly a pity that the dates of trial were unduly spread out, and some of the reasons given for rejecting the evidence of Dr. Shenoy are perhaps less convincing than others. After all, no judgment, when meticulously dissected, will be found to be completely beyond criticism. But, generally speaking, I think it can fairly be said that the learned Judge's conclusions are not vitiated by substantial misdirection. Bearing in mind the well-known principles laid down by Lord Greene in *Yuill v. Yuill* [2] and by Lord Thankerton in *Watt v. Thomas* [3], I cannot accept the argument that the findings to which the Company takes exception were " so clearly wrong that the appellate tribunal's judgment of fact should be substituted for his ". As to whether, if I had enjoyed the advantage of seeing and hearing the witnesses for myself, I would have taken a different view of the merits of the case, it is idle to speculate. But there is no reason for holding that the canvasser Nair, who made a favourable impression on the trial Judge, ought to have been disbelieved—particularly when Sivasubramaniam was not called to contradict him. The acceptance of Nair's evidence rules out the possibility that it was not the deceased but some healthy

[1] (*1927*) *A. C. 139.*

[2] (*1945*) *P. 15.*

[3] (*1947*) *A. C. 484.*

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man, fraudulently impersonating him, who had been taken before Dr. Sivapragasam ; indeed the Company concedes that what purports to be the signature and handwriting of " K. Ahamed " in the relevant documents were in fact his. Why should one assume that Dr. Sivapragasam, who was specially directed to see that the declaration was made and signed in his presence, had failed in this duty ? Dr. Sivapragasam held a responsible position in the Government Medical Service in November 1947, and continued to enjoy the Company's confidence until he died. If his report was made after an honest medical examination, Dr. Shenoy's version cannot be accepted. There was no evidence to justify the assumption that Dr. Sivapragasam was the kind of man who would have performed his professional duties dishonestly or even lightly. It is not the plaintiff's fault that the Company's decision to repudiate liability was postponed for so long that Dr. Sivapragasam died in the interval. One cannot understand why Dr. Sivapragasam was not asked his views on Dr. Shenoy's version as soon as the letter D2 was received in February 1949.

I would allow the appeal and order a decree to be entered in favour of the plaintiff as prayed for, with costs in both Courts.

FERNANDO, J.—

Counsel for the respondent Company at the appeal have argued quite insistently that the state of health of the assured had been proved to be such that the trial Judge should have held that the assured gave incorrect answers to the questions put in the following items in the personal statement D1 :—

3A. for the reason that he had suffered from swelling of the knees and joints shortly before the date of the proposal.

3D. for the reason that he did in fact suffer from hernia.

9A1 and 9A2. for the reason that to his own knowledge he suffered from various complaints in August and September 1947 and was under medical treatment in Ceylon and in India.

It was also argued that, quite apart from the consultation of Dr. Narayannen for influenza in 1944 or 1945, the treatment in 1947 should have been disclosed in cage 14 of the proposal form, and that the failure to do so entitled the Company to a finding that the answer given was incorrect. Counsel did not press for a finding in their favour upon the third issue framed at the trial, but only for the reason that the alleged non-disclosures relevant to that issue were the same as are relied upon to establish the incorrectness of the answers given in the items to which I have just referred.

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Upon this part of the case, the criticism offered by Counsel for the Company is that the trial Judge failed to recognise the importance of two planks of the prosecution case, namely, (*a*) that it was Dr. Shenoy, *and not Dr. Narayannen*, who attended on the assured during the three weeks of his last illness, and (*b*) that during the months of August and September, 1947, the assured had written a number of letters from India to one Kochakan in Ceylon which disclosed that the assured was then suffering from various ailments and was then under medical treatment. We were invited to say that both these facts were conclusively proved at the trial, and that, considered together with certain other parts of the evidence, they established the incorrectness, if not also the deliberate falsity, of some of the answers in D1.

There was firstly Dr. Shenoy's own evidence that he treated the assured "from about the middle of February, until his death" on 21st March 1948, at first at Eddakat and later at Cannanore, visiting him daily, and being present at his bedside two hours before his death. During the entirety of this period Dr. Shenoy did not see Dr. Narayannen attend on the patient. There was then the evidence of Dr. Miller that he had been called in consultation by Dr. Shenoy and had examined the assured on the day of his death as well as on an occasion about 10 days before. The copy of the death registration entry (D17A) shows that the death was registered on 22nd March 1948 at the Cannanore Municipal office, that the name of the medical attendant was entered as "Dr. L. S. Shenoy" and that the age as furnished was 55 years, the same as that estimated by Dr. Shenoy according to his evidence ; copies of this entry were attached to applications made by the widow of the assured to this Court in July 1948 and to the District Court in August 1948 in connection with the administration of the estate of the assured. The position taken by the appellant with regard to this entry is that there were two errors in it—the first (as to age) was corrected (D20) in July 1948 by the Stationary Sub-Magistrate of Cannanore upon application (D18) made by Andutty, the brother-in-law of the assured, and the second (as to the name of the medical attendant) was corrected by the same Magistrate (D22) in September 1948, upon the petition of the widow and Dr. Narayannen's name was substituted. The contention of the Company is that the corrections were sought only because Dr. Shenoy had (about a month after the death) declined to accede to a request by Andutty for a certificate informing the Company that coronary thrombosis was the cause of death, and that the need for a correction as to the name of the doctor became urgently apparent only when the Company had early in August 1948 (P25) called for an extract from the death register. It was argued for the Company, not only that the death registration entry confirmed the evidence of Dr. Shenoy of the fact that he attended, but also that the correction was a device employed to support the false position that Dr. Narayannen had been in attendance. With respect, the second part of the argument is difficult to appreciate. The Company relies upon the widow's application for the correction as being confirmation of Dr. Shenoy's evidence of the attempt to induce him to certify to an untrue statement as to the cause of the death of the assured. If there

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were extrinsic circumstances suggesting an inference that the application to correct the entry was based upon false averments, then undoubtedly the making of such an improper application would be strong corroboration of Dr. Shenoy's evidence. But here the only available means by which we can test the propriety of the motive behind the application consists in the evidence of Dr. Shenoy himself. I thought at first that Counsel for the appellant justifiably complained that the trial Judge did not address his mind to the fact that the orders for correction were made by a judicial officer who, in one at least of the orders (as to age) stated " I have made inquiries and I was satisfied that the age of the deceased was 45 years ", and who in making the later order which now turns out to be so important, must be presumed to have been judicially satisfied as to the facts which rendered his order necessary. It is significant that the petition by the widow (D21) contained this statement :—

> " Dr. L. S. Shenoy did not treat him. The Doctor who treated him was Dr. M. Narayannen of Tellichery. *If you verify this from the said Doctors*, they will testify the truth of this statement."

Counsel for the Company relied on section 35 of the Evidence Ordinance, but in my opinion the section gives greater support to the appellant. So far as the trial Judge was concerned, the entry that was relevant was the entry as corrected and he was quite entitled to assume by reason of the Magistrate's orders that what were relevant were the particulars in the *corrected entry*. So that on fuller consideration I have little doubt that the Judge realised that the original entry was of little or no avail to the Company as corroboration of Dr. Shenoy unless it could be shown *aliunde* that the Magistrate was actually misled by false misrepresentations.

In support of the proposition that Dr. Shenoy alone attended on the assured, it has been further submitted that the evidence of Dr. Narayannen as to his attendance on the assured is demonstrably false. In the certificate P5 which he issued on 15th August, 1948, Dr. Narayannen set down the cause of death as " coronary thrombosis ", but he described the symptoms as " anaemia, palpitation and weakness ", which latter, the Company argues, are not the characteristic symptoms of coronary thrombosis. Where further particulars were required, he referred (in P28 of 7th September, 1948) to the following symptoms :—

> " The blood pressure was very low (100mm) systolic and he was in a collapsed condition with pain over the chest, with dyspnoea nausea and vomiting. The patient was restless with a sensation of oppression. There was cynosis, skin cold with profuse sweating and the pulse was imperceptible.
>
> Dyspnoea was on the increase."

In his evidence in chief, the doctor omitted to mention some of the symptoms described in P28, and he made good the omission only in the course of cross-examination.

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Dr. Narayannen admitted in evidence that he had consulted a medical text book and his diary before he wrote P28. The diary was apparently one kept for income tax purposes : his explanation that an entry as to fees is more readily accepted by the income tax authorities when supported by details of a patient's symptoms is scarcely credible ; and the failure to produce the diary deprived the Court of the only reasonable means of testing so curious an explanation. He tried to account for the omission from P5 of important symptoms by stating that he wrote it without consulting his diary, and when pressed upon the matter said that he " thought anything was good enough for the Insurance Company ".

Dr. Narayannen's need to consult a text book is not so difficult to appreciate : he has treated only a few cases of coronary thrombosis, each with the settled expectation that immediate or very early death was inevitable, and this particular case was no exception. Furthermore, although Dr. Narayannen observed that the assured was continuously screaming and writhing with pain, his personal convictions as to the fatal effects of morphia with heart patients, despite the contrary opinions of text book writers, prevented him from administering even small doses of that drug. He did not think fit to call in another doctor, even though such a practice was usual and though the family could well afford the cost of a second opinion. Although the doctor observed that the patient was semi-conscious during the whole period, he nevertheless consented, upon the patient's insistence, to his removal from Eddakat to Cannanore on 19th March at the risk of death during the journey.

These and other features of the evidence of Dr. Narayannen rendered it highly improbable, either that he could have made a correct diagnosis, or that he was aware of the correct treatment of thrombosis, even if fortuitously diagnosed ; and they amply justify the view taken by the trial Judge that " it is utterly impossible to act upon his evidence with any degree of confidence ". But considering that much of what is unsatisfactory in his evidence can be reasonably accounted to ignorance of or at least unfamiliarity with the subject of thrombosis, I am unable to agree with Counsel for the Company that the trial Judge should necessarily have concluded that the witness *did not ever* attend on the assured during the relevant period.

The learned Judge rejected the evidence of Dr. Shenoy in identical terms. It was argued that his evidence (unlike that of Dr. Narayannen) not being intrinsically false should not have been rejected " only upon a mere reading of it ", and that the specific reason stated as the ground for its rejection was only that the condition of the patient in February and March as observed by Dr. Shenoy did not justify the inferences which he purported to make as to the state of health at the time of the proposal. While conceding to some degree that the Judge may have been justified in declining to accept Dr. Shenoy's opinions as to the patient's state of health in November, 1947, Counsel argued that a mere reading of his evidence did not demonstrate the falsity of two statements in the evidence of Dr. Shenoy, namely, (*a*) that he did attend on the

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patient regularly during the last illness, and (*b*) that the patient made the admissions reported to the Company by Dr. Shenoy's letter D3 of 8th June, 1949 :—

> "That he had swelling of the legs for about three months prior to February, and that he got serious from Colombo, and therefore had to fly to Madras in a plane, and then to Eddakat by train. He had breathlessness, and there was difficulty in passing urine. The motions were scanty. He never reported to me the previous history of rheumatic fever. He told me that he had this swelling some six months previous to the recent illness and that he was treated by a native physician."

What we are asked by Counsel for the Company to say in appeal is that Dr. Shenoy must necessarily have been believed by the trial Judge when he stated that these admissions were made, and that these admissions, either by themselves or together with admissions alleged to have been made by the assured in certain letters alleged to have been written to the witness Kochakan, demonstrate the inaccuracy if not also the falsehood of various answers given in D1.

The learned Judge clearly appreciated that it would be a great advantage to ascertain which of the two doctors was the medical attendant during the relevant time. But he was faced with a situation where two professional men gave completely irreconcilable versions on a simple question of fact, so that to believe the one was to brand the other a perjurer. In other circumstances, it would have been his duty to choose between the two, however unreliable the evidence of both. In this case, however, what was important was the state of the assured's health at the time of the proposal, and there was other material upon which to form an opinion as to his health, namely, the evidence of the canvasser Nair and the report of the medical referee Dr. Sivapragasam made on 30th November 1947 in the proposal form. I feel quite unable to say in appeal that the Judge erred in acting upon that material and in ignoring completely the evidence of both the other doctors.

Dr. Shenoy's evidence was not rejected solely because he was contradicted by Dr. Narayannen ; a stronger reason was that acceptance of the truth of his evidence would necessarily have led to the inference that Dr. Sivapragasam was either a knave or the victim of a clever fraud practised by persons now unknown. Here again, having regard to Dr. Sivapragasam's standing in the medical profession in Ceylon and to the responsible office which he held in 1947, the Judge could not fairly have entertained any such inference unless he was forced to do so by reliable evidence as to the actual circumstances in which the medical examination of the assured was conducted. The failure of the Company to call its agent Sivasubramaniam made it obvious that the circumstances would not have supported such an inference.

It is useful in this connection to consider certain relevant dates. Notice of the death was given to the Company in June 1948 (P16) ; the claim

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forms were furnished in July 1948, and Dr. Narayannen's certificate as to the cause of death in the same month (P5) ; the same doctor's explanatory letter (P28) was written in September 1948 ; thereafter no further queries or complaints whatever were made by the Company until they wrote the letter of repudiation (P2) in August 1950. The Company contacted Dr. Shenoy towards the end of 1948, and he stated to them on 5th February 1949 (D2) that he had attended on the assured and in June 1949 (D3) that the assured had made certain admissions as to his state of health. Although Dr. Sivapragasam was alive until July 1950, there is nothing to show that the Company made any inquiries of him during the 18 months which elapsed after Dr. Shenoy's first letter, inquiries which would have greatly assisted both the Company and the Court. Moreover, if the plaintiff had been informed earlier of the Company's intention to repudiate, her action might have been filed at a time when Dr. Sivapragasam would have been available as a witness. The Company had, at the latest in June 1949, all the information upon which it subsequently repudiated the claim in August 1950, but the claimant was given no inkling in the meantime of the difficulties in store for her. In these circumstances, it was quite pardonable for her counsel to suggest that the decision to repudiate was only taken after it was known that Dr. Sivapragasam was no longer alive to confirm the statements in his medical report.

Having regard to the evidence of the canvasser Nair which the learned Judge chose to believe, there were no suspicious circumstances attendant on the medical examination by Dr. Sivapragasam in November 1947, and doubt could only have been cast upon his evidence by the other eye-witness Subramaniam who was the Company's agent. The only explanation offered by the Company for the failure to call this agent was the bare allegation by counsel that there must have been a deception to which the agent also was a party and that he would therefore obviously have been an adverse witness. I feel quite unable to countenance this allegation against a person who, right up to the time of the termination of the trial in October 1953, continued to function as the Company's agent in this country. But even if the Company laboured under the misfortune that they were unable to rely upon the evidence of their own agent, it would be unreasonable to take a mere suggestion of his dishonesty into account to the prejudice of the plaintiff.

What the learned Judge was in substance invited by the Company to do upon Dr. Shenoy's evidence was to form seriously adverse inferences as to the conduct of two persons who are no longer alive to defend their interests. Dr. Sivapragasam would have been able to explain his conduct to the Company but for the failure to communicate with him when he was alive ; he might have been able to explain his conduct to the Court but for the failure to repudiate this claim within a reasonable time. The Judge had no explanation before him for either failure and I think it a fair observation that the Company had only itself to blame if the Judge decided on the faith of Dr. Sivapragasam's certificate that the assured enjoyed perfect health in 1947 and that accordingly the story of contrary admissions to Dr. Shenoy had necessarily to be rejected.

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The remaining evidence relied upon by the Company in proof of the assured's ill-health at the time of the proposal consisted of letters D6, D8, D9, D10 and D11 alleged to have been written to one Kochakan in Colombo by the assured from India. Kochakan had apparently been a close business friend of the assured before his death and had jointly purchased with him two houses of considerable value. But differences arose thereafter between Kochakan and the relatives of the assured, so much so that he was sued by the present plaintiff in the District Court of Colombo on a claim of Rs. 10,000 and judgment was entered against him. That action was fixed for trial on 11th October, 1951, and Kochakan's name came on the Company's list of witnesses in this case for the first time on the 19th October, 1951, together with the names of one Dr. T. Sivapragasam (not of course the medical referee) and ayurvedic Dr. Abdul Rahiman. It was still later that the Company listed the letters which Kochakan would produce. One of the letters (D8) referred (according to Kochakan) to this ayurvedic physician who was in India in August 1947 and his name was presumably placed on the list of witnesses in order to support the letter D8 and Kochakan's oral evidence that this physician had attended on the assured. But the Company did not ultimately call this physician or even Dr. Sivapragasam who according to Kochakan had attended on the assured. Another of the letters (D9) refers to a draft for Rs. 2,000 which according to Kochakan was sent to the assured in India through the Imperial Bank ; but despite the fact that the Exchange Control requires careful checks to be kept as to remittances abroad, no evidence was adduced at the trial to support Kochakan's bare word that he did post the draft.

Kochakan admittedly was not a careful business man, and had to admit that in a former case he professed that he had no proper place to keep *business* books and documents. That being so, it is strange that he should have retained from 1947, until late in 1951, inconsequential letters like those he produced. It is abundantly clear that at the lowest he was quite prepared to play the part of a sneak against the plaintiff in revenge for her suing him in an action which was ultimately successful, and indeed the Company's counsel quite rightly stated that his evidence was unworthy of credit without corroboration. Called as he was to corroborate Dr. Shenoy,the latter's evidence was no corroboration of Kochakan. Accordingly, the only element of corroboration consisted in the fact that certain of the statements in the letters did refer to events which actually took place at the time they were written ; but the plaintiff's very argument was that the introduction into the letters of factually correct statements was necessary to support the claim that they were genuine. The witness Mamoo, the brother of the plaintiff, was confident that the assured never signed his name on private letters in English and a glance at the actual signatures on these letters is sufficient to show that there is nothing characteristic about these signatures which would enable a person like Kochakan to identify them. In the face of the contradiction by Mamoo and in view of the suspicion with which Kochakan's evidence had necessarily to be regarded, the Company could not, without calling some expert witness, have reasonably expected the learned Judge to hold that the letters were actually written by the assured.

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The considerations to which I have referred lead me to conclude that the learned District Judge rightly declined to hold in favour of the Company upon the alleged state of health of the assured at the time of the proposal and his alleged admissions as to ill-health and treatment in 1947. These same considerations would at the lowest prevent me from holding as a Judge of appeal that the District Judge should necessarily have found in favour of the Company on those matters.

There is nothing which I can usefully add to what my brother Gratiaen has written upon the important questions of law raised by the appellant. I respectfully agree with his judgment on those questions and with the order he proposes.

Appeal allowed.

1955 *Present :* **Sansoni, J.**

KUMATHERIS APPUHAMY, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 514—M. C. Panadure, 38,380

Income Tax Ordinance—Proceedings for recovery of tax—Section 80 (1)—Applicability to an insolvent assessee.

An assessee who is insolvent and has been adjudicated accordingly is not entitled to claim that no proceedings can be taken against him for recovery of tax under section 80 (1) of the Income Tax Ordinance.

APPEAL, with application in revision, from an order of the Magistrate's Court, Panadure.

H. Wanigatunga, with *J. E. R. Candappa*, for the accused appellant.

Arthur Keuneman, Crown Counsel, for the respondent.

Cur. adv. vult.

August 31, 1955. SANSONI, J.—

This is an appeal by an assessee who has been sentenced to six months simple imprisonment for failing to pay a sum of Rs. 28,688·02 due as income tax. As no appeal lies from an order made by a Magistrate under S. 80 (1) of the Income Tax Ordinance, an application for revision was also filed. It has been urged for the assessee that he had been adjudicated an insolvent on 15th December 1954, and therefore the Magistrate should not have made the order in question. The argument was that as all the assets of the insolvent were under sequestration and

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had vested in the assignee, the assessee was therefore not in a position to pay the tax. I was also referred to S. 78 of the Ordinance which provides that tax in default shall be a first charge upon all the assets of a defaulter, subject to certain provisos, and it was submitted that in view of these provisions the Commissioner of Income Tax should have proved his claim in the insolvency proceedings. In such an event he would be entitled to recover the tax due for one complete year of assessment as a first charge on the assets, while the remaining arrears of tax will rank with the other unsecured debts of the insolvent.

I have not been referred to any authority which suggests that an assessee who is an insolvent and has been adjudicated accordingly is exempt from action under S. 80 (1) of the Ordinance. The procedure laid down in that section may be taken by the Commissioner whenever he is of opinion that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale. In the case of an insolvent assessee it is reasonably certain that recovery of tax in default would be impracticable : in view, therefore, of the fact that the Section vests a discretion in the Commissioner, I can see no objection to such a course as is prescribed in S. 80 (1) being taken by him where the assessee is insolvent.

It has been decided by Maartensz, A. J., in *Commissioner of Income Tax v. de Vos* [1] that the Commissioner is not bound to follow any particular method of recovering the tax from the defaulter. S. 79 (2) provides a method of recovering tax by seizure and sale of movable property ; S. 79 (3) provides a method of recovering tax by seizure and sale of movable and immovable property ; S. 81 provides a method of recovering tax out of monies lying in the hands of third parties for the use of the defaulter. But S. 83 makes it quite clear that where the Commissioner is of opinion that action under any of these provisions has failed or is likely to fail to secure payment of the whole of the tax due from any person, he may proceed to recover any sum remaining unpaid by any other means. The discretion is his and he may exercise it as he chooses. It follows that the Commissioner need not go against the property of the defaulter before he takes action under S. 80 (1), and that is what he has done in this case. The application of S. 78 only arises in a case where the Commissioner seeks to recover the tax out of the assets of the defaulter, but that is not the case here.

It may be unfortunate that the insolvent is prevented from paying the tax in default by reason of his assets having vested in the assignee, but he is in no worse position than any other person in insolvent circumstances upon whom a fine has been imposed by a Magistrate. The appeal is therefore dismissed and the application for revision is refused.

Appeal dismissed.
Application refused.

[1] (1933) 35 N. L. R. 349.

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1955 *Present :* **Rose, C.J.**

NALLATHAMBY, *et al.*, Appellants, *and* SOMASUNDERAM-KURUKKAL, Respondent

S. C. 126—C. R. Vavuniya, 10,558

Jurisdiction—Action for redemption of otty mortgage—Court where such action may be instituted—Courts Ordinance (Cap. 6), s. 75—Civil Procedure Code, s. 9 (b).

An action for the redemption of an otty mortgage and for the release of the mortgaged land from the mortgage is a dispute affecting an interest in land and can, therefore, be brought in the court within the local limits of whose jurisdiction the land in question is situate.

APPEAL from a judgment of the Court of Requests, Vavuniya.

C. Suntheralingam, with *T. Arulananthan*, for the plaintiffs appellants

S. Sharvananda, for the defendant respondent.

Cur. adv. vult.

February 15, 1955. ROSE, C.J.—

This matter raises a question of jurisdiction. The plaintiffs-appellants brought this action in the Court of Requests of Vavuniya for the redemption of an otty mortgage and for the release of the mortgaged lands from the mortgage. It is common ground that the action could only properly have been brought in that court on the ground that the lands in respect of which the action is brought lie within the local limits of the jurisdiction of the Vavuniya court.

There is no doubt that the lands in respect of which the mortgage was entered into do lie within the jurisdiction of the court but the learned Commissioner held that the action was not brought " in respect of " the lands within the meaning of section 9(*b*) of the Civil Procedure Code and that no " interest in or right to the possession " of the lands in question was in dispute within the meaning of Section 75 of the Courts Ordinance.

The learned Commissioner appears to have relied in part upon two cases reported in *2 Weerakoon*. In the first case, at page 68, the action was brought to compel the lessor to accept rent and the learned judge very naturally held that the action was not brought in respect of any land at all.

The second case, at page 64, although it was a possessory action, raised only the question as to the method by which the action was to be valued. In that case too, therefore, no interest in the land was in dispute.

It seems to me therefore that neither of these cases are of assistance in deciding the present point.

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Learned counsel for the appellants did not press in appeal the point that this is a hypothecary action within the meaning of Section 75 of the Courts Ordinance but he contended that it is an action in which both an interest in the land is in dispute as also the right to the possession of the mortgaged lands. The plaintiffs-appellants pray not only that the defendant-respondent should accept the money brought into court to settle the debt but also that the mortgaged lands should be released from the mortgage. It seems to me that it would be wrong to hold that a mortgage—usufructuary or otherwise—cannot be said to be an interest in land. The matter may not be free from difficulty but it seems to me that a dispute as to whether this particular usufructuary mortgage should be removed and the lands released from the encumbrance is a dispute affecting an interest in the lands in question. Moreover, so long as a mortgage is in existence the defendant has a right to possess the lands and in that sense the dispute may also be said to be one relating to the possession of the mortgaged lands.

For these reasons I am of opinion that the action was properly instituted in the Court of Requests of Vavuniya. The appeal is therefore allowed and the matter remitted to the learned Commissioner to determine according to law. The appellants will have the costs of this appeal and of the proceedings hereto completed in the lower court in any event.

Appeal allowed.

1955 *Present :* **Fernando, J.**

J. H. DAVID SILVA, Appellant, *and* D. R. O., KOLONNA KORALE, Respondent

S. C. 716 of 1955—M. C. Rakwana, 46,051

Forest Ordinance—Section 20—Prosecution for unlawfully clearing Crown land—Quantum of evidence.

The appellant was charged with unlawfully clearing about two acres of Crown land described as " Lot 18 in Village Plan 758 ", in breach of section 20 of the Forest Ordinance and the rules framed thereunder. It appeared from the evidence that the two acres in question were surrounded on all sides by land not occupied by the Crown. The only evidence alleging that the land in question was Lot 18 and Crown Forest was the bare statement of the Village Headman. The Plan itself was not produced with technical evidence to show that the two acres in question constituted Lot 18 in the Plan.

Held, that the evidence was insufficient to establish that the land in question was Crown land.

APPEAL from a judgment of the Magistrate's Court, Rakwana.

Sir Lalita Rajapakse, Q.C., with *S. H. Mohamed*, for the accused-appellant.

Shiva Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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October 19, 1955. FERNANDO, J.—

The appellant was charged with unlawfully clearing " about two acres of a land called ' Galbokuoya Reservation ' more particularly described as Lot 18 in Village Plan 758 which is a land at the disposal of the Crown ", in breach of section 20 of the Forest Ordinance and the rules framed thereunder. The only evidence in proof of the allegation that the land is " land at the disposal of the Crown " was that of the Village Headman who stated that the land is named " Galbokuoya ", that it is described as Lot 18 in Plan 758 and that it is a Crown Forest. It appeared from his evidence that the two acres which had been cleared were bounded on the North and South respectively by Village Committee roads and on the East by a land purchased by the accused and on the West by some old fields, a description which indicates that the two acres in question are surrounded on all sides by land not occupied by the Crown.

It was elicited in cross-examination from the same witness that at an inquiry by a Settlement Officer in 1952 the accused claimed the two acres and that the officer kept the deeds which the accused produced. Later however the witness said that no such claim was made. The defence called no evidence and the appellant was convicted of the offence charged. In my opinion the evidence was insufficient to establish that the land in question is Crown Land. The statement in the charge that the land in question is described as Lot 18 in Village Plan 758 must presumably have been made on the basis that Lot 18 is known to be, and would be shown by the Plan to be, land at the disposal of the Crown. If the Plan itself had been produced together with technical evidence to establish that the two acres in question constitute Lot 18 in the Plan, then there would be no doubt as to the identity of the land. But all we have here is a bare statement by the Headman that the land in question is Lot 18 and is Crown Forest. Moreover there was the evidence by the Headman that the accused had claimed this land before the Settlement Officer, even though the Headman subsequently tried to withdraw that admission. On the Headman's own description of the land it is more than likely that the claim made before the Settlement Officer must have related to the two acres in question. According to the Headman himself no order appears yet to have been made upon that claim. Hence, at the least, the accused's occupation is referable to a *bona fide* claim of right.

For these reasons I would set aside the conviction and acquit the accused.

Appeal allowed.

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[In the Court of Criminal Appeal]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Weerasooriya, J.**

REGINA *v.* S. PINHAMY

Appeal No. 102 of 1955, with Application No. 157

S. C. 16—M. C. Puttalam, 3,120

Evidence—Identification of a dead person by his skull—Medical witness—Expert only in medical matters—Evidence Ordinance, s. 45.

In a trial for murder the Judicial Medical Officer of Colombo expressed the opinion that the skull produced in the case was that of the deceased. He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the head of the deceased on a photograph of his skull. There was, however, no evidence that the medical witness was an expert on identification by superimposition of photographs.

Held, that it was not established that identification of dead persons by superimposition of photographs was a science or art within the meaning of section 45 of the Evidence Ordinance. The mere reference to the medical witness as " Judicial Medical Officer, Colombo " was insufficient for the purpose of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fell within the functions of a medical officer.

Witness—Right of a party to recall him—Discretion of Court—Evidence Ordinance s. 138 (4).

The Court is not bound to permit a witness to be recalled whenever an application is made in that behalf under section 138 (4) of the Evidence Ordinance, unless the party making the application gives satisfactory reasons.

Jury—Communication between juror and witness—Duty of Court to discharge jury—Oath of separation—Effect thereof.

A Judge would not be justified in discharging the Jury merely because a witness was seen conversing with a Juror, unless the conversation was improper and it is necessary in the interests of justice to discharge the Jury.

On the third day of trial it was alleged by the accused person's pleader that the medical witness was seen talking to a Juror during the luncheon adjournment on the previous day. The allegation was made in the Judge's Chambers without any application for a retrial after investigation. At the time of the alleged conversation the witness had finished his evidence. On the sixth date of trial application was made to discharge the Jury.

Held, that there was no valid ground for discharging the Jury.

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Evidence—Opinions of experts expressed in text books—When Counsel may read them during address to the Jury or cross-examine an expert witness on them—Evidence Ordinance, ss. 46, 57, 60.

The proviso to section 60 of the Evidence Ordinance does not enable Counsel to read to the Jury extracts from treatises on medical jurisprudence which were not properly admitted in evidence in the course of the trial and before Counsel's address. Counsel is not entitled to read to the Jury the opinion of an expert expressed in any treatise commonly offered for sale unless, where the expert himself is dead or cannot be called as a witness, such opinion has been proved by the production of the treatise. *R. v. Baba* (6 N. L. R. 35), followed. *Quaere*, whether the Court could be called upon to take judicial notice of such opinion on application made under section 57 of the Evidence Ordinance.

Although, under section 46 of the Evidence Ordinance, Counsel may cross-examine an expert witness by reading to him extracts from a treatise written by an expert, the witness may be asked only questions which he is competent and qualified to answer.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *R. A. Kannangara*, *A. S. Vanigasooriar*, *Daya Perera*, and *N. C. J. Rustomjee* (Assigned), for the Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 12, 1955. BASNAYAKE, A.C.J.—

At the conclusion of this appeal we did not announce our decision as we wished to deliver our judgment in writing in view of the importance of some of the points raised by learned Counsel for the appellant.

In regard to the first ground of appeal we do not think that the verdict is unreasonable and cannot be supported by the evidence in the case. There is overwhelming evidence which, if believed, points conclusively to the prisoner as the man who murdered the deceased Katpahan Rasiah *alias* Arunasalam. While learned Counsel for the appellant did not dispute that the evidence, if believed, had this effect, he argued strenuously that the witnesses D. M. K. Punchirala and Kapuru Banda Dissanayake were entirely untrustworthy and no part of their testimony should have been acted upon. The learned Commissioner has, however, placed before the Jury all the matters that should be considered in weighing their testimony. The infirmities in the evidence of those witnesses are not

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of such character as to justify us in holding that a verdict based on such evidence is unreasonable. The weight to be attached to the testimony of a witness is a matter for the Jury.

A number of points have been taken on the ground of misdirection, but it is not necessary to discuss them all as the learned Commissioner has dealt with the case very fairly in his charge to the Jury. In certain respects the learned Commissioner's charge is even unduly favourable to the prisoner.

Learned Counsel dwelt at great length on the evidence of the Judicial Medical Officer (hereinafter referred to as the medical witness), who expressed the opinion that the skull produced in the case was that of the deceased. He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the head of the deceased on a photograph of his skull. The photographic work of enlargement and superimposition was done by a C. I. D. official photographer of some experience working under the instructions of the medical witness. Under cross-examination the medical witness stated that there was no doubt in his mind that the skull was the skull of the deceased, but on further cross-examination he admitted that in superimposition of a photograph on a skull a lot depends on the skill of the photographer and that there might be cases of individuals who have very much similar skulls. He also admitted in the course of cross-examination that that was the first and only case of identification by superimposition he had done. It was not so reliable as identification by fingerprints. He nevertheless maintained that in this instance he had no doubt that the skull belonged to the deceased on his examination of the superimposition.

Learned Counsel contended that that opinion was not relevant as there was no evidence that the medical witness was an expert on identification by superimposition of photographs. Under section 45 of the Evidence Ordinance opinions of persons specially skilled in science, or art, are relevant when the Court has to form an opinion as to science, or art. It has not been established that there is a science or art of identification of dead persons by superimposition of photographs. Neither the photographer nor the medical witness gave a detailed account of how the superimposition was done, nor did the medical witness give any cogent reasons for his assertion that the skull was without doubt the skull of the deceased. When an expert is called to give evidence the side calling the witness should elicit from him his qualifications and experience in order to establish to the satisfaction of the Court that he is a person who is specially skilled in the science on which he is called to give expert testimony. The record shows the qualifications of neither the medical witness, nor the C. I. D. photographer, both of whom appear to have been called as experts on the matter of superimposition. The mere reference to the medical witness as "J. M. O., Colombo", is insufficient for the purpose of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fall within the functions of a medical practitioner.

The medical witness's evidence alone is not conclusive of the identity of the deceased. It can only be taken as an item in the chain of evidence

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that was led to establish his identity. It is as such that the learned Judge directed the Jury to regard it. He pointed out that the identification of deceased persons by the superimposition of photographs was not a recognised science; that the opinion based on such examination was not infallible; that even if the superimposition was perfectly accurate there can be no "absolute certainty" that the identity was established; and that there was a possibility of the existence of other skulls which would fit into the picture. The effect of all this was to remove from the mind of the Jury any impression that the dogmatic assertion of the medical witness might have created. In view of the caution with which the Jury has been asked to treat the evidence provided by the superimposition of the photograph of the head of the deceased on his skull, we do not think that the learned Counsel's submission that the Jury has been misdirected on the point can be sustained.

A point was also made of the fact that the learned Commissioner refused to allow the C. I. D. photographer to be recalled. This witness gave evidence on the second date of the trial, and the application was made on the seventh date of the trial, which lasted ten days, after the medical witness had been recalled at the instance of the defence and cross-examined at great length. The learned Counsel who made the application for the recall of the C. I. D. photographer did not give reasons or explain why he wanted him recalled or what evidence he sought to get out of him at that stage. It was contended that the learned Judge was bound to allow such an application under section 138 (4) of the Evidence Ordinance which enables the Court to permit a witness to be recalled either for further examination-in-chief or for further cross-examination.

There is nothing in the language of the section which imposes on the trial Judge an obligation to recall a witness on the mere asking of the prosecution or the defence, nor are we able to agree with learned Counsel that the Court is bound to permit a witness to be recalled whenever an application is made in that behalf. That section vests a discretion in the Court and that discretion is one that must be exercised on the material before it. A party asking for the recall of the witness must indicate, to the trial Judge, why he wants the witness recalled, and satisfy him that it is necessary for a just decision of the case. We are not prepared to say that the learned Commissioner has improperly exercised his discretion in this case.

It was urged on behalf of the appellant that the medical witness was seen talking to a Juror during the luncheon adjournment on the second day of trial and that the learned Commissioner was wrong in refusing to discharge the Jury when it was brought to his notice. At the time the medical witness was alleged to have conversed with the Juror he had finished his evidence and had not been informed, and had no reason to think, that he would be recalled. In fact the application was made on the sixth date of trial and six days after the alleged conversation. The official record in regard to this matter reads as follows:—

"Mr. Balasuriya brings to my notice that he saw Dr. P. S. Gunawardena, J. M. O., Colombo, who is a witness in this case, speaking to a

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juror, Mr. P. H. A. Fernando, during the luncheon interval yesterday. He requests me to make a note of this in Chambers. He does not want me to inquire into this matter in open Court as he says this might prejudice the prisoner more.

"I indicate to him that I am unable to entertain any application for a retrial without an investigation into the charge that he is making and satisfying myself that the conversation was improper and was likely to prejudice a fair trial in this case. Mr. Balasuriya states that he does not desire to have an investigation into this matter and therefore he is not asking for a retrial".

The appellant's pleader tendered no affidavits in support of his allegation. Even if an affidavit had been tendered we do not think that the above material disclosed any valid ground for discharging the Jury. A Judge would not be justified in discharging the Jury merely because a witness is seen conversing with a Juror. There would be no justification whatever for such a course when the witness happens, as in this instance, to be a witness who has no interest in the case. The discharge of the Jury is a matter within the discretion of the Judge. That discretion has to be exercised judicially on reliable material placed before him. A Jury should not be discharged unless the Judge is satisfied that it is necessary to do so in the interests of justice.

When such an allegation is made an investigation as to the impropriety of such conversation must be held if the Jury is to be discharged. For, if a Judge were to discharge a Jury, without inquiry, upon a mere allegation that the Juror was seen talking to a witness he would be doing grave harm both to the witness and the Juror. Jurors are administered an oath of separation whenever the Court adjourns. By that oath Jurors undertake not to hold communication with any person other than a fellow Juror upon the subject of the trial during their separation.

In view of that oath the need for the Judge satisfying himself that there has been in fact an improper conversation between Juror and witness is greater. For a discharge without inquiry may cast on the Juror an undeserved reflection that he had acted contrary to the terms of his oath. A Juror should be free to talk to anyone on matters unconnected with the subject to the trial. It would be an interference with the rights of Jurors if they were to be totally debarred from conversing with a witness under any circumstances. Nevertheless, prudence demands that a Juror should avoid conversing in public with a witness during the trial. Similarly a witness should avoid conversation with a Juror in public however familiar and friendly he may be with him in private life. The importance attached to keeping the Jury beyond any kind of influence can be realised from the fact that in the early days in England Jurors were kept together from the commencement of a trial till its conclusion. But to-day we are satisfied with the safeguard of an oath of separation. The greater is the need therefore not only to ensure that the oath is observed strictly but also to make it appear that it is so observed.

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What we have said above should not be taken as an invitation to Jurors to throw discretion to the winds and converse freely in public with witnesses on subjects other than the trial.

Jurors and witnesses should be mindful of the fact that the uninformed and uninitiated onlooker is likely to draw wrong inferences from a conversation between a witness and a Juror. For that reason Jurors should be extremely circumspect.

Learned Crown Counsel drew our attention to the case of *Rex v. Twiss* [1] where it was sought to have a Jury discharged on the ground that certain of the witnesses for the Crown were seen conversing with some of the Jurors at a cafe during the luncheon adjournment. Darling, J., in refusing the application on the ground that there was nothing in the affidavits to show that the conversation was on the subject of the trial, said—

> "It is necessary for us to consider whether what the juryman did was of such a character as to lead us to think that there may have been an injustice done to the appellant in this case. It is not enough to say that he spoke to somebody ; it is not enough to say that the person to whom he spoke was a witness in the case, although that makes it necessary to consider the matter more carefully ".

Learned Counsel for the appellant relied on the case of *Rex v. Green* [2], where a conviction was quashed on the ground that a written communication, which had not been made known to the parties, had passed between the Jury and the recorder while the Jury were in their room considering the verdict, but that decision was made on the ground that it had been said by the Divisional Court more than once that any communication between the Jury and the Presiding Judge must be read out in Court, so that both parties, the prosecution and the defence, may know what the Jury are asking and what is the Judge's answer. That decision has no application to the present case.

It was distinguished in the subsequent case of *Rex v. Furlong* [3] in which the Court, while confirming that the proper practice is that any communication from the Jury after they have retired to consider their verdict, and the Judge's answer thereto, should be read out in open Court before the Jury have returned their verdict and that the Judge has a discretion whether he will allow Counsel or the prisoner if undefended to address him on the Jury's communication, refused to quash the conviction on the ground that the communication between the Judge and the Jury after the Jury had retired was not read out in open Court before the verdict. This is what happened in that case. In the course of the deliberations, the Jury desired to ask a question of the learned Judge. The Judge at that time had gone to his lodgings which were very close to the Court—just across the road. He directed his clerk to go into Court and ask the

[1] *13 C. A. R. 177.*

[2] *1950 (1) All E. R. 38 and 34 C. A. R. 33.*

[3] *34 C. A. R. 79.*

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Jury to put their question into writing, and the Jury put their question into writing and handed it to the bailiff. The Judge came over to the Court immediately after he had written his answer to the question and the answer was taken back to the Jury. The Judge intended to announce in Court at once what the question and answer were, but the Jury came back to Court before he had the opportunity of doing so, and he accepted their verdict and read out the communication thereafter.

In the course of the argument in that case a point was made that the Judge's clerk entered the Jury room. It was found that he did not, but the Court held that even if he did it would not have been in itself an irregularity because the Court had always the power to allow somebody to make a communication to the Jury if it is a communication proper to be made and if it is made by the direction of the Court.

In the subsequent case of *Fromhold v. Fromhold* [1], which is a civil case, it was held that there is no difference in practice between civil and criminal cases in regard to communication between Judge and Jury, and that it was the duty of the Judge to disclose the contents of any communication from the Jury. Although the proceedings were quashed and a retrial was ordered, the failure to make known to the parties the communication from the Jury was not the ground for the order.

In the case of *Straffen* [2], in the course of the trial it was brought to the notice of the Judge that a Juryman had a conversation about the case with a person other than a fellow Juror at the Southsea Liberal Club. In that case the Jury was discharged on material which had been placed before the trial Judge, and after they were discharged an investigation was held in open Court at which the Jurors were given an opportunity of being represented if they wished to do so.

Learned Counsel also made a point of the fact that the appellant's pleader was not permitted to refer in his address to " medical textbooks " and to " the Ruxton Case ", and that the accused was prejudiced thereby. There is no record of what exactly the pleader for the defence wanted to read to the Jury and of the ruling given by the learned Commissioner. Learned Counsel was unable to cite any authority in support of the proposition that Counsel is entitled to read to the Jury extracts from treatises on medical jurisprudence which have not been properly admitted in evidence. We are unable to agree with learned Counsel's submission that it was permissible under the proviso to section 60 of the Evidence Ordinance to read to the Jury the opinions of experts which had not been admitted in evidence. The only reported decision on the point is clearly against him [3]. In that case Counsel for the defence sought to read to the Jury passages from Taylor's Medical Jurisprudence containing opinions expressed there in relation to homicidal mania. The trial Judge on objection taken by the Crown refused to allow the defence Counsel to do so. After the trial the presiding Judge submitted for the opinion of two Judges of this Court the question, whether he was right in refusing to allow Counsel to read to the Jury opinions from a

[1] *1952 W. N. 278.*

[2] *London Times—23/7/52.*

[3] *Rex v. Baba (6 N. L. R. 35).*

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book which (1) had not proved to be what learned Counsel asserted it was ; (2) nor was found to contain the opinion of an expert on homicidal mania ; (3) nor had been referred to in any way before, so that, if it did contain opinions which were applicable to the facts of the case under trial, there had been no opportunity for the Counsel for the Crown to test or discuss such opinions.

The reference was heard before Moncrieff, A.C.J., and Wendt, J. It was held that Counsel was not entitled to read to the Jury extracts from any scientific treatise unless such extract had been introduced by way of evidence in the course of the trial and before Counsel's address. We were invited by Counsel to review and overrule this decision as, he submitted, it was wrong. We are unable to uphold the submission of Counsel and we wish to state that we are in entire accord with the ruling that Counsel or pleader is not entitled to read to the Jury the opinion of an expert expressed in any treatise commonly offered for sale unless such opinion has been proved by the production of the treatise in a case where the expert himself is dead or cannot be called as a witness.

Learned Counsel also complained that the appellant's pleader was not permitted to cross-examine the medical witness by reading to him extracts from a treatise entitled " The Medico-Legal Aspects of the Buck Ruxton Case ". Under section 46 of the Evidence Ordinance Counsel is entitled to show that an expert witness's opinion is inconsistent with the opinions of other experts. The learned pleader was allowed to cross-examine the medical witness on those lines. The learned Commissioner intervened only when the pleader asked the medical witness questions which he was not qualified to answer. In disallowing the first of such questions he said—

> " I disallow this question. If Professor Glaister says something which this witness is competent to answer, I will allow ".

We are unable to find in the rulings of the learned Commissioner any departure from the provisions of the Evidence Ordinance. We do not think therefore that the complaint is justified.

Learned Counsel for the appellant also referred to the last two paragraphs of section 57 of the Evidence Ordinance. Those two paragraphs read—

> " on all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference. If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so ".

It is not necessary to discuss this provision as the Court was not called upon by the appellant's pleader at any stage of the proceedings to take judicial notice of the opinions he attempted to read to the Jury.

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Another ground of appeal argued at length was that the learned Commissioner " failed to charge the Jury either adequately or properly on the bearing of police assault, duress, and influence on the case ". This ground relates to the evidence adduced by the prosecution through witnesses who in the course of the Police investigation had produced various articles which, on their testimony at the trial, had been sold, bartered or given to them by the appellant (allegedly according to the prosecution) after the deceased had been murdered. There was evidence that some of these articles formed the stock-in-trade of the deceased who was an itinerant seller of jewellery, and that the other articles too belonged to him. One witness, indeed, states under cross-examination that he had been " mercilessly " assaulted by the Police and asked " to come out with things " which he did not know. But he denied that any part of the evidence which he gave at the trial was false or that it was induced by the assault. This witness also spoke to people in the village generally having been assaulted by the Police, but when the appellant's pleader sought to enlarge on this theme the learned Commissioner intervened and cautioned the witness against speaking about matters which were not within his personal knowledge. This caution was repeated by the learned Commissioner when the village headman was questioned in cross-examination about complaints received by him from various people in the village that they had been assaulted by the Police. The view taken by the learned Commissioner seemed to have been that evidence relating to the existence of a state of fear among the inhabitants of the village where the murder had been committed and which had been brought about by assaults or reports of assaults at the hands of the Police was inadmissible as hearsay. Learned Counsel for the appellant contended, on the other hand, that such evidence was relevant and admissible as having an important bearing on the credibility of the witnesses who in those circumstances had come forward and made statements to the Police on the basis of which they were called to give evidence at the trial. We are not satisfied, however, that this evidence was sought to be elicited at the trial on the ground of relevancy urged by learned Counsel for the appellant at the hearing before us. Even otherwise, at the conclusion of the case for the prosecution there was sufficient evidence on record which if believed pointed to the fact (although it was denied by the Police officers themselves) that the Police had, in the course of their investigation, been guilty of acts of intimidation and assault. The learned Commissioner did not, in his charge to the Jury, invite them to disregard this evidence. On the contrary he specifically asked them to consider whether the witnesses concerned had given false evidence as a result of fear induced by assaults or threats of assault. We are of the opinion, therefore, that this ground fails.

For the above reasons the appellant is not entitled to succeed and his application is refused and the appeal is dismissed.

Appeal dismissed.

Application refused.

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1955 *Present :* **Gratiaen, J., and Swan, J.**

P. M. WALTER LEO *et al.*, Petitioners, *and* THE LAND COMMISSIONER, Respondent.

S. C. 141—Application for a Writ of Certiorari to quash the decision made by the Land Commissioner under L. R. O. Application No. 3076.

Certiorari—"*Judicial act*"—*Excess of jurisdiction—Burden of proof—Land Redemption Ordinance, No. 61 of 1942 (as amended by Ordinance No. 62 of 1947)—Sections 3 (1) and (4), 8—*"*If the Land Commissioner is satisfied*"—"*Agricultural land*".

If an inferior tribunal making a judicial decision has to be "satisfied" that a certain state of facts exists before adopting a permitted course of action that state of facts must *in fact* exist, and the burden is on the tribunal, whose jurisdiction has been challenged, to prove the facts which give it jurisdiction. If upon the facts the excess of jurisdiction is manifest, or if the material placed before the superior Court is plainly insufficient to justify a conclusion that the limited jurisdiction has not been exceeded, *certiorari* will lie.

A writ of *certiorari* is available against the Land Commissioner if, purporting to act under the Land Redemption Ordinance, he orders the compulsory acquisition of property that is not "agricultural land" within the meaning of sections 3 (1) and 8 of that Ordinance.

The mere existence of coconut trees and plantain bushes on residential property does not automatically convert it into "agricultural land" within the meaning of the Land Redemption Ordinance.

Bandiya v. The Land Commissioner (1950) 52 N. L. R. 95, not followed.

APPLICATION for a writ of *certiorari* on the Land Commissioner.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *S. P. M. Rajendram*, for the petitioners.

Walter Jayawardene, with *H. L. de Silva*, Crown Counsel, for the respondent.

Cur. adv. vult.

November 25, 1955. GRATIAEN, J.—

This is an application for a mandate in the nature of a writ of *certiorari* quashing an order dated 9th January 1953 made by the Land Commissioner for the acquisition of a land, together with the buildings standing on it, under the Land Redemption Ordinance No. 61 of 1942 (as amended by Ordinance No. 62 of 1947). The petitioners are the owners of the property ($2\frac{1}{2}$ acres in extent), and the purported acquisition is resisted on the fundamental ground that it is not "agricultural land" within the meaning of the Ordinance.

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The first question which arises is whether *certiorari* can ever lie in cases of this kind. This depends on the validity of Mr. Walter Jayawardene's submission that the Commissioner's functions under the Ordinance are purely administrative in character. The Commissioner is admittedly empowered " to determine questions affecting the rights of subjects " but it is denied that in the process of determining those questions he is under " a duty to act judicially " ; accordingly, (so the argument proceeds) this Court cannot control his administrative acts by way of *certiorari* or prohibition.

The Land Redemption Ordinance certainly empowers the Commissioner to make decisions which interfere with rights of private property, resulting in the owner being divested compulsorily of his title. The initial test of amenability to *certiorari* is therefore satisfied. *R v. The Electricity Commissioners* [1]. The question is whether the exercise of administrative powers resulting in an order for acquisition does involve, at least at the preliminary stages, the performance of a judicial function. Let us therefore examine the process by which the Commissioner's ultimate decision is reached.

The first limitation placed on the Commissioner's statutory powers is that no property other than " agricultural land ", as defined in section 8 of the Ordinance, is liable to be acquired. That is to say, the Commissioner cannot take over on behalf of the Crown any property which, at the time of the acquisition, is not " used or capable of being used wholly or mainly for the purpose of agriculture . . . " (I have omitted the other words of definition as they have no bearing on the present case).

A second limitation is imposed by section 3 (1) (as amended). The Commissioner must be " satisfied " that the " agricultural land " sought to be acquired had been :

either (*a*) " sold in execution of a mortgage decree whether or not that land was subject to the mortgage enforced by the decree ;

or (*b*) " transferred by its owner or his executors or administrators to any other person, or to the heirs, executors, or administrators of any other person in satisfaction or part satisfaction of a debt which was due from that owner or his predecessor in title to that person and which was secured by a mortgage of that land subsisting immediately prior to the transfer ;

or (*c*) " transferred by its owner or his executors or administrators to any other person at the request of a mortgagee of that land, in satisfaction or part satisfaction of a debt which was due from that owner or the predecessor in title to that mortgagee and which was secured by a mortgage of that land subsisting immediately prior to the transfer. "

(*N.B.*—There follows a provision exempting " undivided shares " unless they had been converted subsequently into divided allotments.)

[1] (1924) 1 K.B. 171 at 204.

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It is only after the Commissioner has satisfied himself that any " agricultural land " answers one or other of the descriptions specified in section 3 (1) that he is empowered to decide whether such land " should or should not be acquired ". Section 3 (4) declares that, " subject to any regulation made in that behalf ", the last of these vital questions " shall be determined by (him) in the exercise of his individual judgment, and every such determination shall be final. " One observes that, by way of contrast, no statutory sanctity attaches to his preliminary decision that the property is of a kind which he has authority to acquire.

It is apparent from this analysis that the Commissioner's final decision under section 3 (4) is purely administrative in character, and does not involve the exercise of judicial or even " quasi-judicial " functions. He is guided at that stage solely by considerations of policy and expediency and by his " individual judgment ", so that the Courts have no power to interfere with that discretion by *certiorari*. This has been made clear by the House of Lords in *Franklin v. The Minister of Town and Country Planning* [1], and by the Privy Council in a recent case from Ceylon. *Nakkuda Ali's case* [2].

The Commissioner's immunity from *certiorari* in respect of that part of his statutory powers does not, however, conclude the question before us. The notable judgment of Parker J. in *R v. Manchester Legal Aid Committee* [3] establishes that the writ does lie in cases where a person vested with statutory authority to determine " questions affecting the rights of subjects " was under " *a duty to act judicially in the course of reaching a final decision which is itself purely administrative* ". The preliminary issues on which the Commissioner must satisfy himself under section 3 (1) have to be decided " solely on the facts of the particular case, solely on the evidence before (him) and apart from any extraneous considerations. In other words, (he) must act judicially, not judiciously." (page 431). Parker J. has also explained, by reference to the earlier authorities, that the judicial process, when invoked for the purpose of reaching a consequential administrative decision, does not necessarily require that there should even be a *lis* (in the strict sense of the term) or a " duty to hear two sides ". In some contexts the tribunal has authority to act only on its own knowledge and information ; in others it may act *ex parte*. The true test is whether, as Sir Hartley Shawcross argued, (see page 422), the tribunal must " apply a legal mind " in reaching a decision " based solely on the facts of the particular case. "

One has only to examine the provisions of section 3 (1) (*a*), (*b*) and (*c*) to appreciate that the issue whether any " agricultural land " is in fact qualified to be made the subject of an order for acquisition can never be answered correctly except by application of the judicial process, and without regard to questions of administrative policy or expediency. Sometimes the problem is simple enough, but on other occasions its solution may present formidable difficulties even to persons trained in the law. Consider, for instance, the question under section 3 (1) (*b*) which

[1] *(1948) A. C. 87.*
[2] *(1950) 51 N. L. R. 457, also reported in (1951) A. C. 66.*
[3] *(1952) 2 K. B. 413.*

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arose for decision in *Perera v. Unantenne* [1] and the ever-recurring issue as to whether a purported conveyance by way of sale constitutes in truth a mortgage or a trust. *Sethuwa v. Ukku* [2]. I am perfectly satisfied that, at the preliminary stages of the proceedings under the Land Redemption Ordinance, the Commissioner's functions (so far from being purely administrative) are exclusively of a judicial character. Whenever he makes a wrong decision under section 3 (1) with a view to making a consequential order under section 3 (4) he oversteps the limits of his statutory jurisdiction.

Mr. Walter Jayawardene quite properly invited us to consider whether a decision under section 3 (1) can be quashed by *certiorari* if the Commissioner himself was " satisfied " (even erroneously) that the property fell within one of the descriptions specified in paragraph (*a*), (*b*) or (*c*) of section 3. I am aware that Gunasekara J., sitting alone, was inclined to take this view in *Bandiya v. The Land Commissioner* [3], but, with respect, he could not have had the benefit of as complete an argument as we have enjoyed in the present case. As Lord Radcliffe remarked in *Nakkuda Ali's case* (supra, at page 492), " it would be a very unfortunate thing if the decision of *Liversidge's case* [4] came to be regarded as laying down any general rule as to the construction of such phrases ." Indeed, Lord Wright conceded in *Liversidge's case* that, if a person must be " satisfied " on any point (even for the purposes of an administrative decision) the word at least means " reasonably satisfied ", and " cannot import an arbitrary or irrational state of being satisfied. " *A fortiori*, if an inferior tribunal making a judicial decision has to be " satisfied " that a certain state of facts exists before adopting a permitted course of action, that state of facts must *in fact* exist. The objective test is especially necessary in a context where a public officer (not required to possess a legal training) purports to give a decision which, through misdirection, would defeat the intention of the legislature by extending the categories of private property liable to compulsory acquisition.

The petitioners do not challenge the Commissioner's decision that the property sought to be acquired had at an earlier stage been purchased by their vendors " in execution of a mortgage decree " within the meaning of section 3 (1) (*a*). But they protest *in limine* that, at the time of the purported acquisition, the property was not " agricultural land " as defined in section 8 ; in other words, an essential condition precedent to the Commissioner's power to assume jurisdiction under section 3 (1) does not exist.

The scheme of the Ordinance has already been explained : (1) a certain state of facts (namely, the " agricultural " character of the land) must exist before (2) the Commissioner can enter upon his jurisdiction to decide whether such land falls within one of the alternative categories so as to qualify it for acquisition. Not until then is he empowered (3) to decide that the land so qualified ought to be acquired. If conditions (1) and (2) are objectively satisfied, his administrative decision at stage (3) is unassailable. But, if condition (1) does not exist, he has acted in excess

[1] (*1953*) *54 N. L. R. 457.*
[2] (*1955*) *56 N. L. R. 337.*
[3] (*1950*) *52 N. L. R. 95.*
[4] (*1942*) *A. C. 206.*

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of jurisdiction and his decision becomes amenable to *certiorari*; so also if condition (1) is satisfied, but if he has reached a wrong decision as to condition (2).

The present case is concerned only with the question whether condition (1), namely, the "agricultural" character of the land, is objectively satisfied. "No tribunal of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depends." *Banbury v. Fuller*[1]; *R v. Commissioner of Income Tax*[2]. This principle was recently reaffirmed by Lord Goddard C.J. in his principal judgment in *R v. Fulham, Hammersmith and Kensington Rent Tribunal*[3]:

> "If a certain state of facts has to exist before an inferior tribunal has jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction *but cannot give themselves jurisdiction by a wrong decision upon them*; and this Court may, by means of proceedings for *certiorari*, inquire into the correctness of the decision."

For these reasons, it is our duty to be satisfied that the property to be affected by the order for acquisition was in fact "agricultural land" at the relevant point of time.

In the *Fulham Rent Tribunal Case* (supra) Devlin J. explained that, in a situation of this kind, the burden is on the tribunal whose jurisdiction has been challenged "to prove the facts which give it jurisdiction". (page 10). The same learned Judge again emphasised in *Christopher Brown, Ltd.'s case*[4] that the the jurisdiction of "inferior tribunals of any sort", when challenged, "has to be proved affirmatively". If upon the facts, the excess of jurisdiction is manifest, or if the evidence before the superior Court is plainly insufficient to justify a conclusion that the limited jurisdiction has not been exceeded, *certiorari* will lie. On the other hand, the dispute may turn on a question of fact about which there is a conflict of evidence: in that event the Court will generally decline to interfere by way of *certiorari* leaving it open to the aggrieved party to challenge the jurisdiction of an inferior tribunal in a regular action where the issue can be more conveniently disposed of.

The Land Commissioner who made the order for acquisition on 9th January 1953 sought to justify his assumption of jurisdiction under the Ordinance by stating very baldly, in his affidavit dated 30th November 1954, that "upon careful consideration of the material before (him) *he was satisfied* that the land was agricultural land within the meaning of the Ordinance." What that material was, has not been disclosed to us; and I have already explained that the mere fact that he was "satisfied" (which is conceded) did not vest him with jurisdiction if in fact the land was not "agricultural" in character. The only other evidence relied on by the Commissioner is the affidavit of the Superintendent of an estate in Lunuwila who described the condition of the property when he visited it in April 1949—that is to say,

[1] (*1853*) *9 Ex. D. 29 at 35.*
[2] (*1888*) *21 Q. B. D. 313.*
[3] (*1951*) *2 K. B. 1 at 6.*
[4] (*1954*) *1 K. B. 8 at 13.*

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7½ months before the petitioners purchased it, and nearly 4 years before the order for acquisition was made. On that occasion the property consisted of a substantial dwelling house, a brick well, a temporary latrine, and a garden containing " 181 coconut trees of various ages and several plantain bushes."

As against this, there is the uncontradicted evidence of the petitioners that they purchased the premises on 9th December 1949 for Rs. 15,000 in order to make it their place of residence. They incurred an additional expenditure of Rs. 2,000 in improving the house and constructing a garage for their motor car, and they have lived there ever since.

Can the entire property, in its improved condition, fairly be described as " agricultural land " ? It is common knowledge that people in Ceylon who reside outside congested urban areas generally prefer the amenities of spacious grounds on which some agricultural and garden produce can be cultivated. The question is always, of course, one of degree, but it is certainly quite wrong to say that the mere existence of coconut trees and plantain bushes on a man's residential property automatically converts it into " agricultural land " within the meaning of the Land Redemption Ordinance. The extent so cultivated may well be regarded as ancillary to the main use of the property for purposes of residence. It would be straining the words of definition beyond reasonable limits to say in the present case that the petitioners use their place of residence, which is slightly over 2 acres in extent, " wholly or mainly " for the purpose of a business which is " agricultural ". An Ordinance designed to interfere so seriously with the rights of private property should, I think, receive a strict interpretation.

Can it even be said that section 8 is satisfied because the property, though mainly residential in character at the relevant date, was at least " capable of being used wholly or mainly for the purpose of agriculture " ? That again is a question of fact. In the present case, at any rate, the substantial house and its appurtenances are clearly not of the kind which would be economically appropriate for occupation by, shall we say, the watcher in charge of a small agricultural holding consisting of 181 coconut trees and some plantain bushes. The buildings cannot therefore be regarded as potentially ancillary to " agricultural land " of such modest proportions. In the result, the entire property in its present condition is beyond the reach of the Commissioner's statutory powers.

On the material placed before us, there is manifestly no evidence from which we can fairly conclude that the Land Commissioner did not exceed the limits of his jurisdiction under section 3 (1). His consequential order for the petitioners' residential property as " agricultural land " cannot therefore be allowed to stand. The order dated 9th January 1953 must be quashed, and the Commissioner must pay the costs of this application which I would fix at Rs. 525.

SWAN, J.—I agree.

Application allowed.

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1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

P. PITCHAMUTHU, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 489—Indian and Pakistani Residents (Citizenship) Appeal No. C. C. 3347

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Section 15—Right of appeal thereunder—Powers of the appellate Court.

An order made under section 14 (7) (*b*) of the Indian and Pakistani Residents (Citizenship) Act is appealable under section 15 of that Act.

In an appeal preferred under section 15 of the Indian and Pakistani Residents (Citizenship) Act the Supreme Court has no power to remit the case back to the Commissioner for further investigation.

APPEAL under section 15 of the Indian and Pakistani Residents (Citizenship) Act.

Walter Jayawardene, with *S. P. Amarasingham*, for applicant-appellant.

H. A. Wijemanne, Acting Deputy Solicitor-General, with *R. S. Wanasundera*, Crown Counsel, for respondent.

September 2, 1955. BASNAYAKE, A.C.J.—

When this appeal came up for hearing before my brother Pulle, on 6th June this year, learned Counsel for the appellant invited him to remit the case back to the Commissioner for the Registration of Indian and Pakistani Residents to enable him to adduce further evidence regarding the residence of the appellant's children.

As my brother was not satisfied that such an order could properly be made by this Court in an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (hereinafter referred to as the Act), he gave Counsel an opportunity of presenting a fuller argument on the point and ordered that the case be relisted when they were ready. The matter has now been listed in pursuance of that order.

Learned Deputy Solicitor-General who appears for the Crown has raised a preliminary objection to the appeal being heard at all. He contends that the order against which the appeal has been taken is one made under section 14 (7) (*b*) of the Act and that an appeal does not lie against such an order. He submits that an appeal lies only against an order made under section 11 or 14 (6).

It will be helpful if I were to state shortly the facts of this case before I discuss the argument of the learned Deputy Solicitor-General.

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The appellant Pitchamuthu Pitchamuthu who applied for registration as a citizen of Ceylon under the Act was given notice under section 9 (1) by the Deputy Commissioner that he had decided to refuse his application on the grounds specified in the notice, unless he showed cause to the contrary within a period of three months from the date thereof. Thereupon the appellant asked the Deputy Commissioner to fix an inquiry under section 9 (3) (*a*) so that he may show cause.

The Deputy Commissioner accordingly made order under section 9 (3) (*a*) appointing the time and the place for an inquiry. At the close of the inquiry the Deputy Commissioner made order refusing the application under section 14 (7) (*b*). The present appeal is from that order.

Section 15 which provides for an appeal to this Court reads as folows :—

" (1) An appeal against an order refusing or allowing an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant or, as the case may be, by the person who lodged any objection which has been overruled by the order.

" (2) Each appeal under this section shall be preferred within three months of the date of the order by means of a petition setting out the facts and the grounds of appeal.

" (3) The date on which an order allowing an application takes effect shall—

(*a*) where an appeal has been preferred, be the date on which the Supreme Court affirms such order or makes or directs the Commissioner to make such order ; and

(*b*) where an appeal has not been preferred, be the date next succeeding the day on which the time limit for appeals, specified in sub-section (2), expires ".

Learned Deputy Solicitor-General's argument that an appeal has been given only against an order made by the Commissioner under section 11 or section 14 (6) is one that does not commend itself to us. We are unable to read into section 15 the restriction he seeks to place on it. That section gives a right of appeal " against an order refusing or allowing an application for registration ". An order made under section 14 (7) (*b*) at the close of an inquiry held in pursuance of section 9 (3) (*a*) refusing an application is clearly within the words of section 15 and cannot be excluded from its ambit. There is nothing in the statute that restricts the application of the words in section 15 to appeals from orders refusing or allowing application for registration under section 11 or 14 (6). We therefore overruled the preliminary objection and proceeded to hear the appeal on its merits.

The appellant has not satisfied us that the Deputy Commissioner was wrong, nor has he been able to point to any provision of law under which this Court may remit an appeal back to the Commissioner for further investigation. Indeed we do not think that such a procedure is contemplated by the Act. The powers of this Court in an appeal are to be found in section 15 itself, and this Court is not entitled to exercise any powers

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outside those conferred by that section. The power to remit for further investigation is not inherent in that section and cannot be exercised unless it is expressly granted. Here there is no such express grant. Such a power is granted by section 37 of the Courts Ordinance, section 347 of the Criminal Procedure Code and section 773 of the Civil Procedure Code. But those provisions apply only to proceedings which are regulated by those enactments and do not extend to an appeal under section 15 of the Act.

When a statute creates a new jurisdiction and confers new powers for carrying out the objects of the statute and gives a right of appeal from the decisions of the tribunal so created, the powers of the appellate Court when hearing an appeal under the statute are limited to those expressly granted.

We accordingly dismiss the appeal with costs which we fix at Rs. 105.

PULLE, J.—I agree.

Appeal dismissed.

1955 *Present :* **Gratiaen, J., and Swan, J.**

A. K. SUBRAMANIAM, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 1,040—Indian and Pakistani Residents (Citizenship), No. X 3,739

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Appeal from order of Commissioner—Time limit.

The time limit for appeal under the Indian and Pakistani Residents (Citizenship) Act is three months from the date on which the order appealed from is communicated to the applicant.

APPEAL under the Indian and Pakistani Residents (Citizenship) Act.

Walter Jayawardene, for the applicant-appellant.

V. Tennekoon, Crown Counsel, for the respondent.

November 25, 1955. GRATIAEN, J.—

The applicant was refused his application for registration as a citizen of Ceylon on the ground that he admittedly owned certain property in India by inheritance. The Deputy Commissioner took the view that this was a fatal disqualification because in his opinion " the ownership of property in India is repugnant to the Ordinance and a person cannot

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get citizenship rights so long as he owns property in India." There is no such disqualification and learned Crown Counsel states that he is unable to support the order refusing the application or the ground of that refusal. Learned Crown Counsel has however brought to our notice that although the inquiry was held on 18th February, 1955, the petition of appeal is dated 6th June, 1955. The time limit allowed by the Ordinance is three months from the date of the order and that clearly means the date on which the order was communicated to the applicant. Under the Ordinance, the Deputy Commissioner is required either to make his order at the close of the inquiry or to inform the applicant of the date on which the order will be made. There is no evidence on the record as to which of these steps was taken in the present case and I observe that the typed order in the record which was signed by the Deputy Commissioner is in fact undated. There is also evidence on the record that on 16th April, 1955, the applicant wrote to the Deputy Commissioner complaining that he had not been informed of the result of the inquiry which had been held by the Deputy Commissioner on 18th February, 1955. Even then a copy of the order was not sent to the applicant until he sent the Department a sum of 72 cents to defray the cost of typing. Accordingly, we are quite unable to decide when the order was in fact communicated to the applicant for the first time and for this very reason it is impossible for us to say that the appeal was made out of time.

We allow the appeal and direct the Deputy Commissioner to take action on the footing that a *prima facie* case for registration has been made out. The applicant is entitled to his costs which we fix at Rs. 105.

SWAN, J.—I agree.

Appeal allowed.

1955 *Present :* Gunasekara, J.

SENEVIRATNE, Appellant, *and* SUBRAMANIAM, Respondent

S. C. 323—M. C. Vavuniya, 26,174

Appeal—Points of law—Certification—Form—Criminal Procedure Code, s. 340 (2) and Schedule II, Form 12.

Sentence—First offender—" Deterrent punishment ".

(i) The accused appellant had no right of appeal except on a matter of law. The petition of appeal, in which the grounds of appeal were all grounds of law, bore a certificate by a proctor in these terms :— " I certify that the points of law raised in this petition of appeal are fit matters for adjudication by the Supreme Court ".

Held, that the certificate complied sufficiently with the requirements of section 340 (2) of the Criminal Procedure Code although it did not follow the very words of the prescribed Form.

(ii) Sentence of imprisonment passed as " deterrent punishment " on a first offender altered to one of fine

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APPEAL from a judgment of the Magistrate's Court, Vavuniya.

Colvin R. de Silva, with *K. Shinya* and *H. D. Thambiah*, for the accused appellant.

M. M. Kumarakulasingham, for the respondent.

Cur. adv. vult.

April 21, 1955. GUNASEKARA, J.—

This is an appeal from a conviction on a charge of wilfully obstructing an officer of a town council in the performance of his duty, an offence punishable under section 236 of the Town Councils Ordinance, No. 3 of 1946.

The sentence passed on the appellant was one of rigorous imprisonment for one month, and therefore, in terms of section 335 of the Criminal Procedure Code, he has no right of appeal except upon a matter of law. The learned counsel for the respondent objected to the hearing of the appeal on the ground that it did not comply with the provision in section 340 (2) that where the appeal is on a matter of law " the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an advocate or proctor that such matter of law is a fit question for adjudication by the Supreme Court ". The petition contains several grounds of law and bears a certificate by a proctor in these terms :—

> " I certify that the points of law raised in this petition of appeal are fit matters for adjudication by the Supreme Court. "

It was contended for the respondent that this certificate is insufficient for the reason that it fails to specify the grounds of appeal to which it applies and is not in the prescribed form, which reads :—

> " I certify that the matters of law stated in the . . . . ground of appeal is a fit question for adjudication by the Supreme Court."

In support of his objection Mr. Kumarakulasingham cited the cases of *Bruin v. Wijesinghe* [1] and *The Additional Controller of Establishments v. Lewis* [2]. In the former case what was certified was " the matter of law in the petition of appeal ", but there were " four things stated in the petition of appeal as if they were matters of law ". It was thus not possible to distinguish the matter that was certified from the three that were not, and Schneider J. held that the certificate was so vague that it could not be regarded as satisfying the requirements of the Criminal Procedure Code. In the present case it is not difficult to identify the matters which are the subject of the certificate, for the grounds of appeal are all grounds of law and the certificate relates to all of them. In *Lewis's Case* the certificate, which relates to " the matters of law stated " in the petition, is similar to the certificate in the present case ; but it is not equally easy to ascertain which of the grounds of appeal were regarded by the proctor who signed the certificate as grounds of law, and therefore

[1] *(1927) 5 T. C. L. R. 71* [2] *(1949) 40 C. L. W. 3.*

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which of them were covered by the certificate. The result of the departure from the prescribed form in that case was that in effect there was no such certificate as is required by the Code. It is true that Basnayake J. points out that the prescribed form requires that the grounds of appeal should be stated in consecutively numbered paragraphs and that the certificate should specifically refer by its number to the ground of appeal in which the matter of law to be argued is stated ; but I do not understand him to imply that a certificate that does not follow this form to the letter is necessarily bad, even though it may state clearly what are the various matters of law that are certified. In *The Police Officer, Dondra, v. Baban*,[1] which is cited in *Lewis's Case*, the petition contained seven grounds of appeal, of which only one raised a matter of law, but the proctor certified " that the above matters of law stated in this petition are fit and proper for the consideration of the Honourable the Supreme Court ". Jayawardene A. J. pointed out that the certificate was " not regular " and that it " should refer specifically to the ground which embodies the point of law raised ", and he sent the case back for the proctor to state what the paragraphs were which contained the matters of law certified. In the present case the information could be obtained from the petition itself although the certificate did not follow the very words of the prescribed form. I therefore overruled the preliminary objection and heard the appeal.

The facts giving rise to the prosecution of the appellant are as follows :— On the 18th September 1953 the Chairman of the Town Council of Vavuniya, issued to the complainant respondent, who is the council's distraining officer, a distress warrant in the prescribed form for the recovery of certain sums shown in the schedule to the warrant as due from certain persons as arrears of rates in respect of certain premises. The appellant was one of the persons named in the schedule as defaulters and a sum of Rs. 160·30 was shown as due from him as rates for the years 1950, 1951 and 1952, and the 1st and 2nd quarters of 1953. The respondent went on the same day to the premises in question, which were occupied by the appellant, and demanded payment of the sum for the recovery of which the warrant had been issued. The appellant refused to pay and the respondent thereupon told him that he would seize his movable property. Then the village headman, who had accompanied the respondent, pointed out a chair that was in the premises as the appellant's property, and the respondent seized it. The appellant snatched the chair and said that he would not let him seize any property. The obstruction complained of consisted in this conduct.

The appeal was pressed on two grounds, one of which was that the warrant was illegal for the reason that the council had failed to notify to the appellant the decision upon an objection taken by him to the assessment of the premises, and the other was that there is no evidence that the property seized was property liable to be seized. Section 179 of the Town Councils Ordinance provides that the assessment of any immovable property for the purpose of any rate under that Ordinance shall, with the necessary modifications, be made in the manner prescribed by section 117

[1] *(1923) 25 N. L. R. 156.*

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of the Municipal Councils Ordinance (now section 235 of the Municipal Councils Ordinance, No. 29 of 1947) with respect to immovable property within municipal limits, and all the provisions of that section, together with those of section 118 (now section 242 of Ordinance No. 29 of 1947), among other sections, shall, with the necessary modifications, apply with respect to every such assessment made for the purposes of the Town Councils Ordinance. Section 235 (7) of Ordinance No. 29 of 1947 provides among other things that when any objection to an assessment is disposed of the council shall cause the decision thereon to be notified to the objector. Section 242 provides that no movable property found in any premises in respect of which any rates may be due shall be seized for any arrears of rates beyond two quarters next preceding such seizure, unless the movable property belonged to a person who was the owner or joint owner of the premises at the time the arrears beyond such two quarters accrued and became due, or unless such movable property belongs to any person who has occupied the premises when these arrears accrued and became due. The two grounds of appeal that were pressed were based on these two provisions of Ordinance No. 29 of 1947.

According to the evidence that has been accepted by the learned magistrate, notice of the assessments in respect of each of the years 1950 to 1953 was duly served on the appellant and he objected only to the assessment in respect of 1950. There is no evidence that the decision on this objection was not notified to him. The distress warrant is regular on the face of it and there is no evidence to rebut the presumption that it was validly issued. The contention that the warrant is illegal must therefore be rejected.

In the course of his argument on this point Dr. de Silva also sought to maintain that there was no proper inquiry, in the sense of an inquiry that satisfied the requirements of the law, into the appellant's objection to the assessment. But this is not one of the matters of law covered by the proctor's certificate and therefore it does not raise a question for decision in this appeal.

As regards the other ground of appeal that was argued, there was sufficient evidence, in my opinion, to prove that the chair that was seized was the appellant's property and that the appellant was in occupation of the premises when the arrears of rates beyond two quarters next preceding the seizure accrued and became due. When the respondent told the appellant that he would seize his movable property and the headman pointed out the chair for seizure and it was seized the appellant did not deny that it was his property. Nor did he say at the trial that it was not his property. Moreover, as the learned magistrate points out, it was found in premises occupied by the appellant. According to the respondent's evidence the appellant was in occupation of the premises in question throughout the period 1950 to 1953, and the respondent himself served on him all the notices of assessment in respect of those years.

I see no reason to interfere with the conviction.

The maximum punishment for the offence is a fine of Rs. 50 or imprisonment of either description for three months. The learned magistrate has taken the view that deterrent punishment is desirable because

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several cases have recently been brought before him " where the constituted authority of the Town Council had been challenged ". But the appellant himself is apparently a first offender and his own act of obstruction was not accompanied by any aggravating circumstances. With all respect to the learned magistrate it seems to me that the case is not one that calls for a sentence of imprisonment to be passed on a first offender in order to deter others from committing similar offences. I set aside the sentence passed by the learned magistrate and I sentence the appellant to a fine of Rs. 50 or two weeks' rigorous imprisonment in default of payment of the fine. Subject to this variation in the sentence the appeal is dismissed.

Conviction affirmed.

Sentence varied.

1955 *Present :* **Swan, J.**

SOCKALINGAM (Inspector of Labour), Appellant *and* ASANERIS APPU, Respondent

S. C. 1,260 of 1955—M. C. Badulla, 1,037

Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954—" Serving of customers "—Sections 62 (2), 68.

A customer is served within the meaning of the Shop and Office Employees (Regulation of Employment and Remuneration) Act when a man who enters a shop and inquires for the price of an article is told what the price is.

APPEAL from a judgment of the Magistrate's Court, Badulla.

V. S. A. Pullenayegum, Crown Counsel, for the complainant appellant.

T. B. Dissanayake, for the accused respondent.

Cur. adv. vult.

November 1, 1955. SWAN, J.—

This is an appeal with the sanction of the Attorney-General against the order of acquittal made in this case by the Magistrate of Badulla. The accused-respondent was charged under the Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954, with having kept his boutique open after closing hours, the time for closing in this instance being 6 p.m. After trial the learned Magistrate while accepting the evidence for the prosecution acquitted the respondent on the ground that he had not kept his shop open *for the purpose* of serving customers.

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Briefly stated the facts are as follows :—When the appellant, who is a Labour Inspector, was going on his rounds on the day in question he observed at about 7.20 p.m. that the respondent's boutique was partially opened. He watched the premises for about half a minute and saw people going inside. One man asked the accused what was the price of green-gram and the accused replied that it was 80 cents. He added that he saw people enter the shop, and from the manner in which they entered and remained inside he concluded that they were waiting to be served. The accused in his evidence said that he left two or three planks open to enable his children who had gone out to play to come inside. He specifically denied that he had kept his boutique open for business. He denied that he had answered the query of a man regarding the price of green-gram. This evidence, however, was disbelieved. The learned Magistrate said that he was satisfied that the prosecution version was true and that the accused in denying that a man came and inquired for green-gram was speaking a falsehood. However he acquitted the accused because he was not satisfied that the prosecution had proved that the shop was kept open for the purpose of serving customers.

I think the learned Magistrate was clearly wrong. Sub-section 2 of section 62 provides that " where in any prosecution for any offence alleged to have been committed by reason of the contravention of any closing order made under this Act any person is proved to have entered or to have been found in any shop at any time when such shop was required by such order to be closed for the serving of customers, such person shall be presumed, until the contrary is proved, to have been a customer ". There were thus persons in the shop who, unless the contrary was proved, were customers.

That the boutique was kept open after closing hours has been proved. So that the only question one has to decide is whether it was kept open for the serving of customers. In the interpretation clause (vide section 68) *serving of customers* includes " the answering of questions or furnishing of information or explanation relating to the price, description or quality of any goods whether or not such goods are kept for sale at such shop ". Thus a customer was served within the meaning of the Act when the man who came in and inquired for the price of green-gram was told that it was 80 cents.

I set aside the order of acquittal and convict the accused. The case will be remitted to the lower court in order that the learned Magistrate may pass sentence.

Acquittal set aside.

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1955 *Present :* **Gratiaen, J., and Swan, J.**

MERCANTILE BANK OF INDIA LTD., Appellant, and V. S. RATNAM, Respondent

S. C. 366—D. C. Colombo, 25,215

Cheque—Crossed generally—Theft of cheque—Payment by drawee otherwise than to a banker—Drawee's liability to drawer—Bills of Exchange Ordinance, ss. 8 (3), 79 (2).

Where a cheque crossed generally by the drawer is paid by the drawee otherwise than to a banker, the drawee's liability to the drawer is not automatic ; it arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee. Therefore, where such a cheque is stolen after the payee indorses it in blank and is subsequently paid across the counter to a holder, the drawer cannot avail himself of the provisions of section 79 (2) of the Bills of Exchange Ordinance to institute action for a declaration that the drawee is not entitled to debit his account with the amount of the cheque.

APPEAL from a judgment of the District Court, Colombo.

G. E. Chitty, with *J. de Saram*, for the defendant appellant.

N. K. Choksy, Q.C., with *D. J. Tampoe* and *K. M. U. Jayanetti*, for the plaintiff respondent.

Cur. adv. vult.

November 17, 1955. GRATIAEN, J.—

According to the facts as found by the learned trial Judge, the plaintiff had borrowed Rs. 2,000 from Dr. Thurairajah (hereafter called " the payee ") on the security of his cheque dated 1st December 1950 drawn on the defendant Bank in favour of the payee " or order ". At the time of its delivery to the payee, the cheque had been crossed generally. The arrangement was that the cheque should be presented for payment on a future date to be agreed upon, and in the meantime the payee was to be paid Rs. 13·33 each month by way of interest on the loan. Six months later (i.e., on 1st June 1951) the plaintiff was in a position to repay the loan but, as the cheque in its original form might be rejected as " stale ", the plaintiff, at the payee's request, altered the date " 1.12.50. " to " 1.6.51. " and placed his signature below the alteration. The payee then took back the cheque and shortly afterwards, having indorsed it in blank, gave it to someone to be sent by post to the Bank of Ceylon for collection.

2——J. N. B 52586—1,500 (4/56)

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Unfortunately, the payee had not taken the precaution of indorsing the cheque specially in favour of the Bank of Ceylon or even of making it " not negotiable ".

On or about 11th June 1951 the payee began to feel uneasy because the Bank of Ceylon had not acknowledged receipt of the cheque. He then learnt that his letter, with the cheque enclosed, had not reached them. The plaintiff was informed, and he visited the defendant Bank where he discovered that the amount of the cheque had been paid across the counter on 4th June 1951 to a subsequent indorser signing himself as " W. D. Fernando ". The cheque, at the time when it was presented for payment, bore words cancelling the original crossing and also purporting to contain, immediately beneath those words, the plaintiff's signature.

The plaintiff has repudiated the signature purporting to authorise the cancellation of the crossing, and his evidence on the point has been accepted by the learned Judge. I would therefore hesitate to take a different view, but the resemblance of the impugned signature to his admitted signatures is so remarkable that (as the learned Judge himself remarked) the officers of the Bank could not be blamed for acting upon the purported cancellation.

The payee's honesty was not challenged at the trial, so that (upon the trial Judge's findings of fact) the inference is irresistible that somebody had dishonestly intercepted the letter containing the cheque either before or after it was sent by post to the Bank of Ceylon. The details of what occurred thereafter have not been investigated, and there is no evidence on record from which we can determine whether " W. D. Fernando " whose indorsement appears below that of the payeee participated in the fraud. He may have been the thief, or he may have been an innocent person with whom the thief negotiated the stolen cheque for valuable consideration. Speculation on these intriguing questions is unprofitable and unnecessary for the purpose of our decision.

The plaintiff and the payee were uncertain as to which of them should claim the value of the stolen cheque from the defendant Bank. At first the payee sent the Bank a letter of demand, but ultimately it was decided that the plaintiff should institute this action on his own account for a declaration that the Bank was not entitled to debit his account with the sum of Rs. 2,000 representing the payment made across the counter on 4th June 1951.

The learned Judge entered a decree in favour of the plaintiff on the ground that, by reason of the Bank having paid the crossed cheques otherwise than to a Banker, the plaintiff's original debt to the payee was revived by operation of law. The Bank was therefore held liable to indemnify the plaintiff for the loss resulting to him from its disobedience of his mandate as to the mode of payment.

It may be assumed for the purposes of this appeal that, when the cheque was presented for payment by " W. D. Fernando " on 4th June 1951, the Bank realised (or should have realised) that it was still crossed generally and ought not to have been paid across the counter. The question is—what legal consequences flow from this unauthorised mode of payment ?

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Section 79 (2) of the Bills of Exchange Ordinance expressly provides that, where a cheque crossed generally has been paid by the drawee " otherwise than to a Banker ", he is liable to the " true owner " for " any loss he may sustain owing to the cheque having been so paid ". The proviso to the section introduces a statutory exemption from liability which has no bearing on the present case. Indeed, section 79 (2) admittedly does not apply to the plaintiff It was the payee who became the " true owner " of the cheque when he took delivery of it on 1st June 1951 ; and, for reasons which I shall later explain, the payee had himself been divested of ownership before the cheque was paid across the counter to " W. D. Fernando ".

In what circumstances then, can the drawer of a cheque which was generally crossed refuse to let the drawee debit his account if the cheque was paid across the counter ? The Ordinance does not prohibit this mode of payment in express terms, nor does it provide the drawer himself (as opposed to the " true owner ") with a statutory remedy in such a situation. Nevertheless, under the common law of England which applies to Ceylon in cases of this kind, the general crossing of a cheque operates as a mandate to the drawee to make the payment to a banker *and to no one else ;* accordingly, a drawee who makes a payment across the counter in disobedience of the mandate acts at his peril. His liability to the drawer in such an event is not, however, automatic : it arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee.

In *Bobbett v. Pinkett* [1], Bramwell J. has given an example of a situation in which the drawer of a crossed cheque can, if so minded, repudiate a payment made by the drawee in an unauthorised manner. In that case a specially crossed cheque was stolen from the payee *before he had indorsed it*, and the drawee ultimately paid the cheque upon a forged indorsement to a banker other than that named in the crossing. It was held *inter alia* that the drawer could have objected to his account being debited with the amount of the cheque. The reason is quite clear. The payee had not parted with his title to the cheque at the time it was stolen, and the forged indorsement could not operate to pass title to a subsequent holder (however innocent). In that state of things, the drawer's original debt to the payee was revived because the payee had relied on the protection of the special crossing when he " accepted the cheque as discharge of the debt ". *Grant's Laws of Banking* (Edn. 5th) p. 214. Accordingly the drawer's loss, resulting from the revival of the earlier debt, was directly referable to the drawee's failure to obey the mandate contained in the crossed cheque.

A different situation was incidentally discussed in *Smith v. The Union Bank of London* [2]. *If, notwithstanding the unauthorised mode of payment, the money is in fact paid to the lawful holder of a crossed cheque* no action lies against the drawee. In other words, it is an essential element of the drawer's cause of action that he had sustained a loss directly resulting from the unauthorised mode of payment. Provided that the money

[1] *(1876) 1 Ex. D. 369.* [2] *(1875) 10 Q.B. 291.*

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reaches the hands of the true holder of the cheque, the actual mode of payment is irrelevant. The Court of Appeal affirmed the judgment of Blackburn J. in *Smith's case* [1].

The principle that an unauthorised mode of payment of a crossed cheque does not automatically attach liability to the disobedient banker seems to be tacitly recognised in *Baines v. The National Provincial Bank* [2]. A bookmaker had there delivered a crossed cheque for £200 to a customer shortly before 3 p.m., on 14th August 1925. The customer arrived in great haste on the same day at the office of the Bank on whom the cheque was drawn and persuaded them to pay the money to him across the counter (instead of through a collecting Bank) a few minutes after their normal closing hour. On the next morning the bookmaker sent a message to the Bank stopping payment of the cheque, but was told that the instructions had arrived too late. The bookmaker unsuccessfully repudiated the payment on the ground that the payment had been made shortly after closing time. It was not suggested that objection could be taken to the payment across the counter in disobedience to the mandate, because the true purpose of a mandate contained in a crossed cheque is to prevent the money reaching the hands of some person other than " the true holder ".

It is in the light of these principles that the plaintiff's claim against the defendant Bank must be examined. He did not allege in his plaint that any loss had resulted to him from the payment of the crossed cheque across the counter, nor was an issue raised at the trial as to whether such loss had in fact occurred. For this reason alone, the learned Judge should have upheld the objection that the plaint disclosed no cause of action against the Bank. The learned Judge took the view, however, that the plaintiff's liability to the payee on the original debt was revived when the cheque, having been stolen in transit, fell into the wrong hands. Mr. Chitty contended, on the other hand, that in this particular case the cheque had been accepted in complete satisfaction and not as conditional payment, of the earlier debt. There is much to support Mr. Chitty's argument, but in my opinion, even upon the theory of a conditional payment, the debt did not revive. Let me explain why.

Assuming that the cheque was accepted only as conditional payment of the original debt, the payee had indorsed it in blank and subsequently ceased to be its " true holder " at the time when it was stolen. The payee's indorsement converted the cheque into a " bill payable to bearer " by virtue of section 8 (3) of the Ordinance. Accordingly, " W. D. Fernando " who presented the cheque bearing the payee's genuine indorsement in blank was its " holder " at that point of time, so that payment to " W. D. Fernando " (even if he were the actual thief) operated as " a discharge of the bill ". *Grant* (*supra*) *p. 193.* The circumstance that the crossed cheque was paid across the counter instead of through a Bank did not divert the proceeds into wrong hands. Indeed, the payee's failure to protect himself by making the cheque " not negotiable " was the primary cause of his loss. He was in no better position, after losing the cheque which he had indorsed in blank, than he would have

[1] *(1875) 1 Q.B.D. 531.* [2] *(1927) 96 L.J.K.B. 801.*

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been if he had lost a currency note which he had taken in satisfaction of the earlier debt. In such a situation, the loss clearly lies (as between himself and his debtor) where it falls.

In this case the plaintiff had delivered to the payee a cheque in precisely the form in which it was asked for, and funds were available in the Bank to meet it upon presentation. The subsequent conversion of the document, by indorsement, into a " bearer cheque " was the primary consequence of the loss sustained by the payee. Once the cheque was paid to " W. D. Fernando " the payee had no further claims upon the plaintiff ; nor indeed, had he a remedy against the Bank under section 79 (2) because he was not the " true holder " of the cheque at the time that it was paid. His only remedy is against the thief if he can find him.

For these reasons I would hold that the plaintiff has not established a right to repudiate the payment by the Bank. He intended the cheque to discharge his earlier liability to the payee, and he achieved that result. Accordingly, the Bank was clearly entitled to debit his account with the sum of Rs. 2,000 paid across the counter. I would allow the appeal and dismiss the action with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.

1955 *Present :* **Gunasekara, J.**

A. S. SILVA *et al.*, Appellants, *and* L. B. WARNASURIYA, Respondent

S. C. 337–338—M. C. Colombo, 48,932/B

Betting on Horse-racing Ordinance (Cap. 36)—Section 3A (1) (b), read with s. 16—" Occupier ".

In a prosecution of two or more persons for unlawful betting in breach of section 3A (1) (*b*), read with section 16, of the Betting on Horse-racing Ordinance the fact that one of the accused was " working " in the premises where the betting took place, without any evidence as to the nature of his work, does not necessarily mean that he was an " occupier " of the premises within the meaning of that expression in section 2 of the Ordinance.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Colvin R. de Silva, with *A. W. W. Gunewardene*, for accused-appellant.

E. H. C. Jayatileke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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January 17, 1955. GUNASEKARA, J.—

These are appeals from a conviction of the two appellants on a charge laid against them jointly of an offence punishable under section 10 of the Betting on Horse-racing Ordinance (Cap. 36).

The charge alleges that they committed a breach of section 3A (1) (*b*) of the Ordinance in that they did " on 9.1.54. being the occupier of premises No. 556, Dematagoda Road, Dematagoda, use the said premises for the purpose of unlawful betting on Horse Races to be run or proposed to be run at the Boosa Race Course on 9th January, 1954 ". It also cites section 16 of the Ordinance, which is in these terms :

> " Where any premises are entered under the authority of a search warrant issued by a Magistrate under section 15 (1) upon the Magistrate being satisfied that there is reason to suspect that an offence against section 3 (3) or section 3A is being or has been committed in those premises, then,—
>
> (*a*) if any instrument of unlawful betting is found in those premises or upon any person found therein, or
>
> (*b*) if persons are seen or heard to escape therefrom on the approach or entry of any person authorised under such warrant to enter and search such premises, or
>
> (*c*) if any person so authorised is unlawfully prevented or obstructed or delayed in entering or approaching such premises—
>
> it shall be presumed, until the contrary is proved, that such premises are kept or used for the purpose of unlawful betting on a horse-race and are so kept or used by the occupier thereof. "

The conviction of each of the appellants is based upon a finding that he is an occupier of the premises, that facts giving rise to the presumption created by this section have been proved and that the presumption has not been rebutted.

It has been proved by uncontradicted evidence which has been accepted by the learned magistrate that shortly after 10.30 a.m., on the 9th January, 1954, a party of police officers entered these premises under the authority of a search warrant such as is referred to in section 16, that on their entry about four men were seen to run out of the premises and that the police officers found in the premises and upon three persons who were there various documents and other things which the learned magistrate holds are instruments of unlawful betting. There is no ground for disturbing these findings, and they lead to the presumption that the premises were kept or used for the purpose of unlawful betting on a horse-race and were so kept or used by their occupier.

It has also been proved, by evidence that has not been contradicted or even challenged in cross-examination, that the 1st appellant Sangadasa was in occupation of the premises on the day in question, having taken them on rent from their owner some 4 or 5 years previously, and had a shop there in which he was carrying on a business in electrical goods. In terms of section 2 of the Ordinance, " ' occupier ', in relation to any

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premises, includes any person having the use temporarily or otherwise of the premises and any agent of any such person ". It has been clearly proved that the 1st appellant was an occupier of the premises, for he undoubtedly had the use of them, at the material time.

The learned magistrate's conclusion that the 2nd appellant too was an occupier is based entirely upon a finding that he " works at No. 556 and he was in fact present during the raid ". This finding is supported by the evidence but is insufficient, in my opinion, to justify the conclusion that the 2nd appellant was an occupier of the premises. The magistrate cites the definition of " occupier, " implying that the fact of the 2nd appellant's working in the premises proves that he had the use of them or that he was an agent of the 1st appellant. While there is evidence from a prosecution witness that the 2nd appellant " works " in the 1st appellant's shop that is housed in these premises there is no evidence (and, of course, no finding) as to the nature of his work. In the absence of such evidence it does not seem to be possible to say that he was the 1st appellant's agent for any purpose or even that he had the use of the premises. I am unable to accept a contention of the learned crown counsel that working in the shop would necessarily involve a use of the premises ; for there can be work, such as sweeping the premises or guarding them, that does not necessarily imply a use of the premises.

Evidence was given by a police officer to the effect that at the time of the raid the 2nd appellant was seated at a table upon which and in the drawers of which some of the " instruments of unlawful betting " were found ; and by a man whom the police had employed as a decoy on this occasion that he had on previous occasions (though not on this) placed bets with each of the appellants in these premises. The learned crown counsel sought to rely on this evidence for an argument in support of the conviction of the appellants. It is not necessary to discuss the argument, however, for the learned magistrate has based no finding on this evidence and it does not appear from his judgment that any part of it has been accepted by him. Indeed he has expressly left the decoy's evidence out of consideration as evidence that " does not touch the case ".

The evidence that has been accepted by the learned magistrate is insufficient to prove that the second appellant was an occupier, and the conviction of this appellant, which depends solely on this finding, must therefore be set aside.

It is contended for the appellants that although they are accused of jointly committing the same offence section 16 of the Ordinance does not provide for a presumption that the offence was committed jointly by all the occupiers of the premises, and it is argued that therefore the conviction of the 1st appellant too must be set aside. The effect of the construction of section 16 that is contended for by learned counsel for the appellants would, as I understand it, be that the prosecution could rely on the presumption for proof that the offence described in the charge was committed by each occupier of the premises but not for proof that it was committed by all of them jointly. A failure to prove that the offence was committed by the 1st appellant jointly with the 2nd, however, is not necessarily fatal to the conviction of the 1st, for the only

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effect of the accusation that they jointly committed the same offence is that they could, in terms of section 184 of the Criminal Procedure Code, be charged and tried together or separately as the trial court thought fit. What gives the court this discretion is the fact that the accusation is made and not proof of its truth. In my opinion there is no justification for an order quashing the trial of the 1st appellant on the ground that the magistrate has erred in the exercise of his discretion to try the two appellants jointly or separately. Indeed no application was made to him for separate trials.

No evidence was called on behalf of the defence. According to the case for the prosecution the 1st appellant was not present in the shop at the time of the raid. The learned magistrate has considered the question whether this circumstance is sufficient to rebut the presumption that the offence charged was committed by the 1st appellant, and I am unable to say that his finding on this question is wrong.

I dismiss the appeal of the 1st appellant Sangadasa, and I set aside the conviction of the 2nd appellant Premaratne and the sentence passed on him and I acquit him.

Appeal of 1st Appellant dismissed.

Appeal of 2nd Appellant allowed.

1955 *Present :* **Weerasooriya, J.**

NABISA UMMA, Appellant, *and* FUARD, Respondent

S. C. 160 with Application 118—C. R. Colombo, 37,612

Landlord and tenant—Decree for ejectment —Subsequent acquisition of title by tenant—Right of tenant to resist execution of decree.

Where a landlord obtains a decree to eject his tenant, it would not be open to the tenant to resist the execution of the decree on the ground that he subsequently acquired title to a portion of the leased premises from a person other than the landlord.

APPEAL, with application in revision, from a judgment of the Court of Requests, Colombo.

A. C. Nadarajah, for the defendant appellant.

F. R. Dias, for the plaintiff respondent.

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November 23, 1955. WEERASOORIYA, J.—

In this case a decree was entered of consent on the 6th of October, 1952, in terms of which the defendant became liable to be ejected from the leased premises on any date after the 31st of December, 1954. Before, however, writ was taken out by the plaintiff, the defendant on the 26th October, 1954, moved the Court " not to entertain any application for ejectment without notice to the defendant ". This application was made on the ground that on the 6th of March, 1954, the defendant became the owner of an undivided 3/16 share of the leased premises, having purchased that share from the plaintiff's brother (who is not a party to the action). After inquiry into this application the Court made order dismissing it, and the present appeal has been taken from that order. The defendant has also filed papers applying for revision of that order.

Mr. Nadarajah who appears for the defendant does not contend that the decree against her is bad but he says that by reason of what has happened subsequently she is entitled to resist the execution of it in so far as it is sought to eject the defendant from the leased premises. I have not been referred to any provision of law under which the execution of a decree validly entered may be resisted in the manner claimed by Mr. Nadarajah. He has cited the case of *Fernando v. Kurera et al.* [1]. That case does not appear to be any authority for his proposition since all that it was decided there was that an agreement *inter partes* which, though antecedent to and not embodied in the decree, relates to the execution thereof, may be the basis for an order under s. 344 of the Civil Procedure Code that the decree should not be further executed against the judgment debtor.

The question as regards the legal position when subsequent to the tenancy agreement the tenant becomes the owner of the leased premises was considered recently by Sansoni J. in the case of *Visvalingam v. Gajaweera* [2]. According to that judgment where the landlord files an action against the tenant for ejectment it would not be open to the tenant to plead as a defence that he had subsequent to the tenancy acquired title to a share of the leased premises from a person other than the landlord. In the present case the defendant seems to be in a weaker position than the defendant in that case, since decree has already been entered for her ejectment and the only question is whether that decree should be executed.

As no appeal seems to lie from the order of the Commissioner it is rejected. The application in revision is refused with costs.

Appeal rejected.

Application refused.

[1] *(1936) 38 N. L. R. 337.*

[2] *(1954) 56 N. L. R. 111.*

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[In the Court of Criminal Appeal]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Fernando, J.**

REGINA *v.* D. D. W. WAIDYASEKERA

Appeal No. 46 of 1955, with Application No. 75

S. C. 36—M. C. Colombo South, 60,406

Causing death of woman by act done to cause miscarriage—Elements of the offence—Burden of proof—Right of accused to plead consent of deceased—Evidence of similar acts—Relevancy—Evidence Ordinance, s. 15—Penal Code, ss. 81, 303, 304, 305.

Summing-up—" Reasonable doubt "—Quantum of direction.

(1) In a prosecution under section 305 of the Penal Code for causing the death of a woman by an act done with intent to cause miscarriage, it is not necessary that the Crown should prove that the accused did not cause the miscarriage in good faith for the purpose of saving the life of the woman. The accused, however, is entitled to the benefit of any general exception within the ambit of which he could bring himself.

If the accused relies on the exception in section 81 of the Penal Code the burden is on him to show that the deceased expressly or impliedly gave her consent to suffer, or take the risk of, no less harm than death.

(2) In a prosecution under section 305 of the Penal Code the prosecution may, under section 15 of the Evidence Ordinance, lead evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal.

A nurse who was employed under the accused gave evidence for the prosecution stating that during the ten months of her service under the accused there were 150 to 175 cases in which the accused had caused miscarriage and that in each of those cases the accused used the same instruments and resorted to the same procedure.

Held, that the names of the persons on whom the operations were performed were not necessary to make the evidence relevant.

(3) Once the jury are directed in unmistakable terms as to the burden of proof which lies on the prosecution, the Judge is under no duty to keep on repeating that the accused should be given the benefit of any reasonable doubt.

APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *Malcolm Pereira* and *U. B. Weerasinghe*, for the accused-appellant.

Douglas Jansze, Acting Solicitor-General, with *A. C. M. Ameer*, Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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August 31, 1955. BASNAYAKE, A.C.J.—

At the conclusion of the hearing of this appeal we made order dismissing it and reserved our reasons to be delivered on a later date. We accordingly do so now.

The appellant was indicted on the following charge :—

" That on or about the 2nd day of June 1954 at Bambalapitiya in the district of Colombo within the jurisdiction of this Court you with intent to cause the miscarriage of one Mrs. Gladys Nugera of Moratuwa, a woman with child, did insert certain instruments into her vagina, which act caused the death of the said Mrs. Gladys Nugera, and that you have thereby committed an offence punishable under section 305 of the Penal Code. "

After a trial which lasted 14 days he was found guilty by a unanimous verdict of the jury and sentenced to 10 years' rigorous imprisonment.

The appellant is a registered medical practitioner, a licentiate of the Royal College of Physicians and Surgeons (Edinburgh) and a licentiate of the Royal Faculty of Physicians and Surgeons (Glasgow). He is 60 years of age and has practised his profession for 26 years. He ran a Nursing Home in Bambalapitiya in Colombo under the business name of " Ascot Nursing Home ". The deceased Mrs. Gladys Nugera, a widow with five children (hereinafter referred to as the deceased), entered the appellant's Nursing Home on 29th May 1954. A few days earlier she had consulted the appellant as she had missed her periods for about four months. On being asked by the appellant whether she desired to be treated as an indoor patient she expressed a desire to take such medicines as may be prescribed and take treatment as an outdoor patient. The appellant gave her a mixture and some capsules. It was after taking that treatment that she sought admission to the Nursing Home. On the 29th she came accompanied by one Terrence B. Fernando who falsely represented to the appellant that his name was C. Silva and that the deceased was his wife. After having entered the deceased to the Nursing Home, Fernando left the place, and except for two telephone conversations took no interest in the deceased and did not visit her till 2nd June 1954 on which day the deceased died.

Between the date of the deceased's admission to the Nursing Home and the date of her death the appellant almost daily subjected her to the following treatment. She was removed to the consultation room and made to lie on a bed. All the doors and windows were closed. Then the appellant performed the operations which are thus described by Nurse Kariyawasam.

" Then he took the speculum and inserted it into her vagina. (Speculum P1 shown to witness). After inserting that into the vagina it was withdrawn. Thereafter the doctor took the volsellum (shown P4) into his hand. After cutting the hair the doctor applied some dettol cream on his fingers and inserted his fingers into the vagina. He took the dettol cream from a jar similar to P2. I cannot remember how many fingers were inserted into the vagina. After

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introducing his fingers he withdrew them. Then he inserted the speculum. He removed the speculum and then inserted the volsellum into the vagina. There is a sort of a tube in the vagina and he held that with the volsellum. Having held at some part of the vagina with the volsellum he inserted a dilator. He used two or three dilators.

"After the accused held some part or portion inside the vagina with this instrument, the volsellum, he introduced these three dilators. They were each introduced in turn. The smallest one, that is P18, was introduced first. Then P3 was introduced—he introduced them according to their sizes—and then the last one he introduced was P19. Each time these introductions were taking place, he was holding some part of the vagina with this volsellum. At the time of these introductions I was by the patient as one had to hold her because she was struggling. I held her hands with one hand and her legs with the other. This was according to the manner in which the patient struggled. She screamed fairly at the time these instruments were introduced. One by one they were introduced and withdrawn. I noticed blood on each of them. The patient was not anaesthetized during this operation.

"After the last of the dilators was used and was withdrawn I noticed blood on it. After that, she was given a douche with condys water. It was washed inside. The condys water was poured into a can and there is a tube with a nozzle fixed on to that can and the end of the tube, that is, the nozzle is inserted into the vagina and water flowed into it. After that, some cotton wool was taken and condys water was taken into the kidney tray. I prepared that. The accused took the cotton wool and soaked it in the condys water and squeezed the water out. That was done on this occasion. Then he held this cotton wool with the volsellum and introduced it through the speculum into the vagina. After the douche, the speculum was introduced into the vagina and through the speculum the cotton wool was introduced with the aid of the volsellum. Then plugs were put in. About 5 or 6 such pieces of cotton was used for this plugging. Then the patient was taken back to the ward, to her room. She walked on this occasion. Then medicine was given to her."

On 2nd June the appellant removed from the deceased the body of a foetus minus the head. Nurse Kariyawasam describes what happened that day thus :

"The doors and windows were again closed and she was asked to lie on the bed and the plugs put in the previous day were removed as before. After the extraction of the cotton wool on this occasion, the speculum was removed by the accused. The accused wore his rubber gloves which were similar to P5 (which is shown) and he rubbed dettol cream, taking it from a jar like P2, on his gloved fingers and introduced his hand into the vagina. She was not anaesthetized on this day too but I was holding her. Besides me, the doctor and the patient, there was nobody else. A little later, we took another in. When the accused put his hand into the vagina,

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I was holding the patient's hands and legs as she was struggling violently. Then the accused withdrew his hand and I saw a part of the child's body in his hand. It was about this much in length—indicates from the tips of her fingers up to the wrist—about 6 inches. He dropped that into the pail which was left there for the blood to flow. He emptied his hand into that. He again introduced his hand into the vagina and withdrew it and there was only blood in his hand at that time. I saw that part or portion of a child below the neck on the first occasion and I did not notice the head. On the second occasion, when he withdrew his hand I saw blood in his hand. Then he wanted me to take the two new forceps from the cupboard. I took them and handed them to him. They were these two (witness identifies P7 and P6). P7 is called the ovum forceps and P6 the weighted speculum. I did not see this accused use these two items together, that is the speculum and the weight. I know these two form one instrument. I took out all these three together. I call them forceps. When I handed these to the accused, he introduced the weighted speculum into the vagina. At this time there was nobody else in the room besides the three of us. When the weighted speculum was introduced into the vagina, there was nobody else in the room. This was introduced into the vagina in this manner (shows). The weight that was attached to the speculum was taken off as it was dropping off. These two were used together, but as the weight was dropping off, it was removed, and after that this was put into the vagina in this manner. At the time this was introduced into her vagina, she was not anaesthetized. She cried out and struggled violently. I was holding her at the time. I found it impossible to hold her down. The accused wanted me to call in the attendant, that is, Ariyawathy. I called her and she came in. The door was relocked. She also held the patient on the instructions of the accused. Both of us were holding her to prevent her struggling. Then the ovum forceps P7 was introduced by this accused. When this was introduced, the weighted speculum P6 was in the vagina held in position. He held this with one hand and introduced the ovum forceps with the other while the two of us were holding her down. She was crying out when P7 was introduced. These two instruments P6 and P7 were also immersed in hot water before they were used. When P7 was introduced and withdrawn, I only saw blood on it. I did not see any pieces on it. He introduced P7 several times and I did not see anything come out. I did not see the head of the child at any stage being taken out either with the hand or with the ovum forceps P7. At no stage did I see that. Thereafter, the vagina was douched in condys water by the accused. Then she was dressed in kotex pad on the instructions of the accused and she was helped on to the ward. We practically carried her to the ward, that is, the three or four of us. Ariyawathy and I were among the four. The accused also helped, and she was taken to her room."

After the removal of the foetus the deceased became very ill and died between 9 and 10 that same night. Terrence Fernando who was present at the time of her death left in the appellant's car at about

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11 p.m. promising to return the next morning with a coffin but never did and it was with difficulty that his whereabouts were traced by the Police.

Nurse Kariyawasam, in addition to giving the names of four others who had similar operations performed on them, stated that during the ten months she was employed by the appellant she attended on about 150 to 175 cases in all of which the appellant extracted foetuses. She was present at everyone of those operations. In each of those she saw the whole foetus or pieces of foetus being removed. In each of those cases the speculum, the dilators, and the volsellum were used. In each of those cases the same procedure was gone through by the appellant. The vagina was plugged with cotton wool soaked in condys water. In some instances the foetus dropped by itself and in others the accused introduced his hand into the vagina and brought out the foetus. In some cases the appellant introduced the weighted speculum in order to bring out the foetus.

The appellant disposed of the foetuses either by burning them in a gas incinerator which he had in his Nursing Home or by taking them in the form of parcels and throwing them into a river.

The post-mortem disclosed that the deceased was a well-nourished subject free from heart disease or any other disease. Her uterus was enlarged to about 4 months' pregnancy. The uterus was 8″ long, 4½″ broad and 3″ thick. There was a well marked placental site on the front wall of the fundus, and small pieces of decomposing placental tissues were adhering to it. There was also some clotted blood in the uterine cavity. The cervix was soft and swollen and admitted the index finger with ease. There was an irregular circular perforation of the posterior wall of the uterus at the junction of the body with the cervix about 1″ in diameter, and this opening corresponded with the tear in the pubic peritoneum, and there was infiltration of blood into the extra peritonial pelvic tissue in the neighbourhood of the tear. The vaginal passage contained the head of a foetus of about 4 months' gestation. The legs and trunk were missing. There was also placental tissue and clotted blood. Death was due to shock and haemorrhage following the perforation of the pregnant uterus.

Both the peritoneum and the uterus were injured. The injury was necessarily caused by the introduction of some instrument.

It is not necessary to refer in detail to the other items of evidence led by the prosecution because they have little bearing on the questions that arise on this appeal.

The appellant gave evidence on his behalf. He said that he admitted the deceased on 29th May as a case of heart disease and that later he discovered that she was pregnant for about 3½ months and showed signs of a threatened abortion. Later he saw signs of an inevitable abortion and performed an operation on the deceased on the day she died in order to evacuate her uterus as otherwise she might have died of haemorrhage. He dilated her cervix using three dilators and the volsellum and proceeded to evacuate the uterus with his finger. He managed to get two legs and the trunk of the foetus out, but the head

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got stuck in the uterus and after unsuccessfully trying to bring the head out with the smaller ovum forceps he let the head remain in the uterus as the deceased was showing signs of fatigue. He also expected that the head would come out after sometime. The injury to the uterus according to the appellant was caused by the foetal head. He discounted the theory that the ovum forceps or any other instrument could have caused it.

There was sufficient evidence for the jury to return the verdict they did. Learned Counsel for the appellant therefore sought to attack the conviction on the ground of misdirection.

He referred us to a number of passages in the learned Commissioner's summing-up which he submitted contained misdirections. It is sufficient to set out here the passages to which learned Counsel gave particular attention in the course of his argument. They are as follows :—

" I do not propose to explain the section dealing with that offence which is named foeticide, because there is no such charge against the accused. But his Counsel has put forward as a defence that the act done by the accused was done in good faith for the purpose of saving the life of the mother. You are, undoubtedly, entitled to consider that defence in all its bearings, and, if you believe the accused, there is no doubt that he is entitled to an acquittal.

" But you will have to remember, gentlemen, that it is not sufficient for the evidence to point out that the act was done for the purpose of saving the life of the mother. It must also point to good faith. A mere statement that a person did something in good faith is not enough. I am sure that that would commend itself to you without any wealth of words from me.

" You should consider this evidence in the light of the defence. If you believe the evidence of the accused, he is entitled to be acquitted. When you assess his evidence, you have to make a large allowance for the fact that he is charged with a grave offence and, unlike other witnesses, you cannot expect from him the same mental process, and you must make every allowance for his demeanour ; he might have been nervous or hesitant, even though he is a qualified medical practitioner.

" I should also remind you, gentlemen, that, when you consider his defence, you must keep in mind that nothing is said to be done or believed in good faith which is done or believed without due care and attention.

" Learned Counsel for the defence, in the course of his interesting address to you, stated that it was the conscientious opinion of the accused that he had to evacuate the uterus to save the life of the woman. You have to consider carefully whether the circumstances arising from the performance of the operation alone would save the life of the mother. If there were such circumstances, the law allows the sacrifice of one rudimentary life to save another comparatively more valuable. That is the stated point of the law which is availed of in accord with common sense.

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"But of course, you have to consider the matter in its practical administration. What steps did the accused take? Was the operation a life saving work he did, and was it done in good faith.

"The accused knew he was performing a voluntary illegal act, so far as the law lays it down. He also knew he would have to operate. You should consider his defence and be in a position to say whether his defence absolves him.

"What was of primary importance was to save the life of the mother, not the foetus.

"You must consider, gentlemen, whether this evidence supports his defence that he acted in good faith, for the purpose of saving the life of the woman."

Learned Counsel's submissions on the ground of misdirection may be summarised thus :—

(*a*) The summing-up of the learned Commissioner might have created in the minds of the jury the impression that the appellant admitted that he caused the miscarriage.

(*b*) The appellant did not intend to cause a miscarriage but when he saw that a miscarriage was inevitable took steps to evacuate the uterus in order to save the life of the deceased.

(*c*) If the appellant's admitted acts establish that he intended to cause a miscarriage then the onus is on the prosecution to prove that the miscarriage was not caused in good faith in order to save the life of the deceased.

In making his submissions under heads (*a*) & (*b*) learned Counsel referred us to certain passages in the evidence of the medical witnesses called by the prosecution in support of his argument that the appellant did not intend to cause and did not cause a miscarriage. He also relied on the evidence of the appellant which he submitted should receive the same consideration as those of the prosecution medical witnesses.

The learned Solicitor-General contended that there was ample evidence that the appellant intended to and did in fact cause a miscarriage. He drew our attention to the passages in the evidence he relied on for the purpose of establishing his contention. They are too numerous and lengthy to admit of citation here. We are satisfied upon an examination of those passages that there was ample material before the jury to warrant the conclusion implicit in their verdict that the appellant did insert certain instruments into the vagina of the deceased with intent to cause a miscarriage. The learned Solicitor-General further submitted that the expression miscarriage in the context of section 305 should be given its ordinary meaning of the premature expulsion of the contents of the womb before the term of gestation is complete. He also cited the definition of the expression miscarriage in the Oxford Dictionary in support of his argument. He contended that the appellant's own evidence showed that he did the acts he described with intent to expel a foetus before its time.

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Under head (*c*) learned Counsel submitted that section 303 defines the offence of " causing miscarriage " and that the words " cause the miscarriage " in section 305 must be read subject to the section which defines the offence of causing miscarriage. In a charge under section 305 he submitted that the prosecution must prove—

(*a*) that the accused did an act,
(*b*) which caused the death of a woman,
(*c*) with intent to cause a miscarriage, and
(*d*) that the miscarriage was not caused in good faith for the purpose of saving the life of the woman.

We are unable to uphold the interpretation learned Counsel sought to place on section 305. Unlike section 304, section 305 contains no pointer to section 303, nor is there any indication in that section that the Legislature intended that it should be controlled by section 303. It is not essential that, in a prosecution under section 305, it should be proved that the accused caused a miscarriage. What is material is the intent to cause a miscarriage. The essential elements of an offence under that section, are that—

(*a*) the accused did any act,
(*b*) which caused the death of a woman with child, and
(*c*) that the act was done with intent to cause the miscarriage of the woman.

An interpretation such as the one learned Counsel sought to place on section 305 involves the interpolation in that section of words which do not occur in it and the recasting of the entire section. Such an interpretation is not warranted by the rules of interpretation and does not commend itself to us.

In a charge under section 305 of the Penal Code, it is not necessary that the prosecution should prove that the accused did not cause the miscarriage in good faith for the purpose of saving the life of the woman.

The learned Commissioner's direction that the appellant was entitled to an acquittal if he proved that he caused the miscarriage in good faith for the purpose of saving the life of the deceased appears to have been influenced by the defence indicated at the very outset of the trial by appellant's Counsel. It would appear from the transcript of the shorthand notes of the proceedings that learned defence Counsel held the view that, if the miscarriage had been caused in good faith for the purpose of saving the life of the deceased, the appellant was entitled to an acquittal. We are not satisfied that the appellant was in any way prejudiced by the learned Commissioner's direction. He did not fail to indicate clearly to the jury the onus that lay on the prosecution. The jury was at no time asked to assume that the appellant admitted that he caused the miscarriage.

The learned Commissioner's direction as to the appellant's defence is not unfavourable to him although it might have been better if it had been stated in terms of the relevant general exception. Learned Counsel

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for the appellant submitted that whether his argument based on section 303 succeeded or not he was entitled to the benefit of the relevant general exception. He did not indicate precisely under which general exception in Chapter IV of the Penal Code he sought to bring the appellant's case. We hold that a person indicted on a charge under section 305 is entitled to the benefit of any general exception within the ambit of which he could bring himself.

The appellant's case was that he did not intend to cause the death and that the deceased had impliedly consented to undergo his treatment and that whatever he did was done in good faith for her benefit.

The verdict shows that the jury did not accept the appellant's version for if they did they should have acquitted him in accordance with the direction of the learned Commissioner.

The exception in section 81 of the Code required the appellant to show that the deceased expressly or impliedly gave her consent to suffer the harm caused or to take the risk of that harm—in the present case death. While the Jury might have held on the evidence adduced by the defence that the deceased consented *to be treated* medically and surgically by the appellant, there was in our own opinion scarcely any evidence to justify a finding that she consented *to suffer or to take the risk of the harm which was actually caused to her.*

Learned Counsel also submitted that inadmissible evidence had been admitted to the prejudice of the appellant. Although learned Counsel did not take exception to the admission under section 15 of the Evidence Ordinance of evidence of similar occurrences, he submitted that specific evidence of each of such occurrences must be given as in the case of those whose names were given by Nurse Kariyawasam and that it was not open to the prosecution to lead evidence generally that 150 to 175 similar operations were performed, while Nurse Kariyawasam was in the appellant's service. He therefore did not object to evidence of the cases of Jayanthi, Leilawati, Vimala Kumari, and Mrs. Mather, but objected to that part of Nurse Kariyawasam's evidence where she said that during the ten months of her service under the appellant 150 to 175 similar occurrences took place. Before we examine learned Counsel's submission it will be useful to set out the evidence objected to. Nurse Kariyawasam said—

> "I said that after the death of Mrs. Nugera there was another case of extraction of foetus, that is the case of Jayanthi on whom instruments were used.
>
> *Q.* How many other cases had you attended on where these instruments had been used by this accused ?
>
> *A.* Many.
>
> *Q.* About how many roughly ?
>
> *A.* Is it where whole foetus were removed or where parts were removed ?

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Q. In all how many such cases did you attend on ?

A. About 150 to 175 cases during the months I was there. In all those cases these instruments were used and some other instruments were also employed.

Q. In each of those cases where you saw whole foetus or pieces of foetus being removed the speculum, the dilators, and the volsellum were used ?

A. Yes.

To Court : I was present at every one of those cases.

" I am the nurse who attended on all the women who were taken into the consulting room. In each of those cases I was there. P43 is supposed to be a steriliser. There was no other steriliser apart from this. I have never seen this steriliser being used for the purpose of sterilising instruments.

" Yesterday I spoke about the 150 or 175 cases where instruments were used. In each of those cases, the speculum, volsellum and dilators were used. I also said that, in addition to these instruments, there were certain other instruments which were also used. I can pick them out here. (Witness picks out P37, the flushing curette, and P38 the catheter.) In each of these cases, the vagina was plugged with cotton wool soaked in condys water by the accused. In some instances, the foetus dropped by itself, in some instances the accused introduced his hand into the vagina and brought out the foetus ; and in some instances he introduced the weighted speculum in order to bring out the foetus—not this one but what Dr. Ekanayake brought with him. In each of these cases, the foetus either came out or was taken out, and in each of these cases, the foetus came out after the use of these instruments. In each of these 150 to 175 cases that I witnessed, it was the accused who used the instruments. All these instruments were used by him."

Before learned Crown Counsel led this evidence at the trial he announced his intention to do so in the absence of the jury. Learned Counsel for the appellant submitted that the evidence of similar occurrences would be admissible only if the defence is that of accident. He submitted that his defence was not that it was an accident and objected to the evidence being led. Learned Crown Counsel then submitted that intention was an element of the offence and cited in support of his submission a number of cases[1] practically all of which are decisions of the English Courts.

[1] *52 N. L. R. 457.*
(1894) A. C. 57 at 65.
(1906) K. B. 389, 404, 405, 424, 425.
15 Cr. App. Reps. 50 and 52.
16 Cr. App. Reps. 61 and 69.
13 Cr. App. Reps. 78.
(1949) A. C. 182.
36 Cr. App. Reps. 39.

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The best approach to this question would be by a consideration of section 15 of the Evidence Ordinance in the first instance. That section reads—

> " When *there is a question* whether an act was accidental or intentional, or done with a particular *knowledge* or *intention*, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned is relevant ".

Intention to cause miscarriage is an element of the offence with which the appellant was charged and in his defence he denied that he intended to cause a miscarriage. The issue of intention therefore became one of vital importance.

Here the question was whether the appellant did the act which caused the death of the deceased with the intention of causing a miscarriage. It was therefore relevant to show that the act done by the appellant in regard to the deceased was a part of a series of similar occurrences in each of which the appellant was the person who did the act which caused the miscarriage.

In resorting to English cases for the purpose of seeking an elucidation of section 15 of the Evidence Ordinance it should be borne in mind that the English principle and our section of the Evidence Ordinance are not the same. The English principle is thus stated in Stephen's Digest of the Law of Evidence (11th Edn., p. 20) :

> " Where there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant ".

It will be seen that section 15 of the Evidence Ordinance is wider than the English rule of evidence. Under our provision evidence of similar occurrences is relevant for the purpose of proving a particular intention or knowledge. Judicial opinion in England [1] appears to be divided on the question of a proper approach to the English rule cited above. But the tendency seems to be towards admitting evidence which is relevant to the issue before the jury and not to regard the fact that the evidence is prejudicial to the accused as rendering relevant evidence inadmissible. The most recent decision on this point is the case of *Rex v. Lumeline* [2].

It is sufficient to say that under our law too the prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal. Counsel for the appellant correctly did not take the course adopted by Counsel for the defence at the trial.

[1] *Sims 31 Cr. App. R. 161 (1946).*
Noormohamed (1949) A. C. 182.
Frank Harris 36 Cr. App. R. 39 (1952).
Straffen 36 Cr. App. R. 132.

[2] *London Times August 17, 1955.*

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The occurrence of which evidence is given must be one in a series of similar occurrences in each of which the accused was concerned. Nurse Kariyawasam's evidence quoted above satisfies the requirements of the section. The names of the persons on whom the operations were performed are not necessary to make her evidence relevant. In each of the 150 to 175 cases a miscarriage was caused and it was the appellant who caused the miscarriage. In each of those cases he used the same instruments and resorted to the same procedure.

There remains one more point raised by learned Counsel for the appellant. He contended that there was no direction by the learned Commissioner that the appellant should be given the benefit of any reasonable doubt caused by his evidence. The learned Commissioner has more than once indicated in the course of his summing-up that the prosecution must prove its case beyond reasonable doubt and that the appellant must be given the benefit of any reasonable doubt. What is more, when at the end of the summing-up, on being asked whether there was any matter he had omitted, learned Crown Counsel invited the learned Commissioner to direct the jury that if the evidence adduced by the appellant created any reasonable doubt it was their duty to acquit him, the learned Commissioner once more directed the jury on the matter. The directions on the burden of proof are ample and we do not think that there is any substance in learned Counsel's submission.

There appears to be a mistaken notion that the jury should be reminded at every turn that they should give the benefit of every reasonable doubt to the accused. Once the jury are directed in unmistakable terms as to the burden of proof which lies on the prosecution, for it is in regard to it that the question of reasonable doubt is material, the Judge is under no duty to keep on repeating that the accused should be given the benefit of any reasonable doubt. The rule is that a case is never proved if the jury is left in doubt. It is sufficient if it is made clear to the jury that the burden of establishing the charge in the indictment is all the time on the prosecution and that they should return a verdict against the prisoner only if upon the evidence they are convinced of the accused's guilt. The Judge is not fettered in the use of the language which he may choose for the purpose of this direction. If the summing-up indicates that the jury have been clearly directed as to the burden and standard of proof, the accused cannot be heard to complain that a particular formula was not used.

The recent pronouncements of the British Court of Criminal Appeal in *R. v. Kritz* [1], *R. v. Alfred Summers* [2] and *R. v. Hepworth Fearnley* [3] indicate that the tendency of the British Courts is to get away from the rigid formula of words of the past and not to expatiate on what is a "reasonable doubt" and seek to explain the difference between a "reasonable doubt" and a "fanciful doubt".

Appeal dismissed.

[1] *(1949) 2 All E. R. 406.*

[2] *36 Cr. App. Reps. 14.*

[3] *(1955) 3 W. L. R. 331.*

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1955 *Present :* **Fernando, J.**

SHARUFDEEN, Appellant, *and* SINNADURAI, Respondent

S. C. 942 of 1955—M. C. Matara, 40,052

Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954—Closing order—Contravention thereof—Serving of customers—Necessary ingredient—Sections 43 (1), 62 (2), 68.

The presence of customers in a shop after closing time does not conclusively establish that the shop was kept open for the purpose of serving of customers. Section 62 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act does not raise any presumption that the presence of a customer presupposes that the shop was kept open for serving him.

The accused was charged with keeping his shop open for the serving of customers in contravention of a closing order. There was evidence of the presence of certain persons who had come to take away goods from the shop on behalf of a man who had purchased the goods earlier.

Held, that the evidence was not by itself conclusive proof of "serving of customers" within the meaning of sections 43 (1) and 68 of the Shop and Office Employees (Regulation of Employment and Remuneration) Act.

APPEAL from a judgment of the Magistrate's Court, Matara.

M. M. Kumarakulasingham, for the accused appellant.

George Candappa, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 6, 1955. FERNANDO, J.—

In this case under the Shops and Office Employees Act 19 of 1954, the accused has been convicted on two charges of (1) keeping his shop open for the serving of customers in contravention of a closing order, and (2) of not preventing a customer from entering the shop at a time when the shop is required by a closing order to be closed for the serving of customers.

The Inspector of Labour stated that on the 5th of March, 1955 (which was a Saturday, a day on which the accused's shop should have been closed at 2 p.m. for the serving of customers) he saw the door of the shop open at 2.40 p.m. and a number of people inside. He found in the shop eight people of whom one was the accused and three were his employees. The employees were writing out some bills. As to the other four persons, there was only the defence evidence to indicate who they

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were. A witness Charles Silva stated that he was a lorry owner and that he had come to the shop at 2.30 p.m. together with his lorry driver and cleaner, having been instructed by one Cassim, a trader of Tangalle to remove certain goods which had been ordered from the accused's shop. The witness said that when he asked for the goods the accused told him to come on Monday stating that it was not possible to give the goods after 2 p.m. that day. Cassim confirmed that he had given these instructions to Charles Silva. The prosecution were unable to contradict Charles Silva's evidence as to the purpose for which he and his driver and cleaner had come to the shop that day, and in view of Cassim's evidence it has to be accepted as proved that they did come for this stated purpose. That being so there is no doubt that those three persons were customers in the sense that they had come to take away goods on behalf of a purchaser. But that does not dispose of the question whether the prosecution has proved that the shop was kept open that afternoon for the purpose of serving customers. I have been referred to an unreported decision of my brother de Silva in M. C. Matara 37,174, S. C. 1,409 of 10.2.55. It was there held that "it was not incumbent on the prosecution to prove that a sale had in fact taken place" to maintain a charge under section 43 (1) of the Shops and Office Employees Act. With respect I entirely agree, but I consider that there must be evidence to show that the accused kept his shop open for the purpose of serving customers. Such evidence was present in the case just mentioned, for there the accused was seen weighing some sugar and handing it over to a boy who tendered a five-rupee note.

In the present case the relevant paragraph in the definition of "serving of customers" would be (*g*) "the delivery at such shop . . . . of goods purchased while such shop is kept open". 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. The Magistrate has not found, and indeed on the whole evidence he could only have found with difficulty, that the existence of this purpose had been proved. He has misdirected himself as to the effect of section 62 (2) of the Act. That section provides that any person found in a shop within the hours prohibited by a closing order shall be presumed, until the contrary is proved, to have been a customer. So that undoubtedly, even without the evidence of Charles Silva, there was a presumption that he and the other three persons (not being employees) were customers. But the section does not, as the Magistrate thinks, raise any presumption that the presence of a customer presupposes that the shop was kept open for serving him. In my opinion the presence of customers in a shop after closing time does not conclusively establish that the shop was kept open in order to serve them any more than the mere absence of customers would disprove the existence of a purpose of serving customers if such purpose can be proved *aliter*.

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I would hold that the first charge (under section 43 (1) of the Act) must fail because, although a customer may have been present, there was no evidence to establish that the shop was kept open to serve customers.

The second charge was that the accused did not prevent customers from entering his shop during the prohibited hours. The defence did not lead any evidence which could assist them on this charge. But neither the prosecution nor the Magistrate appear to have realised that it was indeed a charge distinct from the first one. In the circumstances I think it quite sufficient to set aside the conviction on both charges and to order the accused to be discharged after admonition under section 325 of the Criminal Procedure Code. I find that the accused has already paid the fine of Rs. 500 . That sum must be returned to him.

Convictions set aside.

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1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

MARCHANT HEYWORTH & SWIFT, LTD., Appellant, *and* A. E. M. USOOF, Respondent

S. C. 167—D. C. (Inty.) Colombo, 28,778

Contract—Sale of goods—Arbitration clause—Arbitration on reference by one party alone—Validity of award—Reciprocal Enforcement of Judgments Ordinance, s. 3.

In a written contract entered into between a buyer in England and a seller in Ceylon for the sale of 50 tons of rubber, the seller failed to perform his part of the contract. Thereupon the buyer referred the matter to the Rubber Trade Association of London for arbitration in terms of the contract which provided that it was governed by the Rules, Regulations and Bye-laws of the Rubber Trade Association of London. The arbitrators awarded that the seller should pay to the buyer a sum of £15,000. As the seller failed to satisfy the award, the buyer obtained an originating summons from the High Court of Justice under section 26 of the Arbitration Act of 1950 and duly served it on the seller in Ceylon.

The seller, having objected to the arbitration, took no part in the arbitration proceedings and did not appear in the High Court of Justice in England.

When the buyer applied under section 3 of the Reciprocal Enforcement of Judgments Ordinance to have the judgment of the English Court registered in the District Court of Colombo, the District Judge refused the application on the basis of the objection taken by the seller that the High Court in England had no jurisdiction over the seller as the seller had not submitted himself to its jurisdiction.

Held, that, under a marginal clause in the contract, disputes between the parties were to be settled by arbitration. According to the law of England which regulated the transaction in question there was nothing which required that the reference to arbitration should be a formal document signed by both parties. In the circumstances the judgment of the English Court was registrable in the District Court of Colombo under section 3 of the Reciprocal Enforcement of Judgments Ordinance.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *E. R. S. R. Coomaraswamy*, for the Petitioner-Appellant.

R. M. Markhani, for the Respondent-Respondent.

July 19, 1955. BASNAYAKE, A.C.J.—

The appellant, Marchant Heyworth & Swift, Limited, a limited liability company incorporated in the United Kingdom (hereinafter referred to

2——J. N. B 52922-1,590 (2/56)

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as the appellant), applied under section 3 of the Reciprocal Enforcement of Judgments Ordinance to have a judgment given in its favour by the Queen's Bench Division of the High Court of Justice in England registered in the District Court of Colombo.

The material portion of that judgment reads—

"PURSUANT to the Arbitrators' Award herein dated the 26th day of October 1950 WHEREBY IT WAS AWARDED that Sellers have defaulted and shall pay to the Buyers the sum of Fifteen Thousand Pounds (£15,000/-) and Association Fee Ten Shillings (10/-) and Arbitration Fee Three Guineas (£3—3—0*d*) to be paid by Sellers. And the said Applicants Marchant Heyworth & Swift Limited having by the Order of Master Diamond dated the 3rd day of October 1952 obtained leave to enforce the said Award in the same manner as a Judgment or Order to the same effect.

"IT IS THEREFORE ADJUDGED that the Applicants Marchant Heyworth & Swift Limited recover against the Respondents, Ceylon Trading Corporation, £15,003—13—0*d*."

The appellant's application was opposed by the respondent Ahamed Ebrahim Mohamed Usoof, the judgment debtor (hereinafter referred to as the respondent), the sole proprietor of the Ceylon Trading Corporation, on the ground that—

(*a*) he did not submit to the jurisdiction of the High Court of Justice in England ;

(*b*) the High Court of Justice in England acted without jurisdiction ;

(*c*) he was not duly served with the process of the original Court ; and

(*d*) the judgment was not registrable under section 3 (2) of the Ordinance.

The learned District Judge after trial held that the respondent had been duly served with the process of the High Court of Justice in England but that that Court had no jurisdiction over the respondent as he had not submitted himself to its jurisdiction, and refused the appellant's application to have the Judgment in its favour registered.

Dissatisfied with that decision, the appellant has appealed to this Court. It will be convenient to refer shortly to the material facts. They are as follows :—

By a contract dated 22nd June, 1950, the appellant contracted to buy from the respondent a consignment of 50 tons of rubber. The instrument of contract was in the following form :

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CONTRACT

MARCHANT, HEYWORTH & SWIFT, LIMITED

Ref. No. 664.

London House,
3, New London
Street,
LONDON, 22nd June, 1950.

Messrs. Ceylon Trading Corporation, 360, Union Place, Colombo.

We have this day Bought from you the following goods :—

About 50 (fifty) tons FAIR AVERAGE QUALITY RIBBED SMOKED SHEETS RUBBER, R. M. A. 3, packed in cases and/or bales and/or bareback bales, fit for export, at 1*s*/9*d*. (one shilling and ninepence) per lb., nett, c.i.f. Liverpool :

For shipment from the East during June and/or July, 1950.

TERMS : Payment by Sight Draft on presentation in London with Shipping Documents attached.

Confirmed Credit to be opened immediately.

Yours respectfully,
For and on behalf of
MARCHANT, HEYWORTH & SWIFT,
LIMITED.

DIRECTOR.

Please Sign and Return the Receipt attached Hereunder.

Each delivery to stand as a separate contract. This contract is made subject to the Rules, Regulations and Bye-Laws of the Rubber Trade Association of London and any dispute arising thereon or in relation thereto is to be settled by Arbitration here in accordance with such Rules, Regulations and Bye-Laws. The said Rules, Regulations and Bye-Laws of the Rubber Trade Association of London are made, so far as not expressly varied by the special conditions of this contract, part of this contract as if same were set forth herein in full.

Below the words " Please Sign and Return the Receipt attached Hereunder " was a detachable receipt which the respondent duly perfected and sent to the appellant. That receipt and the letter which accompanied it are set out below :

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To : MARCHANT, HEYWORTH & SWIFT, LIMITED

Ref. No. 664.

London House, 3, New London Street, London, E. C. 3.

We hereby confirm having sold to you about 50 (fifty) tons FAIR AVERAGE QUALITY RIBBED SMOKED SHEETS RUBBER R. M. A. 3, packed in cases and/or bales and/or bareback bales, fit for export, at 1*s*/9*d*. (one shilling and ninepence) per lb., nett, c.i.f. Liverpool :

Delivery. For shipment from the East during June and/or July, 1950.

Terms As per your Contract Ref. No. 664 dated 22nd June, 1950

Date.....

CEYLON TRADING CORPORATION.

Sgd.

Manager.

CEYLON TRADING CORPORATION

COLOMBO, 28th June, 1950.

Dear Sirs,

We thank you for your letter of the 22nd instant enclosing your contract No. 664 covering your purchase of the 50 Tons RSS3.

We confirm cables mutually exchanged as per copy attached and in confirmation of our cable we now have pleasure in enclosing our formal contract No. 008/50 in respect of 50 Tons RMA 3—RSS rubber sold to your goodselves at 1*s*. 9*d*. per lb. CIF Liverpool shipment June/July.

Now we have received your Letter of Credit, we shall make arrangements to have this rubber shipped as early as possible.

We thank you for your valued order and co-operation and assure you of our best and careful attention.

Yours faithfully,
CEYLON TRADING CORPORATION

Sgd.

Manager.

The respondent failed to perform his part of the contract. His excuse was that the export duty on rubber had been increased by the Ceylon Government by $2\frac{3}{4}$ pence. Over this failure the parties exchanged a

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series of communications both by post and telegraph. The respondent at first asked for time to perform his contract till the end of August and also for an increase in the credit value. Then he asked for time till the end of September and finally till the 15th of December, 1950, and even suggested 31st March, 1951. The appellant was willing to give the respondent time till even 15th December, 1950, but asked him to give proof of his *bona fides* by shipping at least part of the amount contracted for and specifying the name and date of sailing of the steamer. The respondent failed to give such proof but kept on asking for time and repeating his difficulties and claiming that his default was caused by *force majeure*.

After giving repeated extensions and finding that the respondent was not going to honour his obligations, on 10th October, 1950, the appellant cabled—

"FINAL WARNING INTEND REQUESTING RUBBER TRADE ASSOCIATION LONDON NOON TOMORROW TO APPOINT ARBITRATORS DEAL WITH YOUR DEFAULT".

As this cable evoked no response the appellant proceeded with the reference to arbitration, and on 19th October, 1950, cabled—

"ARBITRATION RE DEFAULT MONDAY NEXT THREE P. M. TELEGRAPH WHETHER YOU WILL BE REPRESENTED AND IF SO BY WHOM".

The respondent objected to the arbitration by the following cable—

"YOUR 19TH CANNOT AGREE ARBITRATION DELAY DUE *FORCE MAJEURE*".

On 23rd October, 1950, the appellant cabled—

"UNLESS WE HEAR BY WEDNESDAY NOON THAT YOU WILL BE REPRESENTED AT THE POSTPONED ARBITRATION AT THREE P. M. THAT DAY ARBITRATORS WILL PROCEED WITH THE CASE".

This cable was followed by another dated 26th October, 1950 :

"ARBITRATORS AWARDED US FIFTEEN THOUSAND POUNDS STERLING DAMAGES FOR DEFAULT IF YOU WISH APPEAL YOU MUST DO SO WITHIN FIVE DAYS AND REMIT FIFTEEN GUINEAS FEES".

The respondent cabled back on 27th October, 1950—

"YOUR 26TH CANNOT ACCEPT ANY AWARDS WILL SHIP GOODS IF SUFFICIENT TIME GIVEN DELAY DUE *FORCE MAJEURE*".

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The appellant replied

"YOUR CABLE 27TH ARE POSTING ALL DOCUMENTS RELATIVE TO CLAIM TO OUR LAWYERS IN COLOMBO ON THURSDAY EVENING NEXT WITH INSTRUCTIONS TAKE APPROPRIATE LEGAL ACTION".

On 9th November, 1950, the appellant's lawyers in Ceylon sent to the respondent a copy of the arbitrator's award together with the following letter :

9th November, 50,
EL/PRS/NG.

Messrs. Ceylon Trading Corporation,
360, Union Place,
Colombo.

Dear Sirs,

Claim of Marchant, Heyworth & Swift, Ltd.

Our clients Marchant Heyworth & Swift, Ltd., London, have sent us the correspondence and documents in respect of the 50 tons Fair Average Quality Ribbed Smoked Sheets Rubber R. M. A. 3, which you had contracted to supply them by shipment during June/July 1950, together with the award of the Rubber Trade Association of London, and we are instructed to demand payment from you and in default of payment to take legal proceedings against you to enforce recovery of £15,003—13—0*d.* representing the amount due to our clients.

You have failed to fulfil your part of the contract with our clients although at your request and for the purpose of assisting you our clients amended the relative credit without prejudice to their rights under the contract to permit shipment to be effected by the end of September last. You have sought to give the impression to our clients that the delay in shipment of the rubber was due to the uncertainty caused by the increase in the Export Duty on rubber and to "*force majeure*". But the reasons given by you for your failure to ship have no substance and cannot be entertained. You are aware that the Government of Ceylon has taken steps to assist shippers of rubber by reimbursing their losses consequent on the increase of the Export Duty.

It is clear that your failure to ship the rubber even at the end of September cannot be excused by the increase in Export Duty on rubber and the rise in the price of rubber and our clients consider that you were hoping for a fall in price to fulfil your contract with financial advantage to you.

In the circumstances our clients were obliged to refer the matter to the Rubber Trade Association of London for Arbitration in terms of the contract entered into with you which provided that it was governed by the Rules, Regulations and Bye-Laws of the Rubber

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Trade Association of London which fact was acknowledged by you in signing the contract receipt. You were given ample notice of the reference to Arbitration and ample opportunity was given to you to be represented at the Arbitration proceedings but you failed to make any response. The Arbitrators have awarded that you defaulted and that you as sellers should pay to our clients the buyers the sum of £15,000 and costs. We enclose the original Arbitration Award No. 5689 * of the Rubber Trade Association of London together with our clients' account showing a sum of £15,003—13—0*d.* due to them and we have to request you to make immediate payment of Rs. 200,645·70 representing the approximate equivalent in Ceylon currency of £15,003—13—0*d.*

In default of payment forthwith we shall take appropriate legal proceedings against you to enforce recovery ".

Yours faithfully,
Sgd. F. J. & G. de Saram.

* " We the undersigned having been appointed by the committee to settle a dispute arising out of a contract dated 22nd June 1950 made between Messrs. Marchant Heyworth & Swift Ltd. and the Ceylon Trading Corporation, Colombo, for Fair Average Quality R. S. S. R. M. A. 3, C. I. F. Liverpool, have carefully considered the same and award as follows, viz. about 50 tons Fair Average Quality Ribbed Smoked Sheets Rubber R. M. A. 3.

That sellers have defaulted and shall pay to the buyers the sum of Fifteen Thousand Pounds (£15,000) ".

As the respondent failed to satisfy the award, the appellant obtained an originating summons from the High Court of Justice under section 26 of the Arbitration Act of 1950. The originating summons was served on the respondent by Mr. V. Murugesu, Proctor, of Messrs. F. J. & G. de Saram and an affidavit to that effect was filed in the High Court. The respondent did not appear in the High Court and took no part in the proceedings.

Learned Counsel for the respondent contended that a party to a contract is not bound to submit to arbitration any dispute thereunder unless he has formally agreed to be so bound. He invited our attention to the case of *Caerleon Tinplate Co. Ltd. v. Hughes and another* [1], and to the case of *T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* [2]. Neither of these cases has any application to the case under consideration.

The question in the former case was, whether or not there had been a submission to arbitration within the meaning of the Arbitration Act, 1889 (52 & 53 Vict. C. 49) section 27 of which provided that " in this Act, unless the contrary intention appears, ' submission ' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not ".

[1] *60 Law Journal, Q. B. D. 640.* [2] *1912 A. C. page 1, at page 8.*

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The action was for the price of goods sold, and it appeared that the defendants sent a bought-note, duly signed by them, to the plaintiffs' agents, containing the following provision :

> " Any dispute arising on this contract to be settled by arbitration in Liverpool ".

On the same day the plaintiffs' agents signed a sold-note which contained no provision for arbitration whatever. It was held that section 27 required an agreement signed by both parties and that as there was no such agreement there was no valid reference to arbitration.

In the latter case, it was held that an arbitration clause found in the charter party was not applicable to the contract evidenced by the Bill of Lading, and to disputes arising between the shipowners and the holders of the Bill of Lading under that document the Bill of Lading being the primary document to be considered in that case.

It was sought to bring into the Bill of Lading the arbitration clause in the charter party by virtue of the following words in the Bill of Lading :

> " William Malcolm Mackay or to his assigns, he or they paying freight for the said goods, with other conditions as per charter party with average accustomed " and " Deck load at shippers' risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause ".

The House of Lords refused to permit such a construction of the Bill of Lading. The speech of Lord Atkinson at page 6 states the principle of construction thus—

> " I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a Bill of Lading—a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage or delivery of the cargo or the payment of freight,—the proper subject-matters with which the Bill of Lading is conversant,—this should be done by distinct and specific words, and not by such general words as those written in the margin of the Bill of Lading in this case ".

Counsel for the respondent argued that the words " terms as per your contract Ref. No. 664 dated 22nd June 1950 " in the respondent's cable did not include the arbitration clause and referred only to what was stated in the appellant's letter in regard to the Terms of Payment. We are unable to uphold his contention. This is not the respondent's first business transaction with the appellant. The respondent's plea that the arbitration clause was unknown to him cannot be accepted in view of the appellant's letter dated 4th April, 1949. It reads :

> " We duly received your of the 19th March enclosing Contracts 001/49 and 002/49, and would like to point out to you that these purchases from you have already been covered by our Contracts which

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are made under the Rules of the Terms and conditions of the Rubber Trade Association of London. We naturally assume that these terms and conditions are well known to you and hope that you are agreeable to them. As you know they fully protect you in every respect ".

Even in the letter by which the instant contract was concluded pointed attention is drawn to the fact that disputes arising on the contract are to be settled by arbitration. The fact that that clause is printed in the margin of the document is no justification for treating it as if it did not exist.

According to the law of England which regulates the transaction in the instant case there is nothing which requires that the agreement to refer a dispute to arbitration should be a formal document signed by both parties. The requirements of that law are that there must be an agreement in the sense that the parties must be *ad idem* and that the agreement must be in writing. The view we have taken finds support in the case of *Frank Fehr & Co. v. Kassan Jivraj & Co. Ltd.*[1] which is quoted at p.25 of the 15th Edition of Russell on Arbitration. Such an agreement may even be extracted from the correspondence between the parties. It may even be incorporated by reference as in the appellant's letter of 4th April, 1949. In the instant case the respondent is not free to plead ignorance of the provision to refer disputes to arbitration as it is not only stated expressly in the formal letter of April, 1949, explaining the terms of business but it is also included in the letter by which the contract was concluded. The contention that there has been no valid agreement to refer is not entitled to succeed.

Even applying the test of our Law the respondent will not be heard to say in the instant case that there was no submission to arbitration. The only requirement of a voluntary submission is that the parties should consent to it either expressly or tacitly by conduct or action.

Once it is held that there was an agreement to refer all disputes to arbitration the only question that remains to be decided is whether the arbitration was properly held in England as provided in that clause. We think the arbitration was properly held in England, and that the petitioners correctly made an application to enforce it in the Queen's Bench Division of the High Court of England.

In our opinion the learned District Judge should not have set aside the order that the Judgment should be registered under section 3 of the Reciprocal Enforcement of Judgments Ordinance. We accordingly set aside the order of the learned District Judge and allow the appeal with costs in both Courts.

PULLE, J.—I agree.

Appeal allowed.

[1] *(1949) 82 Ll. L. Rep. 673.*

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[In the Court of Criminal Appeal]

1955 *Present:* **Gratiaen, J. (President), Gunasekara, J., and K. D. de Silva, J.**

REGINA *v.* K. PIYASENA

S. C. 5—M. C. Kalutara, 21,304

Provocation—Charge of murder—Mere abuse may amount to grave and sudden provocation—Question of fact for jury—Penal Code, s. 294, Exception 1.

In a trial for murder the accused gave evidence stating that he stabbed the deceased in self-defence when the latter struck him with a club. At the same time the evidence of two of the prosecution witnesses indicated that the stabbing was immediately preceded by "foul abuse" on the part of the deceased.

Held, that the jury should have been directed in the course of the summing-up that it was for them to decide, after due consideration of the evidence of the prosecution witnesses and of the accused, whether the deceased man gave the accused provocation and, if he did, whether such provocation was grave enough to reduce his offence to culpable homicide not amounting to murder within the meaning of Exception 1 to Section 294 of the Penal Code.

APPEAL against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *P. B. Tampoe* and *L. F. Ekanayake*, for the accused appellant.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 2, 1955. Gratiaen, J.—

This was an appeal against a conviction for murder. At the conclusion of the argument we substituted a conviction for culpable homicide not amounting to murder and sentenced the appellant to a term of 8 years' rigorous imprisonment. The reasons for our decision must now be stated.

The deceased Andy Singho admittedly came by his death in consequence of a stab injury inflicted on him by the appellant on 25th April 1954. According to the witness Alpi Singho who was called by the Crown, the appellant and the deceased were standing together on the ridge of a paddy field and "exchanging foul abuse", whereupon the appellant stabbed the deceased. Lihinis Appuhamy, who was the deceased's brother, also claimed to have heard "some foul language" after which the appellant, immediately before the stabbing, said "You set fire to my house, are you now trying to show me your pride ?". (Somebody had in fact set fire to the appellant's house about a year

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previously, and suspicion had, rightly or wrongly, fallen on the deceased. The evidence of Lihinis therefore indicates that the appellant protested that the deceased was arrogantly adding insult to past injury, real or assumed.)

The appellant admitted the stabbing, but alleged that he stabbed the deceased in self-defence when the latter struck him with a club.

In his charge to the jury, the learned Commissioner correctly directed them that, *if they accepted the appellant's version*, there was room for them to return a verdict based on the plea of self-defence or alternately on the plea of having acted under grave and sudden provocation.

To this extent the summing-up is unexceptionable. Mr. Kumarakulasingham complains, however, that in certain other passages of the charge the learned Commissioner directed the jury that *if they believed the evidence of Alpi Singho and Lihinis*, the only verdicts which they could properly return were that the appellant was guilty of murder or (if they were not satisfied that a murderous intention was established) of culpable homicide not amounting to murder ; that is to say, he directed them by implication that in that event it was not open to them to take the view that the appellant had acted under grave and sudden provocation within the meaning of Exception 1 to Section 294 of the Code. He also directed them to the effect that if they accepted that evidence they must necessarily reject the whole of the defence version of the circumstances of the homicide, and that the appellant could get the benefit of this exception only if they held it to be probable that the circumstances were substantially as described by him. He did not invite them to consider whether the appellant's version, though exaggerated, was truthful in so far as it mentioned certain acts of provocation in addition to the " foul abuse " spoken to by Alpi Singho and Lihinis.

In our opinion, the learned Commissioner was not justified in directing the jury that a verdict of culpable homicide not amounting to murder on the ground of grave and sudden provocation was permissible only if they rejected the evidence of Alpi Singho and Lihinis. In this country, mere abuse, even if unaccompanied by physical violence, may in certain circumstances afford sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder ; and the question whether such provocation was grave enough to mitigate the intentional killing of a man is a question of fact for the jury, properly directed on the law, to determine. *The King v. Coomaraswamy*[1], *The King v. Kirigoris*[2]. It is not proper for the presiding Judge to withdraw the issue of provocation from the jury unless a verdict under Exception 1 would, on any view of the evidence, be wholly unreasonable. The Judicial Committee, in laying down the test of " gravity " in *Attorney-General v. Perera* [3], did not formulate a rule to the effect that abuse, however provocative in degree, can never by itself bring a case within Exception 1 to Section 294 of our Code.

[1] *(1940) 41 N. L. R. 289.*

[2] *(1947) 48 N. L. R. 407.*

[3] *(1952) 54 N. L. R. 265.*

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In the present case the jury should have been directed that it was for them to decide, after due consideration of the evidence of the prosecution witnesses and of the appellant, whether the deceased man gave the appellant provocation and, if he did, whether such provocation was grave enough to reduce his offence to culpable homicide not amounting to murder. We were unable to hold that, if this issue had been left open as it should have been, they could not reasonably have returned a verdict convicting the appellant only of the lesser offence. For these reasons we substituted a conviction under Exception 1 to Section 294 and passed sentence accordingly.

Conviction altered.

1955 *Present :* **Sansoni, J., and Fernando, A.J.**

N. H. MOHAMED *et al.*, Appellants, *and* K. M. S. ABDUL GAFOOR, Respondent

S. C. 416–417—D. C. Kegalla, 4,483

Constructive trust—Minor—Person in fiduciary relation entering upon and possessing minor's estate—His liability as trustee—Agent—His status as express trustee—Prescription—Fraud—Trusts Ordinance (Cap. 72), ss. 82, 90, 92, 111.

Plaintiff was a minor and lived with his elder sister. Each of them was entitled to a half share of the business of a Tea Factory. Defendant, who was the husband of the sister, of his own accord undertook to manage the business on behalf of the plaintiff and conducted the entire business.

Held, (i) that under section 90, read with section 82, of the Trusts Ordinance the defendant was a constructive trustee as an agent who stood in a fiduciary relation to the plaintiff and, accordingly, held the half share of the business for the benefit of the plaintiff.

(ii) that, inasmuch as a person in the position of an agent is generally treated by English law as an express trustee, the provisions of section 111 (5) of the Trusts Ordinance precluded the defendant from pleading the benefit of the Prescription Ordinance.

(iii) that the liability of the defendant as trustee extended for a short period beyond the period of minority of the plaintiff in regard to profits derived from transactions with third parties.

(iv) that section 111 (1) (*b*) of the Trusts does not require the element of fraud to be proved in order to avoid the plea of prescription.

APPEAL from a judgment of the District Court, Kegalla.

N. E. Weerasooria, Q.C., with *V. A. Kandiah*, *S. W. Walpita* and *O. S. M. Seneviratne*, for the defendants (appellants in Appeal No. 416 and respondents in Appeal No. 417).

C. Thiagalingam, Q.C., with *H. W. Tambiah* and *V. Ratnasabapathy*, for the plaintiff (respondent in Appeal No. 416 and appellant in Appeal No. 417).

Cur. adv. vult.

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January 3, 1955. FERNANDO, A.J.—

The plaintiff instituted this action on February 1946, claiming as against the 1st defendant an accounting in respect of a business carried on at premises known as " The Mawanella Tea Factory " for the period of three years prior to institution of action, and for judgment for Rs. 36,000 representing a one half of the profits of the business for the same period. The 2nd defendant (wife of the 1st) was for reasons which will presently appear added as a necessary party. The claim was founded on the averments :—

(*a*) that one Seyadu Lebbe, the father of the plaintiff and of the 2nd defendant, carried on the business of the manufacture of tea at the Factory ;

(*b*) that Seyadu by two deeds of 1938 (P2 and P3) transferred, to the plaintiff and the 2nd defendant, a half share each of the factory machine and business ;

(*c*) that from about 1939 (the year in which Seyadu died) the 1st defendant managed the business for and on behalf of the plaintiff, who was then a minor, and of the 2nd defendant.

The defendant first filed answer on July 4, 1946, substantially admitting the averments which I have summarized at (*a*) and (*b*) above, and in addition referring to a Deed of lease of 1928 (also numbered P3) which purported to be a lease to Seyadu of the Factory and the land on which it stood for a term of 50 years. They however denied the averment mentioned at (*c*) above and stated instead that, in 1939, one Naina Mohamed took charge of the Factory on an undertaking given by the plaintiff and the defendants to put the Factory in working order and on an agreement to pay Rs. 100 per month if the undertaking was carried out. The answer further stated that the Factory was only put into working order by 1942 (but solely by the 1st defendant and at a cost to him of about Rs. 6,000), and that Naina Mohamed paid Rs. 100 per month to the 1st defendant from February 1942. They further answered that the 1st defendant worked the Factory from May 1944 under his own name and with his own capital. The 1st defendant was also stated to have spent Rs. 1,600 on extensions to the Factory, and a further Rs. 1,300 in defending an action No. 1883 of the District Court of Kegalle, and to have paid sums aggregating to Rs. 1,200 to the plaintiff. The answer concluded by allowing credit to the plaintiff in a sum of Rs. 2,550 being his half share of the monthly rents, and claiming in reconvention the amount of the difference between the expenses incurred by the 1st defendant and the sum allowed as credit to the plaintiff.

Before I refer to subsequent history, it is helpful to note the obvious implications of this answer :—

(i) it is admitted that the plaintiff was entitled to a half share of the leasehold interest in the Factory as successor in title of his father Seyadu as from the date of Seyadu's death, if not earlier ;

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(ii) it is admitted that the plaintiff was entitled to a half share of the rent of the Factory for 51 months from February 1942 (when rent was first paid by Naina Mohamed), i.e. until February 1946 (when the plaint was filed) ;

(iii) in view of (i) and (ii) above, the 1st defendant was from May 1944 the sub-tenant of the Factory under the plaintiff and the 2nd defendant ;

(iv) the plaintiff is liable to re-imburse the 1st defendant for the expenses incurred by him in installing machinery and extending the Factory, which expenses must therefore be presumed to have been incurred by the 1st defendant on behalf of the plaintiff. (The re-imbursement should correctly have been claimed only as to one half of the expenses, since the 2nd defendant held the other half share of the leasehold interest).

In January 1948 (18 months later !) the defendants filed an amended answer in which they sing quite another tune. They say at this stage that the interest which the plaintiff derived from his father was extinguished by a Partition Decree of May 1941 (which divided into Lots the estate on which the Factory stood among the co-owners of the estate and which did not expressly keep alive the lease granted to Seyadu in 1928), and that the plaintiff ceased to have any interest in the Factory or business after that decree ; as a second line of defence, they refer to Case No. 1883 (D13 of 1941) which was ended by a consent decree (D13 of 10th November 1943), and state that any rate the plaintiff ceased to have any interest from the latter date. The averments as to expenses incurred by the 1st defendant are pleaded again, but no claim in reconvention is now made. Nor does this answer refer at all to Naina Mohamed's alleged tenancy of the Factory. Furthermore the 1st defendant's alleged 'sole ownership' of the Factory is now ante-dated to November 1943, instead of May 1944.

The plaintiff (or his advisers) also appear to have had second thoughts. He moved in December 1948 to amend his plaint by deleting the references to the three year period before action, an amendment which in substance meant that his claim for an accounting and half the profits would cover the whole period from 1939 to the date of the plaint in 1946. The defendants objected to the amendment, but it was allowed by the District Judge on condition that the defendants could raise a plea of prescription without first amending their pleadings. The following were the principal issues raised at the trial. I have for convenience noted the answers of the learned Judge to each of them :—

4. Did the 1st defendant from 1939 manage the said business for or on behalf of the plaintiff who was a minor at the time ? *Answer*—Yes.

5. Is the 1st defendant the Manager and Agent of the plaintiff's half share of the said business ? *Answer*—Yes.

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6. Is the plaintiff entitled to an accounting from the 1st defendant from the year 1939 ? *Answer*—Yes. Up to the end of December 1943.

7. If so what sum is due from 1st defendant to plaintiff ? *Answer*—To be determined after an accounting is taken.

8. Were the rights, if any, conveyed by deeds No. 53 and 54 wiped out by the partition decree dated 15th May 1941, in D. C. Kegalle Case No. 1415 ? *Answer*—No.

12. After the date of decree in Case No. 1883 (10.11.43) is the plaintiff entitled to claim any benefit under or on the basis of the said deed No. 53 ? *Answer*—No.

13. Did the 1st defendant work the said Factory as his sole business as from January 1944 ? *Answer*—Yes.

18. Does the plaint disclose a cause of action against the defendant ? *Answer*—Yes.

19. Is the claim, if any, of the plaintiff before 1.2.43 prescribed ? *Answer*—No.

21. In Case No. 1883 D. C. Kegalle, did the plaintiff acquiesce in the position that he was not entitled to any right or benefit by virtue of deed No. 53 ? *Answer—Yes.*

22. If so, is the plaintiff now estopped from claiming rights or benefits under the said deed ? *Answer*—Yes from December 1943.

It is noteworthy that the defendants did not, even as a counter to issues 4 and 5, put in issue the question (raised in the original answer) whether Naina Mohamed took charge of the Factory on his own account in 1939 and whether therefore the 1st defendant was not answerable to the plaintiff in respect of the profits derived during Naina Mohamed's regime. But this question was the one mainly agitated at the trial, and by far the largest part of the oral evidence and of the mass of documents in the case were relevant only to that question. The learned District Judge has, with admirable brevity, considered that question : he finds that Naina Mohamed did in fact " work the Factory " from 1939 until February 1944, *but that " the 1st defendant was the real person who was running the Factory "*. It is the latter part of his finding that Mr. Weerasooriya strongly challenges in appeal.

The parties are Muslims ; the plaintiff was in 1939 a youth of seventeen ; the 1st defendant was the husband of his elder sister by a former marriage ; when his father died, plaintiff lived with that sister and subsequently in the Factory, but often took his meals at the sister's house near the Factory ; he and his sister were at that time co-owners of the Factory ; the 1st defendant contrived at his own cost to settle a maintenance case instituted against the plaintiff. All these facts are not denied by the defendants. The plaintiff's evidence, which the learned Judge has believed in preference to that of the 1st defendant and Naina Mohamed,

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is that the 1st defendant ' agreed to work the Factory for him and his sister '. If the business of the Factory had been conducted by the sister upon a similar understanding, Section 90 of the Trusts Ordinance would undoubtedly have applied to protect the interests of the minor plaintiff, and to my mind it makes no difference that the business was conducted by the sister's husband ; he was either a trustee, or at best an agent, for his own wife, and if he took charge of the Factory in either capacity he was bound to ' protect the interests ' of the minor plaintiff. The suggestion that the Factory was first worked after Seyadu's death by Naina Mohamed on his own behalf is contradicted by the documentary evidence, because the books of Bartleet and Co. show that from January to October 1940 the account for the Factory was in the name of the 1st defendant and not of Naina Mohamed. If indeed it is true that Naina Mohamed worked the Factory on his own account, one would expect him to have dealt with the books in his own name ; the learned Judge has rejected the specious explanation that dealings were conducted by the 1st defendant because of Naina Mohamed's ignorance of commercial transactions, and I feel quite unable to disagree with the Judge on this point. The finding which Mr. Weerasooriya attacks has therefore to be sustained, subject only to the modification that I would hold that, during the period ending in November 1943, the 1st defendant did not merely manage the business on behalf of the plaintiff, as respects a half share, but was under Section 90, read with Section 82 of the Trusts Ordinance, a constructive trustee, and accordingly held the half share of the business for the benefit of the plaintiff. The whole of the evidence in the case was read to us at the argument in appeal, parts of it more than once ; without now referring to various items of evidence, I am content to say that the case presented by the defendants was so full of inconsistencies and improbabilities that the learned Judge was rightly unable to rely upon the evidence they adduced ; the change of ground which they adopted when they filed their second answer was in the light of the admissions they were willing to make originally yet another reason why their defence had to be looked upon with deep suspicion.

There next arises for consideration the question of law raised by Mr. Weerasooriya, namely whether the order allowing the amendment of the plaint on December 22, 1948, was bad in that it permitted the inclusion of a cause of action which was time-barred at that date. I am inclined to think that the question does not arise, for the reason that the real effect of the amendment was not to add a new or distinct cause of action, but only to seek fuller relief on the same cause of action as was originally pleaded. But it is unnecessary to consider that aspect of the matter, because even if the amendment had the effect of adding a new cause of action, the new cause would not itself have been barred by the lapse of time.

Section 111 of the Trusts Ordinance makes the Prescription Ordinance inapplicable to a claim by a beneficiary against a trustee founded upon any fraud or fraudulent breach of trust, or to a claim to recover trust property or the proceeds thereof still retained by a trustee. But by sub-section (5) the exception does not apply to constructive

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trusts, except in so far as such trusts are treated as express trusts by the law of England. The plaintiff's evidence (accepted by the learned Judge) shows that the 1st defendant of his own accord undertook to manage the business on behalf of the plaintiff. The 1st defendant was as I have held a constructive trustee as an ' agent ' referred to in Section 90 of the Trusts Ordinance, and such an ' agent ' is treated by English law as an express trustee and as such disabled from pleading the Statutes of Limitation. (Preston and Newsom—Limitation of Actions, 2nd Edn., p. 162, Halsbury, Hailsham Edn., Vol. 20, p. 755). This proposition is so clearly reasonable that I do not feel the need to examine it by reference to the authorities. I will only add that a ' commercial agent ' would not necessarily be treated as an express trustee by the English law ; but the 1st defendant cannot be said, in the circumstances of this case, to have merely acted in that capacity.

I pass now to consider the plaintiff's appeal against that part of the judgment and decree which denies to him an accounting in respect of the period commencing from December 1943. It is necessary in this connection to refer to the Action No. 1883 of the District Court of Kegalle which was instituted in 1941. One Susila de Silva had in the earlier partition action (to which I have already referred) been allotted the portion of the Estate on which the Tea Factory stood. In October 1941 she filed plaint against the present plaintiff and Naina Mohamed alleging that they were in wrongful possession of the Factory and claiming ejectment and damages ; this plaint of course amounted to a denial by Susila de Silva of the plaintiff's leasehold interests. The present plaintiff and Naina Mohamed filed answer in 1942, pleading that the prior partition decree was not binding on them and that they were in occupation under the present 2nd defendant as successor of her father Seyadu. The present 2nd defendant was also added and filed answer on the footing that she was the lessee of the Factory. (I would point out, in passing, that the present plaintiff was then a minor and that according to the pleadings in the present case the 1st defendant claims to have spent Rs. 1,300 on behalf of the present plaintiff in connection with that Action No. 1883. In these circumstances, it is significant that the lawyers were not at that stage instructed to plead that the present plaintiff had a share in the leasehold interest.)

The action No. 1883 was ultimately settled in terms set out in the decree of 10th November 1943. The terms were that Susila de Silva will execute *in favour of the present plaintiff and the present 1st defendant* a lease of the Tea Factory for a period of 35 years at Rs. 75 per month. The lease was to be executed before the end of November 1943 at the expense of the lessees. It has to be conceded that the plaintiff was present at the settlement. He had attained majority five days earlier (5th November 1943). The evidence of Susila de Silva's husband was to the effect that, after the settlement, he wrote to both the plaintiff and the 1st defendant asking them to take up the lease, but that neither of them responded to this request. He says that thereafter (it is not clear when exactly), he gave an informal lease to the 1st defendant whom he thereafter regarded as his tenant.

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The conclusion reached by the learned Judge upon the settlement decree of November 1943 and the evidence to which I have just referred is that the plaintiff agreed by the settlement to give up all his rights under the earlier lease to Seyadu and that his failure to take up the new lease in terms of the settlement disentitles him from making any claim against the 1st defendant in respect of the period subsequent to 1943.

I think this finding is open to criticism in one respect. The plaintiff has stated that the 1st defendant ' turned him out ' of the Factory in July 1944, and this was not contradicted. He must be taken to have been in the Factory during the first half of that year. Further, as I stated earlier, it is not clear when exactly the 1st defendant became the informal tenant of the Factory. He too had been written to several times by de Silva in regard to taking up the lease, but did not respond. All this must have taken some time. Moreover, although the defendants produced receipts for rent paid to Susila de Silva, the first of these is for the months of July and August 1944, a circumstance which supports the plaintiff's evidence that he was expelled in July. Hence it would seem that both the 1st defendant and the plaintiff (who as the Judge holds must be taken to have abandoned his *prior* right as lessee) were in occupation of the Factory in the faith of their rights under the decree of November 1943, so that the plaintiff was a joint lessee with the 1st defendant until July 1944, which was the month for which rent was proved to have been first paid by the 1st defendant.

The point of law raised by Mr. Thiagalingam is that, even though the informal lease was taken by the 1st defendant alone, he took it in right of an interest which he had jointly with the plaintiff, and must therefore hold it for the benefit of the plaintiff to the extent of the latter's interest. We have in this connection been referred to the leading cases. *Keech v. Sandford* (reported in White and Tudor's leading cases in Equity) and *Re Biss* [1]. The principle enunciated in the former case decided in 1726 is that if a person who holds a lease as trustee for an infant obtains a lease of the same property in his own name, he will still hold as trustee and be liable to account for the profits—this despite the fact that he may have taken the lease for himself only after the lessor had declined to renew it for the benefit of the infant. Snell (Principles of Equity, 21st Edition, page 124) states that " this principle has been extended to other persons who clearly occupy a fiduciary position, such as executors, administrators and agents, and the rule is in their case an absolute one just as in the case of an express trustee. " He says also that the rule has been extended " to persons who have a partial interest in a lease such as . . . . joint tenants and tenants in common, although such persons do not stand in a definite fiduciary relationship to the other persons interested . . . but the presumption of trust is in these cases rebuttable, and if they can show that they did not in any way abuse their position . . . . they can keep the renewed lease for their own benefit " (idem page 125). These principles of the English Law have been incorporated into sections 90 and 92 of our Trusts Ordinance, which sections must be applied in the same manner as these principles are applied by the English Courts.

[1] *1903, 1 Ch. 40.*

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Having regard to these principles, I think that the settlement decree of November, 1943, is of no assistance to the 1st defendant. The decree recognised a prior claim (if not also the right) of the plaintiff to be a joint lessee, and gave him a right to a lease for approximately the balance period of the original 50-year term granted in 1928; it gave him that right jointly with the 1st defendant (presumably as husband of the 2nd); the two were accordingly jointly interested in obtaining the grant of the lease " although they may not have stood in a definite fiduciary relationship to each other ". I think therefore that the case is at least one where there is a rebuttable presumption of trust, and there is nothing in the evidence in this case which does rebut it. The continued joint occupation until July, 1944, " the turning out " of the plaintiff, and the contemporaneous assumption by the 1st defendant of the position of informal lessee indicate rather that he " abused his position ". Any doubt I might have had on the question whether the 1st defendant stood in a fiduciary capacity in July, 1944, is removed by the following observations :—*Halsbury* (Vol. 20 p. 717) :— " The entry on and possession of an infant's land by some person other than the father or mother may make the same rule applicable to such entry and possession. Where the person so held to be guardian or bailiff continues in possession after the infancy has ceased, he is supposed to continue in possession in the same capacity as before, unless something is done to change the character of the possession, and the statute will not run even after the infancy has ceased, until such character is changed. " *Lord Hardwicke* (cited in *Howard v. Earl of Shrewsbury* [1]) :— " Where any person, whether a father or a stranger, enters upon the estate of an infant and continues the possession this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account *after the infancy is determined.* "

The case of *Waduganathan Chettiar v. Sena Abdul Cassim* [2] does not assist the defendants. Pulle J. was of opinion that a trust of the nature alleged in that case would not be treated in English Law as an express trust and he distinguished the case from that of *Arunasalam Chetty v. Somasunderam Chetty* which was decided by the Privy Council [3], where their Lordships approved the distinction stated by Lord Justice Bowen in *Soar v. Ashwell* [4] :—" An express trust can only arise between the cestui que trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. " In the case before us the 1st defendant was no stranger who becomes bound by a trust already constituted, but an agent who stood in a fiduciary relation to the plaintiff.

It is claimed also for the defendants that fraud has not been pleaded and cannot therefore be regarded as having been established. But neither section 90 nor section 92, on which the appellant relies, render necessary the element of fraud ; those sections apply when two conditions exist, namely that a person is placed in a fiduciary relationship to another, and that he derives a personal advantage to the prejudice of the interests

[1] *1873 L. R. Equity Cases, at page 399.*
[2] *(1952) 54 N. L. R. 185.*
[3] *(1920) 21 N. L. R. 389.*
[4] *(1893) 2 Q. B. 390.*

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of the other. The failure to aver fraud might also have been relied upon by the defendants as a ground for excluding the operation of section 111 of the Trusts Ordinance. But sub-section (1) (*b*) of that section does not require the element of fraud to be proved in order to avoid the plea of prescription.

Counsel also argued that the existence of a trust has been urged for the first time in appeal. This is not strictly so, because plaintiff's counsel had at the trial relied on the Trusts Ordinance. In any event, the plea and the issue that " the first defendant managed the business for and on behalf of the plaintiff, who was a minor at the time " were in my opinion quite sufficient to enable the trial Judge to decide the case on the footing of a trust. He erred in holding that the period for which the plaintiff is entitled to an accounting terminated in December 1943.

I would accordingly dismiss with costs the appeal of the defendants and allow the plaintiff's appeal with costs. The decree of the District Court will be set aside *pro forma*, and a decree entered ordering an account to be taken of the profits of the business of the Factory from 1939, until date of action and ordering the 1st defendant to pay to the plaintiff one half of the profits of the business until that date, together with the costs both of action and of these appeals.

SANSONI, J.—

I agree. I do not wish to recapitulate the facts. They establish the proposition, in support of which Mr. Thiagalingam cited authorities, that the 1st defendant was in a fiduciary position in relation to the plaintiff. He took charge of the Factory and worked it while the plaintiff was living with him and looked upon him as his guardian. It is probable that he sometimes put forward Naina Mohamed and sometimes himself as the proprietor of the business while they were in league to cheat the Income Tax Department and their creditors. It is almost impossible to unravel the tangled skein of their mutual dealings between the years 1939 and 1944. During that period their accounts seem to have been inextricably mixed together and both of them have represented themselves at different times as owners of the business. But I am satisfied that throughout that period it was the 1st defendant who was the actual manager, and not his brother-in-law Naina Mohamed. The legal position then is plain. When the 1st defendant entered into possession of the Factory he must be considered to have done so as the plaintiff's guardian and for the plaintiff's benefit ; he became a trustee for the plaintiff and he is therefore liable to account from the time the plaintiff's title accrued. Leach, C. J., in *Kathorni Bi v. Abdul Wahab* [1] had a similar case to decide. He refers to the earlier English cases and points out that the equitable principles which they established have been embodied in sections 90 and 92 of the Trusts Ordinance (Cap. 72).

I shall assume that the lease in favour of Seyadu was wiped out by the Final Decree which was entered in May 1941 in the partition action. But that will not help the 1st defendant, because once he entered as the agent of the plaintiff, who at that time was regarded as a co-lessee with his step sister (the defendant's wife), his continued possession of the

[1] *A. I. R. (1939) Madras 313.*

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Factory must be considered to have been on the same footing. On what other basis can the 1st defendant claim to have remained in possession ? It cannot be argued that the fiduciary relationship between the plaintiff and the 1st defendant could not exist apart from the lease which made no mention of either of them ; that relationship arose by operation of rules of equity, and the character of trustee with which the 1st defendant was clothed when he entered into possession could not be taken away from him by the acts of third parties, any more than he could rid himself of it by his own unilateral acts.

The settlement of 10th November, 1943, in case No. 1883 does not avail the 1st defendant either. The first point to be noted about it is that it was entered into only five days after the plaintiff attained the age of twenty-one. Where, as in this case, the relationship of guardian and ward had existed between the plaintiff and the 1st defendant for some years previously, there is a presumption in equity that undue influence continued for a short period after the relationship had ceased. See the cases cited by de Silva, A. J., in *Perera v. Tissera* [1] where a similar situation arose. Even at the time of the settlement and for some months thereafter the plaintiff was still working in the Factory and was clearly under the influence of the 1st defendant. No evidence at all has been led to show that before the plaintiff entered into the settlement he received honest and disinterested advice, nor has any attempt been made to establish the good faith of the transaction as required by section 111 of the Evidence Ordinance (Cap. 11). All throughout that case, it must be remembered, the plaintiff was under twenty-one years of age and no guardian ad litem was appointed to represent him. The 1st defendant, on his own admission, was conducting the defence of the plaintiff and financing it. This strengthens the presumption that any settlement entered into was reached in a situation where the 1st defendant considered his own interests, rather than the duty he owed to the plaintiff. Any advantage which the 1st defendant gained under that settlement—which was obviously made while the parties had in mind the earlier lease to Seyadu—must be held by him for the benefit of the plaintiff for he gained it by availing himself of his fiduciary position. It is not open to him to say that he ceased to be a trustee merely because of this settlement. Under Section 90 he continued to be subject to the disabilities of a trustee even though the terms of settlement do not make a reference to the earlier position of the parties.

The evidence established that the 1st defendant had ample means to obtain a lease for 35 years ; the husband of Susila de Silva was anxious that the lease should be executed ; yet for obvious reasons the 1st defendant did not choose to enter into the lease. He preferred to become a monthly tenant in respect of the Factory, fondly thinking that he would thereby extinguish the rights of the plaintiff. I do not believe that the plaintiff did not wish to enjoy the benefits of the contemplated lease. The receipt dated 10th May, 1944, which was issued to the plaintiff for rent paid by him to de Silva for the months of March and April, 1944, shows that the plaintiff's attitude was anything but one of indifference as regards his continuing as a tenant of de Silva. The defendant did

[1] *(1933) 35 N. L. R. 257.*

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not even pay the costs of the action No. 1883. His conduct throughout has been dishonest and he crowned his dishonest dealings, which had begun from the time he entered into possession of the Factory, by turning the plaintiff out of the Factory in July 1944, and becoming the monthly tenant of de Silva. How aptly do the words of Lord King, L. C., in *Keech v. Sandford* (supra) fit this situation when he said :—" If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestuis que trusts ". The monthly tenancy which the 1st defendant created for himself alone, as he thought, must be presumed to be a tenancy for the benefit of the plaintiff and the 2nd defendant. As I hold that the 1st defendant was a trustee for the plaintiff both at the time of the settlement and at the time he became a monthly tenant, the presumption that he did so for the latter's benefit is absolute and irrebuttable according to the rule in *In re Biss* (supra). Romer, L. J., said in that case :—" The equitable doctrine I am considering is not limited in its application to cases where the old lease was renewable by agreement or custom, or where the new lease was obtained by surrender or before expiration of the old lease . . . . . And further I may note here that the cases show that, with regard to a person obtaining a renewal, who occupies a fiduciary position, it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease ". The 1st defendant continued to be a trustee for the plaintiff throughout and I hold therefore that the 1st defendant is liable to render an account for the entire period up to the time of filing this action.

On the question of the amendment of the plaint, this is one of those exceptional cases where, even if the claim covered by the amendment had been barred at the time of the amendment, the judge was fully entitled to allow the amendment. Lord Esher, M. R., in *Weldon v. Neal* [1] said that under very peculiar circumstances the Court might perhaps have power to allow such an amendment. But the plaintiff need not rely on this exception because the amendment did not set up a new cause of action. Further, the claim was not barred at the time of the amendment because a person in the position of the 1st defendant cannot plead the benefit of the Prescription Ordinance.

Finally, I do not agree with the submission of the 1st defendant's counsel that the question of a trust was not raised until the hearing of the appeal The averments in the plaint are sufficient to enable the plaintiff to rely on the equitable principles which we have applied in our judgments. It was not necessary for the plaintiff to plead those principles in his plaint ; their application to the facts as found is automatic. If there were any doubt in the matter I think the course suggested by Lord Atkinson in *Jayawickreme v. Amarasuriya* [2] could be adopted. The plaintiff has " established a good and meritorious cause of action according to the system of law applicable to the case " and the absence of the word " trust " from the plaint and issues should not bar his right to relief.

Appeal 416 dismissed.
Appeal 417 allowed.

[1] *(1887) 19 Q. B. D. 394.*

[2] *(1918) 20 N. L. R. 289.*

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1955 *Present:* **Gratiaen, J., and Swan, J.**

HASEENA UMMA, Appellant, *and* HASHIM, Respondent

S. C. 331—D. C. Kandy, M. R. 4,929

Muslim Law—Claim for kaikuli*—Prescription.*

No cause of action for the recovery of *kaikuli* can be said to be complete until there has been a clear and unambiguous demand by the person entitled to claim it.

Where a Muslim wife sued her husband for the recovery of *kaikuli* more than three years after the date of the dissolution of the marriage but had made no demand for it until very shortly before the action commenced—

Held, that the claim was not prescribed. The prescriptive period for the recovery of the *kaikuli* commenced on the date of the demand and not on the date of the dissolution of the marriage.

APPEAL from a judgment of the District Court, Kandy.

A. M. Ameen, for the plaintiff appellant.

No appearance for the defendant respondent.

Cur. adv. vult.

October 13, 1955. GRATIAEN, J.—

The only question for decision in this appeal is whether the claim of a Muslim wife to recover a sum of Rs. 1,001 paid to her husband as "kaikuli" on the occasion of their marriage is prescribed. It is common ground that such a claim becomes time-barred within three years from the date on which the cause of action arose. The marriage between the parties was dissolved on 8th July 1948, and this action was instituted on 1st October 1952. The learned District Judge took the view that the cause of action arose on the date of dissolution of the marriage, and that the claim was therefore prescribed.

The judgment under appeal would have been perfectly correct if the claim was for *Mahr* as opposed to *Kaikuli*. According to Mohammedan law, it is essential to the constitution of a valid marriage that there should be a consideration (*Mahr*) moving from the husband in favour of the wife for her sole and exclusive use and benefit. Limitation does not run until the *Mahr* becomes due either by the death of one of the parties or by divorce. *Ameer Ali on Mohammedan Marriage* (5th. Edn.) Vol. 2 pages 432 and 454. This principle has received statutory recognition in the Codes enacted from time to time regulating the rights of parties to Muslim marriages in Ceylon.

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Kaikuli, however, stands on a different footing. According to a custom among certain Muslims in Ceylon,

> " *Kaikuli* is a sum of money given by the parents of the bride to her intended husband. After the marriage has taken place, he owns it but is nevertheless liable to pay it over to the wife if she demands it, even during the subsistence of the marriage . . . . The obligation is to pay the money to his wife *whenever she demands it or, if she dies, to her heirs.* " vide the earlier authorities cited in *Sowdoona v. Muees* [1].

Accordingly, no cause of action for the recovery of *Kaikuli* can be said to be complete until there has been a clear and unambiguous demand by the person entitled to claim it. The dissolution of the marriage would no doubt be a very appropriate occasion for demanding *Kaikuli* if it had not previously been claimed, but, in the absence of such a claim, there is no liability.

In the present case, the wife made no demand until very shortly before the action commenced. I would therefore allow the appeal with costs in both Courts and enter a decree against the defendant in favour of the plaintiff for a sum of Rs. 1,001 with interest thereon from the date of the decree until payment in full.

SWAN, J.—I agree.

Appeal allowed.

[1] *(1955) 57 N. L. R. 75 ; 52 C. L. W. 47.*

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1955 *Present :* **Gratiaen, J., and Swan, J.**

M. KANDAVANAM *et al.*, Appellants, *and* V. KANDASWAMY, *et al.*, Respondents

S. C. 293—D. C. Point Pedro, 3,955

Civil Procedure—Claim by a defendant against a co-defendant for substantive relief—Jurisdiction of Court to entertain it.

Res judicata—*Partition action—Withdrawal of action—Consent by some of the defendants—Failure to obtain leave to institute fresh action—Effect on rights of parties in a subsequent action—Civil Procedure Code, ss. 207, 406.*

(i) The Civil Procedure Code does not empower a Court to entertain substantive claims for relief preferred by defendants *inter se*. Therefore, if A sues B for declaration of title to certain property and makes C, a co-owner, a party defendant in order to ensure a more complete and effectual adjudication of the issues arising in the action, C cannot, while supporting A's allegations against B, ask for a declaration of rights and an award of damages on his own account against B.

(ii) A instituted action No. 1 for the partition of a land on the basis that it was exclusively owned in common, from a common source of title, by him and the defendants one of whom was B. C intervened claiming for himself an undivided 2/9 share of the land. A decided to avoid a contest on the issue of C's claim. He obtained, with B's consent, permission from the Court to " withdraw the action " but did not ask for liberty to institute a fresh action. Accordingly, the trial Judge entered a decree dismissing A's action with costs in favour of C.

About a year later the successors-in-title of B instituted action No. 2 against C in respect of the identical land claiming declaration of title to the 2/9 share which C had claimed in action No. 1. A was also joined in action No. 2 as a defendant in order to ensure a more complete and effectual adjudication of the issues arising in the action.

Held, (*a*) that the failure of A to obtain liberty under section 406 of the Civil Procedure Code to bring fresh proceedings at the time when he " withdrew " from the partition action (Action No. 1) was fatal to any fresh attempt by A to reagitate a claim which came into conflict with C's title to an undivided 2/9 share.

(*b*) that the plaintiffs in action No. 2, being privies of B who had consented to the unconditional withdrawal of action No. 1, were also precluded from asserting that the title which had passed to them from B prevailed over the title of C.

APPEAL from a judgment of the District Court, Point Pedro.

C. Thiagalingam, Q.C., with *V. Arulambalam* and *C. Chellappah*, for the 1st and 2nd defendants appellants.

E. G. Wikramanayake, Q.C., with *A. Nagendra*, for the plaintiffs respondents.

H. W. Tambiah, with *A. Nagendra*, for the 3rd and 4th defendants respondents.

Cur. adv. vult.

2——J. N. B 53484-1,592 (2/56)

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October 28, 1955. GRATIAEN, J.—

The plaintiffs sued the 1st and 2nd defendants in this action for a declaration of title to an "undivided 18 lachams share" of a defined allotment of land, 37 lachams in extent. This allotment had originally formed part of a larger land called Thaddanthoddam (47 lachams in extent) out of which two small portions had passed into the possession of third parties by purchase. According to the plaintiffs, the entire 37 lachams allotment to which this action relates belonged to themselves, the 3rd and 4th defendants in the proportions of 18, 11, and 8 respectively. They alleged that the 1st and 2nd defendants, who had no title to the land, obstructed their possession as co-owners on 10th December 1950. Accordingly, they claimed, in addition to a declaratory decree in respect of their title on this basis, an order for the ejectment of the 1st and 2nd defendants and damages. The 3rd and 4th defendants were joined in the action in order to ensure a more complete and effectual adjudication of the issues arising in the litigation.

The 1st and 2nd defendants are husband and wife. She disclaimed any share in the land on her own account. The 1st defendant, on the other hand, claimed to be the owner by inheritance of an undivided 2/9 share ; according to him, the collective rights of co-ownership asserted by the plaintiffs and the 3rd and 4th defendants must be restricted to the balance 7/9 share. On this basis, he repudiated the allegation that he and his wife were trespassers, and resisted the claims for ejectment and damages.

The 3rd and 4th defendants file a joint answer supporting the plaintiffs' allegation that the 1st defendant had no share in the 37 lachams allotment. They too asked for a declaration of their respective rights and an award of damages on their own account against the 1st and 2nd defendants. These latter claims should, of course, have been rejected by the learned Judge *ex mero motu*. The Civil Procedure Code does not empower a Court to entertain substantive claims for relief preferred by defendants *inter se*. It is no doubt permissible, and sometimes necessary, to adjudicate upon competing claims of one set of defendants against the other, but only in so far as would enable the Court to determine whether the relief asked for by the plaintiff (or against him upon a claim in reconvention) ought to be granted. *Fernando v. Fernando* [1] and *Banda v. Banda* [2]. But the formal decree cannot award substantive relief except in favour of the plaintiff or against him. Accordingly, the claim of the 3rd and 4th defendants for a declaration of title and for damages against the 1st and 2nd defendants could only have been entertained in separate proceedings. The question of stamp duty is also involved. These objections go beyond a complaint of mere irregularity. I would therefore hold that the Court had no jurisdiction to enter a decree granting substantive relief to either the 3rd or the 4th defendant against the 1st and 2nd defendants.

[1] (*1939*) *41 N. L. R. 208.* [2] (*1941*) *42 N. L. R. 475.*

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With regard to the plaintiffs' claim against the 1st and 2nd defendants, the learned Judge decided, upon his assessment of the oral and documentary evidence, that they had established their joint right to an undivided 18 lachams share of the land and that the outstanding shares belonged exclusively to the 3rd and 4th defendants in the proportions set out in the plaint. It follows that in his opinion the 1st defendant and his wife, being trespassers, were liable to be ejected at the instance of the plaintiffs.

The judgment on questions of fact is not completely free of misdirection, but I do not consider the errors complained of to be sufficiently substantial to justify our reaching an opposite conclusion. In my opinion, however, the learned Judge wrongly rejected the objection that the plaintiffs were precluded in law from asserting any title which came into conflict with the 1st defendant's title to a 2/9 share.

The 1st defendant's plea, which is equivalent to a plea of *res judicata*, was based on the outcome of an earlier litigation in which he, the present 3rd defendant, a man named Ramalingam, (who is the predecessor in title of the present plaintiffs) and certain others were parties. In order to avoid confusion I propose, in setting out the relevant details of those proceedings, to describe the parties to those earlier proceedings by reference to their respective designations in the present litigation.

On 21st December 1948 the 3rd defendant instituted an action for the partition of this identical land in accordance with a chain of title which coincides precisely with that on which he and the plaintiffs now rely. His plaint specifically averred that " no other persons (had) any right or interest in the land sought to be partitioned ". Ramalingam entered an appearance and obtained permission to file his answer, if necessary, after the completion of the preliminary survey. In due course, the 1st defendant intervened and objected to a partition on the basis asked for by the present 3rd defendant. He was accordingly added as a party defendant, and filed an answer claiming an undivided 2/9 share upon a title precisely similar to that which he asserts in the present action.

The nature of the dispute arising for adjudication between the present 3rd defendant and the present 1st defendant in that earlier litigation was perfectly clear: the crucial issue was whether the 1st defendant had title to an undivided 2/9 share, and was to that extent entitled to object to a partition on the basis that the land was exclusively owned in common by the 3rd defendant and other members of the group claiming title from a common source. But the 3rd defendant decided to avoid a contest on this issue. He obtained, *with Ramalingam's consent*, permission from the Court to " withdraw the action ", but did not ask for liberty to institute a fresh action. Accordingly, the trial Judge entered a decree on 20th October 1949 dismissing the 3rd defendant's action with costs in favour of the present 1st defendant.

The present plaintiffs and the 4th defendant admittedly had no interests in the land prior to 20th October 1949. Very shortly afterwards, however, a number of transactions took place. On 1st March 1950, Ramalingam purchased an undivided share which the 3rd defendant

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had previously allocated to A. Vallipuram (a party to the partition action belonging to the same group as himself). A few months later Ramalingam, by a series of conveyances, parted with all his undivided interests in the property : vide P21 in favour of the 1st plaintiff, P22 in favour of the 2nd plaintiff, and P23 in favour of the 4th defendant. The 4th defendant also purchased " 2 undivided lachams " from the 3rd defendant.

It will be observed that all the interests previously claimed by the 3rd defendant have now been allotted by the plaintiffs either to the 3rd defendant himself or to the 4th defendant by virtue of purchases completed subsequent to the date of the decree in the partition action. Similarly, all the interests previously allotted by the 3rd defendant to Ramalingam and to Vallipuram are now alleged to have passed either to the plaintiffs or to the 4th defendant. On the other hand, the 1st defendant asserted in both proceedings that he had legal title to an undivided 2/9 share, but did not dispute on either occasion that the balance 7/9 share was held by the competing group. In other words, he concedes that the entirety of this balance 7/9 share belongs to the plaintiffs, the 3rd defendant and the 4th defendant in the proportions 18 : 11 : 8. The scope of the dispute in both proceedings was therefore identical.

The present action commenced on 22nd February 1951. The plaintiffs and the 4th defendant, as successors in title to Ramalingam, are admittedly his privies. The 4th defendant is, for the same reason, a privy of the 3rd defendant from whom he purchased a part of the title previously asserted by the 3rd defendant.

As there had been no formal adjudication in the earlier action regarding these competing claims, the doctrine of *res judicata*, in the strict sense of the term, does not apply. What then was the effect of the " withdrawal " of that action by the 3rd defendant with Ramalingam's consent, and of the consequential decree entered by the Court dismissing his claim for a partition of the land to the exclusion of the 1st defendant ?

The 3rd defendant " withdrew " from the partition action under the provisions of section 406 of the Civil Procedure Code which (notwithstanding certain doubts expressed in former times) is now recognised as being applicable to actions for the partition of property. As the Judicial Committee of the Privy Council observed in *Ponnammah v. Arumugam* [1], such an action, " though in form an action for partition, is for the recovery of land ".

Section 406 is in the following terms :—

" 406. (1) If, at any time after the institution of the action, the Court is satisfied on the application of the plaintiff (*a*) that the action must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

[1] *(1905) 8 N. L. R. 223 at 226.*

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(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

(3) Nothing in this section shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others. "

The underlying principle must be examined in the light of the express injunction contained in section 207 that " no plaintiff shall hereafter be non-suited ". In former days, both here and in England, a plaintiff who found that his case was going, or was even likely to go, against him could elect to be nonsuited. By this simple device, he reserved to himself the right to harass his opponent all over again by instituting another action relating to the same dispute. In order to remedy this mischief, Order 41 Rule 6 of the Rules of the Supreme Court, 1875, of England was introduced whereby :

" any judgment of non-suit, unless the Court or Judge otherwise directs, *shall have the same effect as a judgment upon the merits for the defendant.* "

Rule 6 was later superseded by Order 26 Rule 1 relating to the ' discontinuance " of actions, but it has been authoritatively decided that the new Rule places the same fetters upon litigants. The true principle is that " after a plaintiff has proceeded with his action to a certain point, and brought the defendant face to face with him, he is not then entitled to escape the determination of the issue by a side door. He is no longer *dominus litis*. The Judge then has the power of saying whether the action shall be discontinued or not . . . . " and " when a plaintiff has gone on to such a point that he has brought his adversary face to face with him, it is only by the leave of the Judge that he can withdraw so as to have the power of bringing a fresh action for the same cause. " *Fox v. Star Newspapers* (1898) 1 Q. B. 636 C. A., affirmed by the House of Lords in (1900) A. C. 19., where Lord Halsbury observed, " When a cause once comes into Court, and where the plaintiff offers no support to his action, there must be a verdict for the defendant. "

Section 406 of our Code, read with the words of prohibition in section 207, has achieved the same result in this country. " The policy is that an action once instituted must be prosecuted until it is determined by a judgment upon the matter in dispute, and a plaintiff who withdraws from an action or abandons part of his claim will not be permitted to bring a fresh action for the same matter or in respect of the same part, unless he does so with the permission of the Court which may be granted when it appears (*a*) that the action must fail by reason of some formal defect or (*b*) that there are sufficient grounds for permitting the plaintiff to withdraw from the action or to abandon part of his claim. " per Garvin J. in *Annamalay Chetty v. Thornhill* [1]. Indeed, the Court's power to grant liberty to institute fresh proceedings is itself strictly limited, being

[1] *(1932) 34 N. L. R. 381 at 385.*

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conditional upon a judicial decision, based on proper material, that one or other of the alternative situations (*a*) and (*b*) does in fact exist.

The 1st defendant's contention is that the failure of the 3rd defendant to obtain liberty under section 406 (1) to bring fresh proceedings at the time when he " withdrew " from the earlier action is fatal to any fresh attempt by the 3rd defendant or his privy the 4th defendant to reagitate a claim which comes into conflict with the 1st defendant's title to an undivided 2/9 share ; and that the plaintiffs, being privies of Ramalingam *who had consented to the withdrawal of that action without " liberty to reinstitute "*, are equally precluded from asserting that the title which has passed to them from Ramalingam prevails over the title of the 1st defendant.

We were referred by Counsel to certain earlier decisions which have been enumerated in a footnote A [1]. Some were directly concerned with the application of the doctrine of *res judicata* to partition actions. In my opinion, the true principle is no longer in doubt. Every decree for partition involves a determination that each person found to be a co-owner had established a title which was good against the whole world. But in particular cases disputes also arise as to the merits of competing claims between parties *inter se*. It therefore follows that a plea of *res judicata* arising in connection with a decree entered *after adjudication* in a partition action must always be answered by examination of the particular matters in issue which had actually been decided. If, therefore, an action had been dismissed on the merits in view of an adjudication as to a particular point of contest, that adjudication certainly operates as *res judicata*. On the other hand the order of dismissal may proceed from other grounds—e.g., because the parties had failed to establish a title sufficient to justify a decree *in rem*. In that event, the rule of *res judicata* would probably not apply.

But what if the plaintiff in a partition action (after the pleadings have raised a specific point of contest as to the validity of his claim to have the land partitioned on a basis inconsistent with the title asserted by one of the defendants) avoids the contest by withdrawing unconditionally from the action ? In such an event the particular issue which was raised by the defendant would in my opinion constitute the " matter " which the plaintiff is precluded by section 406 (2) from reagitating in the course of subsequent litigation against the same adversary. If the plaintiff proposes, in spite of his withdrawal, to " live to fight another

[1] *Footnote A :—*

Fernando v. Menikrala (1902) 5 N. L. R. 369.
Palaniappa Chetty v. Gomes et al. (1908) 11 N. L. R. 322.
Saram Appuhamy v. Martinahami et al. (1909) 12 N. L. R. 102.
Saram v. Martinahamy et al. (1909) 2 Leader L. R. 156.
De Silva v. De Silva (1916) 3 C. W. R. 318.
Sanchi Appu v. Jeeris Appu (1920) 22 N. L. R. 176.
Perera v. Punchirala (1920) 2 C. L. Rec. 58.
Fernando v. Perera (1923) 25 N. L. R. 197.
Abeysundere v. Babuna et al. (1925) 26 N. L. R. 459.
Sinniah v. Eliakutty (1932) 34 N. L. R. 37.
De Silva v. Juwa (1935) 37 N. L. R. 165.
Kanapathipillai v. Kandiah (1942) 44 N. L. R. 42.
Sockalingam Chetty v. Kalimuttu Chetty (1943) 44 N. L. R. 330.
Nadarajah v. Paththakuddy (1951) 53 N. L. R. 273.
Sedarahamy et al. v. Abubucker et al. (1953) 56 N. L. R. 83.

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day ", he must obtain the Court's permission under section 406 (1) to retain that privilege. If no such permission is granted, the statutory bar created by section 406 (2) comes into operation, and the withdrawal from the action has the same effect as a judgment upon the merits in favour of the contesting defendant in respect of the particular matter in dispute.

I am therefore satisfied that, in view of his withdrawal from the partition action which he had instituted, the 3rd defendant and his privy the 4th defendant are irrevocably precluded from asserting against the 1st defendant a title which is in any way inconsistent with the position that the 1st defendant was in truth a co-owner to the extent of an undivided 2/9 share.

There remains the question whether section 406 (2) also stands in the way of the plaintiffs' claim (as purchasers from Ramalingam) in opposition to the title previously asserted by the 1st defendant. To this I would reply that, just as the 3rd defendant's withdrawal " without liberty " had the effect of a judgment upon the merits in favour of the 1st defendant, the statutory bar equally operates against Ramalingam who consented to the withdrawal. The reason is that, if the earlier action had been dismissed on the merits in favour of the 1st defendant, the adjudication would necessarily also have involved a decision in his favour against Ramalingam. In that event the doctrine of *res judicata* between co-defendants, as laid down in *Fernando v. Fernando* (supra) and *Banda v. Banda* (supra) would have applied. In the case now under consideration, Ramalingam, by consenting to the 3rd defendant's action being withdrawn unconditionally, had in effect agreed to a result which was *as effective in law as a judgment on the merits* in favour of the 1st defendant on the matter in dispute between the 1st defendant, the 3rd defendant, and Ramalingam.

The issues arising for decision in the present action can now be answered. The plaintiffs are precluded from obtaining a declaration of title against the 1st defendant on the basis that they and the 3rd and 4th defendants are the only co-owners of the land in dispute, and the 1st defendant is entitled to a declaration against the plaintiffs (which will also bind the 3rd and 4th defendants) that he owns an undivided 2/9 share in the land. The plaintiffs are, however, entitled to a declaration that the balance undivided 7/9 share belongs to them and the 3rd and 4th defendants in the proportions 18 : 11 : 8 respectively. As the 1st defendant is a co-owner of the land, the decrees entered against him and his wife for ejectment and for damages, must be set aside. I would set aside the judgment under appeal and order a decree to be entered for a declaration of title in accordance with the decision which is summarised in this paragraph of my judgment. The plaintiffs and the 3rd and 4th defendants must pay the 1st and 2nd defendants their costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.

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1955 *Present :* **Gratiaen, J., and Fernando, J.**

N. T. MENDIS *et al.*, Appellants, *and* COMMISSIONER OF LOCAL GOVERNMENT, Respondent

S. C. 187 (Inty.)—U. C. Appeal L—1/29/9

Urban Councils Ordinance, No. 61 of 1939—Sections 193, 194 (1), 195—Recovery of surcharges—" Any person accounting "—" Negligence or misconduct "—Local Government Service Ordinance, No. 43 of 1945, s. 51, as amended by Act No. 8 of 1949, s. 19.

The two appellants, who were members of an Urban Council, were opposed to a decision of the Local Government Service Commission that full pension should be paid to a retired officer of the Council. In an application made by the Commission for a writ of *mandamus* to compel the Council to fulfil its statutory obligation to pay the full pension, the Supreme Court decided that the Council must pay the costs which were taxed at Rs. 3,899. Thereafter the Auditor-General sought to charge against the appellants, as members of the Council, the loss which the Council incurred by payment of the costs.

Held, that under section 194 (1) of the Urban Councils Ordinance it was necessary to prove negligence or misconduct on the part of the appellants before the Auditor-General could call upon them to make good any deficiency or loss which was not tainted by illegality.

APPEAL under section 195 of the Urban Councils Ordinance against an order made by the Auditor-General.

S. P. C. Fernando, with *Stanley Perera*, for the 1st and 2nd appellants.

A. C. Alles, Crown Counsel, for the respondent.

E. R. S. R. Coomaraswamy, with *B. A. R. Candappa*, for the Urban Council (party noticed).

Cur. adv. vult.

October 6, 1955. GRATIAEN, J.—

This is an appeal under section 195 of the Urban Councils Ordinance No. 61 of 1939 against an order made by the Auditor-General on 13th July 1954 charging against the 1st and 2nd appellants, as members of the Panadura Urban Council, a sum of Rs. 3,899 representing a loss to the Council alleged to have been incurred in consequence of their " misconduct ". A similar order has been made against other members of the Council who are not parties to the present appeal.

The 1st appellant had been the Chairman, and the 2nd appellant a member, of the Council from 1st January 1950 until 24th April 1953. The Superintendent of Works of the Council, who had retired from office on 15th March 1950 had requested the Local Government Service Commission (hereafter called " the Commission ") to fix the amount

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payable to him as retiring pension under the Council's by-laws. He had originally been employed directly by the Council, but was transferred by operation of law to the service of the Commission under the provisions of the Local Government Service Ordinance No. 43 of 1945. Accordingly, the power and discretion to grant him a pension on retirement, though previously vested in the Council, now vested in the Commission. Nevertheless under section 51 of the Ordinance as amended by section 19 of the Act No. 8 of 1949 the ultimate financial responsibility for the pension payable to him by the Commission continued to be imposed on the Council.

Some members of the Council, including the appellants, took the view that the retiring officer had not qualified himself for the maximum pension payable under the by-laws. On 9th October 1950 the Council also resolved by a majority vote that the payment of his pension should in any event be withheld " until this officer hands over all documents that were in his charge ". The terms of this resolution were communicated to the Commission which later decided, however, that the officer should be granted the maximum pension payable to him under the Council's by-laws with effect from the date of his retirement.

The appellants and certain other members of the Council were dissatisfied with the Commission's decision, and a sub-committee was appointed to make counter proposals in the matter. In due course, the Council passed a resolution on 9th July 1951 recommending to the Commission that, as the work and conduct of the officer concerned had not been " altogether satisfactory ", his pension should be fixed at a reduced rate representing two-thirds of the maximum pension. This recommendation was duly considered by the Commission but was rejected. The question was again brought up for discussion at a meeting of the Council on 24th August 1951. The 1st appellant, as Chairman, proposed " that eminent counsel should be consulted and that a further appeal be made to the Local Government Service Commission ". The majority of the members resolved, however, that representations by way of protest should be made to the (then) Prime Minister. In the meantime, the Council acknowledged its liability to make payments to the Commission in respect of the officer's pension at the reduced rate, and a cheque was tendered on this basis on the 19th September 1951. Three days later, the Commission returned the cheque and at the same time applied to this Court for a mandate in the nature of a writ of *mandamus* to compel the Council to fulfil its statutory obligation to pay the full pension as fixed by the Commission.

The appellants and other members who shared their views now gave up the unequal struggle. They had not succeeded in obtaining an interview with the Prime Minister in time to achieve any practical results, and they abandoned all hope of persuading the Commission, with whom the final decision in the matter of pensions obviously rested, to alter its earlier ruling. Accordingly, the Council unconditionally acknowledged its liability to make good the full amount of the pension payable. Payment on this basis was made before the *mandamus* proceedings came up

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for hearing. There remained only the question as to who should pay the costs incurred by the Commission in making the application to the Supreme Court. On that issue this Court decided that the Council must pay the costs which were taxed at Rs. 3,899. This amount was accordingly paid out of the Council's funds.

We are now in a position to examine the propriety of the Auditor-General's order which is under appeal. Having audited the accounts of the Council for the relevant period as required by section 193 of the Urban Councils Ordinance, he decided, after hearing the appellants, that the expenditure incurred by the Council in paying the Commission's costs in terms of the order of the Supreme Court ought to be charged against the appellants and the other members of the Council who had opposed the payment of the full pension fixed for the retired officer. He purported to make this surcharge in pursuance of section 194 (1) of the Ordinance which provides as follows :—

> " Every auditor acting in pursuance of this Part shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person and any sum which ought to have been, but is not, brought into account by that person, and shall in every case certify the amount due from such person ".

The relevant words of the section which the Auditor-General purported to apply to this particular case are—" . . . . and *shall* charge *against any person accounting* the amount of any deficiency or loss incurred by the *negligence or misconduct* of that person . . . . ."

Section 194 (1) corresponds to section 247 (7) of the Public Health Act, 1875, of England, and the words " any person accounting " have been construed to be wide enough to include any member of the local authority whose accounts are before the auditor [1]. In order to remove doubts as to whether a narrower interpretation ought to be preferred, the words " any person " were substituted for " any person accounting " in the corresponding section of the later Statute (section 228 of the Local Government Act, 1933)—see *re Dickson* [2]. It is therefore clear that in Ceylon any member of an Urban Council may be compelled not only to refund the amount of any payment (made or authorised by him) which is " contrary to law ", but also to make good " any loss suffered by the Council owing to his negligence or misconduct as such member ". If the payment authorised is contrary to law, the liability to be surcharged is absolute ; but if any deficiency or loss is not tainted by illegality, negligence or misconduct is a condition precedent to liability.

The Council has doubtless incurred a loss because the majority of its members (including the appellants) persisted for too long in their attempt

[1] *R. v. Roberts* (*1908*) *1 K. B. 247 C. A.* [2] (*1948*) *2 K. B. 95.*

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to persuade the Commission to reconsider its decision to fix the retiring officer's pension at a level which they considered too high. But the question is whether such conduct amounted to " misconduct ".

The Auditor-General presumably had in mind the decision of the Court of Appeal of England in *Davies v. Cowperthwaite* [1] which bears some resemblance to the facts now under consideration. The members of an Urban District Council had there resolved to make a contribution out of the rate fund in support of a march of unemployed persons to London to protest against the unemployment assistance regulations. The proposed expenditure was manifestly *ultra vires*, and the Council was restrained by an order of the High Court from making the illegal payment. It was held that the costs incurred by the Council in the injunction proceedings should be surcharged upon those members who had passed the resolution. They had been guilty of " misconduct " within the meaning of section 228 (1) (*d*) of the Local Government Act, 1933—which substantially corresponds to the relevant words of section 194 (1) of the local Ordinance—because " notwithstanding a warning that the conduct which was proposed was unlawful, *and without in any way combating the correctness of the advice*, they took part in passing a resolution which they had been told was an illegal resolution ". For these reasons, their behaviour constituted " misconduct " and went far beyond " mere imprudence or want of judgment which cannot be called misconduct ". In sanctioning an illegal expenditure of the rate-payers' money, they had " acted in a way in which no reasonable men, acting reasonably, and desirous of doing their duty to the rate payers according to law, would have acted ".

The facts of the present case are clearly distinguishable. The Auditor-General has not suggested that the appellants were actuated by improper motives ; indeed there is no evidence on the record to support such an imputation. It is neither illegal nor improper for the elected members of a local authority to make recommendations to the Local Government Service Commission on the subject of pensions which must ultimately be paid out of the rate payers' money. Let it be assumed that, in seeking to protect the rate payers, the appellants acted with too much tenacity and with insufficient tact. As things turned out, their over-enthusiasm during the later stages of the discussions resulted in a loss to the Council, but their behaviour cannot be said to contain that element of bad faith which is necessarily involved in the term " misconduct ".

I would allow the appeal and quash the order of surcharge by the Auditor-General upon the appellants. As this is the first occasion on which the provisions of section 194 of the Ordinance have arisen for clarification in this Court, I think that each party should bear his own costs in these proceedings.

FERNANDO, J.—I agree.

Appeal allowed.

[1] *(1938) 2 A. E. R. 685.*

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1954 *Present :* **K. D. de Silva, J., and Sansoni, J.**

THAMBIPILLAI *et al.*, Appellants, *and* CANAGARATNE *et al.*, Respondents

S. C. 53–54—D. C. (Inty.) Jaffna, 4,398

Execution—Concurrence of decree holders—Civil Procedure Code, ss. 232, 350, 352—Mortgage—Scope of rule that mortgagee should first discuss the property mortgaged.

After the claim of two primary mortgagees was satisfied from the proceeds of a hypothecary sale, the balance of the proceeds lying in Court to the credit of the mortgagor was seized under section 232 of the Civil Procedure Code by three classes of judgment creditors, viz., unsecured creditors holding money decrees of the same Court, unsecured creditors holding money decrees of another Court, and secondary and tertiary mortgagees of the land sold under the hypothecary decree, who had obtained hypothecary decrees prior to the sale but subsequent to the entering of the decree upon the primary mortgage.

Held, that there was nothing in either section 350 or section 352 of the Civil Procedure Code to prevent all the seizing creditors, including the secondary and tertiary mortgagees, from being equally entitled to claim concurrence and share rateably, so long as the money lying in the custody Court had not been appropriated to a particular decree holder or holders by an order of that Court.

Held further, that the claim for concurrence by the secondary and tertiary mortgagees was not prejudiced by the fact that, apart from the land sold at the instance of the primary mortgagees, other lands had also been hypothecated under their bonds.

APPEAL from an order of the District Court, Jaffna.

S. J. V. Chelvanayakam, Q.C., with *M. Rafeek*, for Appellants in S. C. 53.

S. J. V. Chelvanayakam, Q.C., with *A. Nagendra*, for Appellants in S. C. 54.

A. C. Nadarajah, for 1st Respondent in S. C. 53 and for 2nd Respondent in S. C. 54.

T. W. Rajaratnam, for 2nd Respondent in S. C. 53 and for 3rd Respondent in S. C. 54.

C. Manohara, for 3rd and 6th Respondents in S. C. 53 and for 4th to 7th Respondents in S. C. 54.

Cur. adv. vult.

November 24, 1954. SANSONI, J.—

A hypothecary decree was entered in this action on 16th June 1948 in favour of two primary mortgagees, and by order of Court the land mortgaged was sold by a Commissioner. The primary mortgagees' claim has

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been satisfied and the money in Court is the balance left over out of the proceeds of the sale. After this money was deposited in Court seizure notices under section 232 of the Civil Procedure Code were forwarded to the Court by the Fiscal on behalf of three classes of judgment creditors, viz., unsecured creditors holding money decrees of the same Court, unsecured creditors holding money decrees of another Court, and secondary and tertiary mortgagees of the land sold, who had obtained hypothecary decrees prior to the sale but subsequent to the entering of the decree upon the primary mortgage. Some of the seizing creditors went a step further and applied in this action that sums of money be transferred to their actions to satisfy their claims. The District Judge very properly directed that the parties and all the seizing creditors be given notice of such applications. Ultimately an inquiry was held into the claims of all the seizing creditors and the learned Judge held that only those seizing creditors who had applied for a transfer of money from this action to their respective actions could claim concurrence. He appears to have thought that this result followed from the decisions in *Mendis v. Peris* [1] and *Shaw and Sons v. Sulaiman* [2]. The secondary and tertiary mortgagees have appealed and Mr. Chelvanayagam has pressed only their claim to concurrence. He said he was not claiming preferential payment out of the money in Court. Mr. Nadarajah, however, has contested the appellants' claims even to concurrence.

I do not think the decisions cited have established the proposition on which the learned Judge based his order. On the contrary, the basis of the decision in *Shaw and Sons v. Sulaiman* (supra) is that a judgment creditor who applies for execution is not shut out from claiming concurrence so long as the money lying in the custody Court has not been appropriated to a particular decree holder or holders by an order of that Court. No such order had been made in this case prior to the inquiry. There is nothing in either section 350 or section 352 of the Code to indicate that an application for transfer of the money, such as had been made by the respondents to these appeals, confers any particular privilege on a judgment creditor. The essential order of appropriation had not been made. The position, then, is that all the judgment creditors had effected seizures, and since no order in favour of any particular seizing creditor had been made they were all entitled to share in the money and they all had the same rights. The latter part of section 350 seems to govern the matter. The seizing creditors had notified the Court of their claims to the money and the Court rightly caused notices to issue to all of them before making any order as to payment. The justice of the case requires—and that is the test laid down in the section—that all the seizing creditors, including the appellants, should share rateably.

But Mr. Nadarajah also relied on the rule enunciated by de Sampayo, J., in *Wijesekera v. Rawal* [3], that a mortgagee who has obtained a hypothecary decree should first realize the property mortgaged and can resort to

[1] *(1915) 18 N. L. R. 310.* [2] *(1928) 29 N. L. R. 481.*

[3] *(1917) 20 N. L. R. 126.*

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other property of the debtor only for any deficiency, unless the debtor consents otherwise. He submitted that although the land sold under the decree in favour of the primary mortgagee had been mortgaged on the secondary and tertiary bonds, other lands had also been mortgaged and the appellants should first sell those other lands before they claimed concurrence in the proceeds of sale of the land sold. I think there are two answers to this submission. Firstly, it cannot be said that the appellants are seeking to resort to property which has not been mortgaged to them. The land sold was subject to secondary and tertiary mortgages in favour of the appellants, and by claiming to share in the money in Court, which was brought there by the sale of the land, they do not seem to me to be offending against the rule in question. It is not, in my opinion, " other property of the debtor " within the meaning of the rule. Secondly, that rule was obviously introduced for the benefit of the mortgagor whose unsecured property it was probably intended to protect. This aspect of it is emphasised by the words " unless the debtor consents otherwise ". If the rule was introduced to protect other creditors of the mortgagor, obviously it could not have been open to the mortgagor to waive it. I therefore do not think this objection can be taken by the respondents who are creditors of the mortgagor. I would also draw attention to the reservation made by de Sampayo, J., to which Schneider, J., referred in *Pathinayake v. Wickremesinghe* [1], viz., that there might be good reasons for a Court not enforcing the general principle that the mortgaged property should be first discussed. It is clear that if the money lying in Court is drawn by the other creditors, the appellants will lose a great part of their security, and if they have to proceed against the other mortgaged lands first it will be too late for them to claim concurrence. The decrees entered in favour of the appellants first direct the debtors to pay the amounts due under the bonds, and are, in that respect, like any money decrees ; they then direct that in default of such payment the mortgaged lands (including of course the land sold under the primary mortgage) should be sold. The appellants are doing no more than levying execution under the first part of their decrees.

For these reasons I would set aside the order of the learned Judge so far as it rejects the claims of the appellants. They will be entitled to share the money in deposit along with the seizing creditors in whose favour the learned Judge has already held. The appellants are entitled to recover their costs of these appeals from the 1st, 2nd, 3rd and 6th respondents in appeal No. 53, and the 2nd to 7th respondents in appeal No. 54. The order of the learned Judge as to costs in the District Court will stand.

DE SILVA, J.—I agree.

Order set aside.

[1] *(1923) 25 N. L. R 102.*

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[In the Court of Criminal Appeal]

1955 *Present:* **Gratiaen, J. (President), Weerasooriya, J., and Fernando, J.**

THE QUEEN *v.* B. M. HETHUHAMY *et al.*

Appeal No. 77, with Applications 121–123, of 1955

S. C. 9—M. C. Kurunegala No. 9/10229

Evidence—Witness—Conflict between evidence on oath and an earlier statement—Verdict should then be found on the rest of the evidence—Summing-up—Misdirection—Power of Judge to interrogate witnesses.

(i) If the evidence of a witness on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point, his evidence is worthless and cannot properly be taken into account at all for the purpose of deciding that issue. It is illogical to conclude in addition (1) that, because his evidence cannot be acted upon, the opposite of what he said represented the truth, and (2) that as the opposite of what he said at the trial happens to coincide with the version given by another witness, the veracity of that other witness is thereby confirmed.

(ii) Although a presiding Judge is entitled to interrogate a witness for the prosecution, it is generally far more satisfactory to leave the conduct of the case on any vital point of controversy in the hands of the prosecuting Counsel, who must make his own decision whether or not to apply to the Judge for permission to cross-examine as an adverse witness a man whom he has advisedly called.

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

G. E. Chitty, with *Malcolm Perera*, for the 1st accused-appellant.

M. D. Jesuratnam, for the 2nd accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

Cur. adv. vult.

October 6, 1955. GRATIAEN, J.—

The appellants, three in number, were convicted at the Kurunegala Assizes of the following offences alleged to have been committed by them in the village of Galwewa on the night of 14th June, 1954 :

(1) being, together with three others unknown to the prosecution, members of an unlawful assembly the common object of which was to commit robbery of cash and jewellery belonging to M. D. Charles Appuhamy, and also to cause hurt to him ;

(2) rioting ;

(3) robbery of cash and jewellery belonging to the said Charles Appuhamy in prosecution of their common object ;

(4) causing simple hurt to the said Charles Appuhamy in prosecution of their common object.

These offences had unquestionably been committed by five or more persons some at least of whom Charles Appuhamy had been unable to identify.

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The only disputed issue at the trial was whether the purported identification of all or any of the appellants by Charles Appuhamy had been established beyond reasonable doubt. At the conclusion of the argument we quashed the convictions and stated that the grounds of our decision would be pronounced later.

Charles Appuhamy owned a tea boutique in which he resided alone except for his infant child, his wife having previously deserted him. At about 7.30 p.m. on the day in question the front portion of the boutique had been closed, and he was about to put the child to sleep when six persons entered the boutique through the back door which was still open : they seized him and tied him up with a rope and one of them stabbed him once, but not seriously, on the fleshy part of each leg ; having proceeded to remove all his money and jewellery from a cupboard in an adjoining room, the intruders left the boutique with the loot. Shortly afterwards, Charles Appuhamy released himself and, with his child in his arms, he rushed out of the boutique appealing for help. Several neighbours including the prosecution witnesses Ukku Banda and Mudalihamy arrived on the scene. Mudalihamy went almost immediately to report the incident to the Village Headman of Dorabawila who lived some distance away. The Headman reached the scene of the burglary at about 10.45 p.m. and, on being questioned, Charles Appuhamy named the appellants as three of the persons who invaded his home ; he added that he had failed to identify the other members of the unlawful assembly.

No part of the stolen property was traced to the possession of any of the appellants, and proof of their complicity in the crime depended entirely on the reliability of their purported identification by Charles Appuhamy. It was a point in his favour that he knew them before. On the other hand, neither he nor the other prosecution witnesses had previously seen them in each other's company. According to Charles Appuhamy, he identified the appellants by the light of a kerosene oil lamp ; but when the Headman arrived on the scene this lamp was found lying on the ground in a damaged condition with its chimney broken. Charles Appuhamy says that there was also a small lamp used by his customers for lighting cigars and cigarettes, but no such lamp is mentioned in the evidence of the Headman or of the Police officers who visited the boutique on the following morning. The jury was not invited to hold that the light reflected by this second lamp, which was not a production in the case, could have served as an aid to identification. The Police found some decipherable finger-prints at the scene of the burglary, but the expert who examined them could not connect them with any of the appellants.

In this state of the evidence, a great deal turned on the conduct of Charles Appuhamy during the interval of time which elapsed between the completion of the crime and the arrival of the Headman over two hours afterwards. Throughout this period he was in the company of his immediate neighbours all of whom knew him well and also knew the appellants. It would be natural therefore to suppose that, if a man in his situation had in fact identified some of his assailants, he would have mentioned that fact to his friends. But as far as the 2nd and 3rd appellants are concerned, this is precisely what he admits was not done.

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Charles Appuhamy stated that he did at any rate mention to the witness Ukku Banda, but to nobody else, that Hethuhamy (i.e., the 1st. appellant) was the person who had stabbed him. But his evidence on this point was categorically contradicted by Ukku Banda. The reliability of the identification of all the appellants was therefore a matter which called for very cautious scrutiny.

The only explanation given by Charles Appuhamy for his failure to mention the names of the 2nd and 3rd appellants to anybody until the Headman arrived was that he was " in pain " and that " the child was crying ". It is indeed a question whether such a lame excuse for reticence on the part of a villager in the company of his friends could reasonably be believed. But the weakness of the case against the appellants was further increased when Mudalihamy said that, before leaving the Headman's house, Charles Appuhamy expressly stated that he " did not know who the thieves were ". This evidence, given by a witness whom prosecuting Counsel did not apply to treat as hostile or adverse, is supported by what Mudalihamy told the Headman at about 9.30 p.m. So significant an item of evidence should have been brought prominently to the attention of the jury in the summing up ; in fact it was not mentioned at all. On the contrary the jury were invited to consider the possibility that Mudalihamy had " deliberately suppressed " the names of the appellants because " the names involved his own relations ". There was no evidence to support this suggested theory of suppression, and the jury should not have been misled into the belief that Mudalihamy had perhaps been told something by Charles Appuhamy implicating any of the appellants before he went in search of the Headman. The learned Judge's summing-up on this part of the case was therefore defective both for misdirection and for non-direction as to the evidence which was favourable to the defence.

The jury were also misdirected as to the law in regard to another aspect of the issue of identification. As Charles Appuhamy alone had purported to identify the appellants, it became very important to test his evidence (lacking as it did " corroboration " in the strict sense of the term) in the light of his conduct during the interval of time preceding the arrival of the Headman. Ukku Banda was apparently the first neighbour to reach the scene after the commission of the crime, and he denied that Charles Appuhamy had implicated even the 1st appellant as a person who had taken a prominent part in the commission of the crime. No request was made on behalf of the Crown to treat him as an adverse witness, and it was not suggested to us in the course of the argument that such an application, if made, ought to have been allowed. His evidence at the non-summary proceedings was (so Mr. Pullenayagam confirms) consistent with what he said at the trial. The learned presiding Judge, however, took over the " examination-in-chief " of Ukku Banda, and twenty-one consecutive questions were put to him for the purpose of suggesting that his contradiction of Charles Appuhamy on this crucial matter was untrue—indeed, the opposite of the truth—because it was contradicted by a statement which (so the presiding Judge categorically asserted) he had made to a Police officer on the morning after the burglary. The witness persisted for some time in denying that he had been guilty of any such inconsistency,

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but the learned Judge continued, in so many words, to assure him that he had. Eventually, the witness acknowledged the suggested inconsistency but refused to retract his assertion that Charles Appuhamy had not mentioned the 1st appellant's name to him until the Headman arrived.

A presiding Judge is no doubt entitled, in the exercise of his discretion, to interpose questions to a witness for the prosecution during his examination-in-chief, and in rare cases he may even be justified in questioning him with such severity as to suggest that that his evidence is unworthy of credit. But on any vital point of controversy, it is generally far more satisfactory to leave the conduct of the case for the Crown in the hands of the Advocate selected for the purpose by the Attorney General. Prosecuting Counsel should make his own decision whether or not to apply to the Judge for permission to cross-examine as an adverse witness a man whom he has advisedly called.

The Police officer who recorded Ukku Banda's statement on the morning of 15th June 1954 was not called to give his version of what exactly Ukku Banda had said on that occasion. The jury were therefore left to speculate as to the extent and gravity of the inconsistency imputed to the witness. After all, the vital question was whether Charles Appuhamy had mentioned the 1st accused's name *at the earliest opportunity, and not whether he had mentioned it at some later point of time.* Ukku Banda's admission of inconsistency was not so "distinct" as to obviate the necessity for calling the Police officer, as provided by section 145 (2) of the Evidence Ordinance, to prove what Ukku Banda had actually said to him. It is also reasonable, we think, to conclude that Ukku Banda's " admission " was based not so much on his own recollection of what he told the Police officer on 15th June 1954, as on the assurance given to him 14½ months later by the learned Judge who was himself guided by the contents of the officer's note book.

The learned Judge explained to the jury why he had taken up the interrogation of Ukku Banda. " I felt," he said, " that on that point he was trying to mislead you ". Having referred to the " inconsistency, " he directed the jury that the statement made to the Police officer on the earlier occasion was relevant in two ways—" *not merely* to know whether Ukku Banda was told by Charles Appuhamy that Hethuhamy (i.e., the 1st appellant) stabbed him, *but also* to show you that what Ukku Banda told you here cannot be relied upon on that point ". In our opinion the first part of this passage constitutes a misdirection.

> " If a witness is proved to have made an earlier statement *in distinct conflict* with his evidence on oath, the proper direction to the jury is that his evidence is negligible and that their verdict should be found on the rest of the evidence. " *R. v. Harris* [1].

But in the present case certain parts of the summing-up might well have misled the jury into thinking that their disbelief of Ukku Banda was a factor which would entitle them to accept as true Charles Appuhamy's assertion that he had in fact named the 1st appellant as his assailant at the earliest opportunity ; in other words, that they were justified in regarding Ukku Banda's earlier statement to the Police (though repudiated at the trial as incorrect) as substantive evidence in favour of the

[1] *(1927) 20 C. A. R. 106.*

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case for the Crown. It is no doubt true that, at the commencement of his summing-up the learned Judge had told them that this was not the law. Unfortunately, the effect of the earlier explanation in general terms was nullified by the specific direction given in this particular context.

The jury might very well have been influenced by this misdirection in approaching the crucial issue whether Charles Appuhamy did mention the 1st appellant's name at the earliest opportunity. In view of Ukku Banda's unequivocal denial at the trial that such a statement was made to him, the jury should have received a clear direction in conformity with the rule laid down in *R. v. White* [1]. In that case, a prosecution witness had similarly given evidence which supported the defence, but, when confronted with contrary statements previously made in the absence of the accused, he admitted having made these earlier statements but swore they were mistaken. Lord Hewart C.J. observed :

> " It is one thing to say that, in view of an earlier statement, the witness is not to be trusted : it is another thing to say that his present testimony is to be disbelieved and that his earlier statement, which he now repudiates, is to be substituted for it ".

This latter inference, which is not legitimate, is what the jury were virtually invited to draw in the present case.

If a man's evidence on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point, his evidence is worthless and cannot properly be taken into account at all for the purpose of deciding that issue. It is illogical to conclude in addition (1) that, because his evidence cannot be acted upon, the opposite of what he said represents the truth, and (2) that as the opposite of what he said at the trial happens to coincide with the version given by another witness, the veracity of that other witness is thereby confirmed.

If the jury rejected Ukku Banda's evidence, Charles Appuhamy's uncorroborated evidence stood by itself, and represented the whole of the case for the Crown. It had to be tested in the light of his admission that he had not mentioned the names of at least two appellants at the earliest favourable opportunity and also in the light of his uncorroborated assertion that he had mentioned the name of the 1st appellant to only one of his numerous friends who remained with him for over two hours until the Headman arrived. Having regard to his unconvincing excuse for reticence (which was out of harmony with the normal habits of the average Sinhalese villager) we doubt if the jury, properly directed, could reasonably have returned a verdict against any appellant. Add to that the circumstance that, according to the prosecution witness Mudalihamy, Charles Appuhamy had, in answer to a specific question, replied that he " did not know who the thieves were ". In that state of the evidence, a verdict of guilt, if not vitiated by misdirection, might well have justified the reproach that it was quite perverse.

For all these reasons, we took the view that the trial of the appellants was unsatisfactory, and that the verdicts against all three appellants should be quashed.

Verdicts quashed.

[1] *(1922) 17 C. A. R. 69.*

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1955 *Present :* **Gratiaen, J., and Swan, J.**

M. SINNA MARIKAIR, Appellant, *and* K. THANGARATNAM, Respondent

S. C. 481—D. C. Batticaloa, 559 (L)

Muslim Law—Donation by grandmother—Revocability—Muslim Intestate Succession and Wakfs Ordinance (Cap. 50), s. 3.

Under the proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance a gift of immovable property by a Muslim grandmother to her grandchildren is revocable unless there are words in the deed from which a renunciation of her right of revocation appears either expressly or by necessary implication.

APPEAL from a judgment of the District Court, Batticaloa.

S. J. V. Chelvanayakam, Q.C., with *J. N. David*, for the defendant appellant.

V. A. Kandiah, with *S. Sharvananda*, for the plaintiff respondent.

Cur. adv. vult.

November 23, 1955. GRATIAEN, J.—

The only question for our decision on this appeal is whether a gift of immovable property by a Muslim lady to her grandchildren in terms of a notarial transfer dated 11th December 1935 was irrevocable.

According to the *Minhaj et Talibin* (Howard's translation) page 235 " a father or any ancestor " may, under the Shafei law, revoke a gift in favour of a child or other descendant, provided that the donee has not irrevocably disposed of the thing received, e.g., by selling or dedicating it. Sir Roland Wilson " suspects ", however, that the term " ancestor " in this passage only includes " the true grandfather but not female ancestors or false grandparents ". *A Digest of Anglo-Mohammedan Law* (1930 Edn.) page 430. The learned District Judge adopted this latter opinion, and held that the deed was irrevocable.

The proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) was enacted for the special purpose of relieving Judges in Ceylon of the responsibility of solving these knotty problems. The proviso expressly states :

" . . . no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed . . . . "

As the deed of gift in question was made after the proviso came into operation, it is quite unnecessary for us to determine what precisely

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is meant by the word " ancestor " appearing in Mr. Howard's admirable translation into English of Mr. Van den Berg's French translation of a treatise written in Arabic. The proviso is intended to remove doubts and difficulties on issues of this kind. As Garvin J. observed in *Razeeka v. Mohamed Sathuck* [1], " Under the Kandyan Law gifts are ordinarily revocable, but this Court has held and it is now settled law that when such a gift is expressed to be irrevocable the donor may not revoke it. I can see no reason why the principle of these decisions should not be applied to the case of gifts between Muslims. This view of the law is affirmed in (the proviso to) section 3 of the Ordinance. " Garvin J's opinion was cited with approval in *Rafeeka's case* [2] and, with respect, I think that it should be followed. Ever since the Ordinance passed into law, a Mohammedan deed of donation (whoever the donor may be) must be deemed to be revocable unless the contrary is so stated in the document itself. *Saraumma v. Mainona* [3] has decided nothing which compels us to take a different view.

Mr. Kandiah argued that the Ordinance ought not to be given an interpretation which may possibly have the result of introducing a violent change in what he described as " the common law right of Muslims ". With respect, the Ordinance does not purport to change the general law of Ceylon. It merely limits in certain ways the extent to which recognition can reasonably be given to the personal laws of a particular section of the community. The necessity for this limitation became apparent when the Courts found it increasingly difficult to determine the true scope of certain aspects of those personal laws. The language of section 3 and its proviso are clear and unambiguous, and cannot work hardship to Muslim donors and donees who take the trouble to examine it before entering into transactions of the kind to which this action relates.

In the present case, I find no words in the deed from which a renunciation of the right of revocation appears either expressly or by necessary implication. Accordingly, the donor was entitled to revoke the gift, and she did so in fact. Mr. Kandiah conceded that if this be so, the judgment under appeal must be varied by declaring the plaintiff entitled only to an undivided $\frac{1}{4}$ share of the lands in dispute and to damages at Rs. 18·75 per month from 27th February 1950 until they are restored to their rights of co-ownership. The appellant must be paid his costs in both Courts.

SWAN, J.—I agree.

Judgment varied.

[1] *(1931) 33 N. L. R. 176 at 179.* [2] *(1931) 33 N. L. R. 295.*
[3] *(1948) 50 N. L. R. 319.*

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1955 *Present :* **Weerasooriya, J.**

PETER FERNANDO, Appellant, *and* ABEYSINGHE (S. I. M. Police), Respondent

S. C. 1,158—M. C. Panadura, 39,972

Interpretation Ordinance (Cap. 2)—Section 6 (3) (b)—Offence falling under repealed statute—Charge in respect of it under repealing statute—Legality—Motor Car Ordinance, No. 45 of 1938—Motor Traffic Act, No. 14 of 1951, ss. 2 (1), 14 (1), 244.

When a penal statute is superseded by another statute a person cannot be prosecuted under the repealing statute for an offence which was committed when the repealed statute was in force. It is, however, open to the prosecution, by virtue of section 6 (3) (*b*) of the Interpretation Ordinance, to charge the offender under the relevant provisions of the earlier statute notwithstanding its subsequent repeal.

Section 244 of the Motor Traffic Act, No. 14 of 1951, does not enable a prosecution under that Act for failure to register a car in breach of the repealed Motor Car Ordinance, No. 45 of 1938.

APPEAL from a judgment of the Magistrate's Court, Panadura.

S. Ponniah, with *C. Chellappah*, for the accused appellant.

Shiva Pasupati, Crown Counsel, for the Attorney-General.

November 24, 1955. WEERASOORIYA, J.—

The appellant was charged with the following offence, that on or about the 1st day of October, 1950, he possessed a motor car No. Z 7960 and failed to register the same in his name in breach of Section 2 (1) read with Section 14 (1) of the Motor Traffic Act No. 14 of 1951 and that he thereby committed an offence punishable under Section 226 of that Act. The initial difficulty in the way of the prosecution was to prove that the appellant committed an offence under the Act, which came into operation only in 1951, in respect of an act done in 1950. The evidence discloses that on the 1st October, 1950, possession of this car was transferred by way of sale to the appellant, who, thereafter, continued to be the person entitled to the possession of it, but he took no action to have himself registered as the owner thereof. In respect of his possession of the car on or about the 1st of October, 1950, without that car having been registered in his name, he would have committed an offence under the repealed Motor Car Ordinance No. 45 of 1938 and it was open to the prosecution to have charged him under the relevant provisions of that Ordinance notwithstanding its subsequent repeal. This is made clear by Section 6 (3) (*b*) of the Interpretation Ordinance.

The learned Magistrate, however, seems to have taken the view that Section 244 of the Motor Traffic Act No. 14 of 1951 enables the prosecution of the appellant as for an offence committed under that Act in respect of his possession of the car in 1950. I cannot see anything in Section 244 which warrants this view. The conviction and sentence are set aside and the accused is acquitted.

Appeal allowed.

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[In the Court of Criminal Appeal]

1955 *Present :* **Pulle, J. (President), Sansoni, J., and Fernando, J.**

REGINA *v.* S. A. PETER

Appeal 47 of 1955 with Application 76

S. C. 55—M. C. Colombo, 8,169

Court of Criminal Appeal—Insanity of prisoner subsequent to conviction—Adjournment.

Hearing adjourned in view of a report from the Prison Medical Officer according to which the appellant, since his admission to prison after conviction, was showing symptoms of mental derangement.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Accused-appellant in person.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 1, 1955. Pulle, J.—

The appellant was indicted on the charge that on the 2nd September, 1954, he committed murder by causing the death of one Palatura Liyanage Ariyadasa. He was convicted of culpable homicide not amounting to murder and was sentenced to twelve years' rigorous imprisonment. He has applied for leave to appeal and has also appealed on certain matters of law.

When the case was taken up for hearing the appellant was present but was not represented. We had before us a report from the Prison Medical Officer according to which the appellant, since his admission to prison after the conviction, has shown symptoms of mental derangement. He is dull and apathetic, mutters to himself and is irrelevant, irrational and confused in conversation. His condition is described as schizophrenia. His immediate removal to a mental hospital was recommended.

We are for the present satisfied, having regard to the report and to an answer given to a question put by the Court, that the appellant is of unsound mind and is consequently incapable of either conducting his own case or of instructing counsel.

There is nothing in the Court of Criminal Appeal Ordinance, No. 23 of 1938, nor in the rules made thereunder which covers the case, nor is there any precedent of this court to guide us. In the case of *Thomas*

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Burns [1] the Court adjourned the hearing of an application for leave to appeal *sine die* because the applicant, after he was sentenced to a term of imprisonment, had been removed to an asylum under a Home Office order consequent on a certificate under the Criminal Lunatics Act, 1884. Rule 80 of the Rules made under the Prisons Ordinance (Cap. 44) provides for a procedure to deal with a prisoner suffering from mental derangement. A board is appointed to report on the case and its recommendation is given effect to by the appropriate authority, I presume, making an order for the removal of the prisoner to a mental hospital where necessary.

We, therefore, adjourn the hearing of this appeal until such time as the court is informed as to whether or not the recommendation of the Medical Officer that the appellant be removed to the Mental Hospital, Angoda, has been accepted. Upon the Court being so informed, the Registrar will re-list the appeal and the application.

Hearing adjourned.

[1] *(1928) 21 Cr. A. R. 57.*

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1955 *Present :* **Gratiaen, J., and Swan, J.**

D. A. PERERA *et al.*, Appellants, *and* SCHOLASTICA PERERA, Respondent

S. C. 89—D. C. Negombo, 17,010

Trusts—Resulting trust—Transfer by person in loco parentis*—Presumption of advancement—Rebuttability—Trusts Ordinance (Cap. 72), ss. 83, 84.*

If a person transfers property to another to whom he stands *in loco parentis* there is a presumption of advancement, so that a resulting trust under section 84 of the Trusts Ordinance does not arise in favour of the transferor. But, under section 83 of the Trusts Ordinance, the presumption of advancement may be rebutted by proof that the transferor did not intend to dispose of the beneficial interest in the property unconditionally to the transferee.

Plaintiffs had deposited a total sum of Rs. 5,000 in favour of their younger sister, the defendant, in the Post Office Savings Bank. Although the account in the Post Office Savings Bank was in the name of the defendant, the Bank pass book was retained by the eldest brother (the 1st plaintiff). The attendant circumstances showed that the beneficial interest in the money was intended to be " given as dowry " to the defendant only if and when she would be " given in marriage " to a bridegroom approved by the family. Defendant, however, soon after she attained her majority, eloped with and married a man of her own selection without the approval of her parents or her brothers.

Held, that when the defendant contracted a marriage without the approval of her family, she became disentitled to receive the sum of Rs. 5,000. The money, therefore, belonged to the plaintiffs.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q. C., with *A. B. Perera* and *S. W. Walpita*, for the plaintiffs appellants.

A. K. Premadasa, with *S. M. H de Silva*, for the defendant respondent.

Cur. adv. vult.

May 26, 1955. GRATIAEN, J.—

All the plaintiffs, who are the elder brothers of the defendant, had met with a moderate degree of success in trade or business. Their father was himself a person of some substance, but he became a chronic invalid in 1942, with the result that the plaintiffs very commendably took over the responsibility of providing dowries in due course for their two unmarried sisters. Accordingly, a cash dowry of Rs. 5,000, towards which each brother made a proportionate contribution according to his means, was collected and handed over to their elder sister when she was " given out " in marriage in 1947. In July 1949, when the defendant was 19 years old,

2——J. N. B 53684-1,592 (8/56)

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a Post Office Savings Bank account was opened in her name with the same object in view, and sums aggregating Rs. 5,000 were deposited from time to time to her credit by the plaintiffs. The Bank pass book was, however, retained for the time being by the eldest brother (the 1st plaintiff), and has never left his custody. The fact that this book was withheld from the young lady has some significance to the issues arising on this litigation.

In May 1951, the defendant, having but recently attained her majority, eloped with and married a young man of her own selection without the approval of her parents or her brothers. The plaintiffs claim that in these circumstances the sum of Rs. 5,000 provisionally ear-marked for her benefit never became her property ; she contends on the other hand that the money had passed to her absolutely as and when each item was deposited in her name with the Savings Bank.

The learned Judge rejected the plaintiffs' submission, and held that " when they deposited the money they intended that the defendant should have the benefit of it *and that this money should be her dowry* ". His decision was much influenced by the admitted absence of any express stipulation by the brothers (at the time when the money was deposited) that the right to draw the money would be conditional on her contracting a marriage approved by them.

The circumstances in which the money came to be deposited by the plaintiffs with the Savings Bank in the name of their unmarried sister certainly rules out the inference that they had committed themselves irrevocably to the granting of an unconditional gift to her. The brothers had no doubt placed themselves *in loco parentis* towards the defendant, so that the normal presumption of a resulting trust under section 84 of the Trusts Ordinance does not arise in their favour. *Fernando v. Fernando* [1], *Mutalibu v. Hameed* [2]. Under section 83 of the Ordinance, however, it was open to the brothers to rebut " the counter-presumption of advancement " by proof that they did not intend at the relevant dates to dispose of the beneficial interest in the money unconditionally to the defendant.

Sections 83 and 84 of our Trusts Ordinance have introduced the English law on this subject, and the true principle was recently elucidated in the House of Lords by Lord Simonds in *Shephard v. Cartwright* [3]. Where a man purchases property in the name of (or transfers property to) a stranger, a resulting trust is presumed in favour of the purchaser (or transferor) ; on the other hand, if the transfer is in the name of a child or one to whom the purchaser or transferor then stood *in loco parentis*, there is no such resulting trust but a presumption of advancement. The presumption may, however, be rebutted, but " it should not give way to slight circumstances ". The judgment proceeds to adopt the following passage from *Snell's Equity* (22nd ed.) page 122 as to the kind of evidence which would be admissible for the purpose of rebutting the presumption of advancement in any particular case :—

" The acts and declarations of the parties before or at the time of the (purchase) or so immediately after it as to constitute a part of the

[1] *(1918) 20 N. L. R. 244.* [2] *(1950) 52 N. L. R. 97.*

[3] *(1955) A. C. 431.*

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transaction, are admissible in evidence either for or against the party who did the act or made the declaration ; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour."

The decision of the Court of Appeal as to the admissibility of evidence of subsequent statements or declarations in favour of the person making them has been over-ruled, but the following observations of Denning, L.J. in (*1953*) *1 Ch. 728 at 761* may be accepted as correctly setting out the general principle as to the presumption of advancement :

" If there is no (admissible) evidence on either side, an advancement will unhesitatingly be inferred ; but, if there is other evidence pointing one way or the other, then the tribunal of fact must, at the end of the case, come to its own conclusion whether an advancement was intended or not, giving proper weight to the natural inclination of a father (or a person *in loco parentis*) to provide for the child, but also taking into account all other circumstances. "

In the present case, the learned Judge correctly, in my opinion, accepted by implication the evidence that the plaintiffs did not intend an absolute and unqualified gift to come into operation as soon as each sum of money was deposited in the defendant's name. In other words, he was satisfied that the contemplated advancement was at any rate to be postponed until the time arrived for her to receive a dowry. But I cannot agree that she could ever have been intended to enjoy the beneficial ownership of the money if she ultimately chose to contract a marriage without the approval of her family. We are concerned only with the actual intention of the donors, and not with the desirability or otherwise of parents or persons *in loco parentis* imposing on a young woman (as a condition of their liberality) their own decision as to whom she ought to marry. If one pays regard to the habits and customs of the class of society to which these parties belong, the inference seems to me irresistible that the beneficial interest in the money provisionally ear-marked for her benefit was intended to be " given as dowry " to the young lady only if and when she was " given in marriage ", as her elder sister had been, to a bridegroom approved by the family. She elected instead to contract a marriage, " for better, for worse ", with someone of her own selection. The unfortunate consequence of that decision (which has, one hopes, been justified in all other respects) was that she became disentitled to receive a dowry which would otherwise have been available to her in accordance with her brothers' intentions. The conditions attaching to the completion of the gift having failed, I would allow the appeal and enter judgment for the plaintiffs as prayed for with costs in both Courts. The money belongs to them.

SWAN, J.—I agree.

Appeal allowed.

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1955 *Present :* **Gratiaen, J., and Swan, J.**

A. RASU CHETTIAR *et al.*, Appellants, *and* S. PONWANDU, Respondent

S. C. 335—D. C. Nuwara Eliya, 3,427

"Account stated"—Money Lending Ordinance (Cap. 67)—Sections 2, 3, 8, 10—Promissory note given partly as security for a renewed loan and partly for repayment of money due on a non-loan transaction—"Capital sum actually borrowed"—"Inadvertence"—"Regular account of each loan".

Plaintiffs were professional money-lenders and general merchants. The defendant carried on a business of his own, and borrowed money from time to time from the plaintiffs on the security of promissory notes. In addition, he purchased textiles from them. He in turn would deposit monies with them and transport their rice in lorries for hire. Details of all these transactions were faithfully recorded in books of account maintained by the plaintiffs. On 13th January, 1952, the plaintiffs and the defendant met for the express purpose of looking into the accounts. They mutually agreed as to the correctness of the cross items of account appearing in the plaintiffs' books of account and, after treating the items so agreed on one side as discharging the items on the other side, went on to agree that the balance only was payable. Four earlier promissory notes given by the defendant as security for loans for sums totalling Rs. 5,000 were discharged and returned to the defendant who in exchange granted in favour of the plaintiffs a fresh promissory note for Rs. 7,000 representing the total amount of his agreed liability after deducting his claims for lorry hire and sums deposited on general account as well as his various payments in settlement or reduction of liability on contracts of loan.

The present action was instituted by the plaintiffs for the recovery of Rs. 7,000 and interest due upon the promissory note dated 13th January 1952. It was contended on behalf of the defendant that the action was not maintainable on the ground of non-compliance with the requirements of sections 10 and 8 of the Money Lending Ordinance. The defendent also asked that the transactions between himself and the plaintiffs be reopened, and an account taken, under section 2. It was submitted that inasmuch as the promissory note was given partly to secure four "renewed" loans amounting to Rs. 5,000 it could not be enforced unless there was entered on the face of the document a statement as to "the capital sum actually borrowed" under the loan transaction; in other words, the promissory note for Rs. 7,000 ought clearly to have indicated that it was partly given to secure four "renewed" loans amounting to Rs. 5,000.

Held, that what took place between the plaintiffs and the defendant on 13th January 1952, immediately before the promissory note for Rs. 7,000 was signed, represented an "account stated" (as opposed to "a mere acknowledgment of a debt"). Therefore, the promissory note was not given, either wholly or in part, "as security for a loan" within the meaning of section 10 of the Money Lending Ordinance. But, although the earlier debts were extinguished by reason of "the account stated", the statutory right to have the loan transactions reopened under section 2 of the Money Lending Ordinance was kept alive for six years commencing from 13th January 1952.

Held further, (i) that, assuming that the transaction of 13th January 1952 could not be regarded in law as an "account stated" and that the promissory note for Rs. 7,000 contravened the requirements of section 10 of the Money Lending Ordinance, the omission to insert the capital sum borrowed in regard to the renewed loans amounting to Rs. 5,000 was due to inadvertence within the meaning of section 10 of the Money Lending Ordinance. "Inadvertence" is wide enough to cover errors of non-compliance made in good faith through a mistaken interpretation of the law.

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(ii) that a money lender who enters in his books loan transactions as well as non-loan transactions in such a manner that the transactions are separable from one another keeps " a regular account of each loan " within the meaning of section 8 of the Money Lending Ordinance.

APPEAL from a judgment of the District Court, Nuwara Eliya.

H. V. Perera, Q.C., with *N. Kumarasingham* and *P. Naguleswaram*, for the plaintiffs-appellants.

S. Nadesan, Q.C., with *T. K. Curtis* and *Frederick W. Obeyesekere*, for the defendant-respondent.

Cur. adv. vult.

November 10, 1955. GRATIAEN, J.—

The plaintiffs, who carry on business in partnership at Udapussellawa, sued the defendant in this action for the recovery of Rs. 7,000 and interest upon his promissory note dated 13th January 1952 in their favour. The defendant, having disputed liability on the merits, pleaded that in any event the action was not maintainable for non-compliance (so he alleged) with the requirements of sections 8 and 10 of the Money Lending Ordinance. He also asked that the transactions between himself and the plaintiffs be reopened, and an account taken, under section 2.

The learned District Judge rejected as entirely false the defendant's version of the circumstances in which the promissory note was granted. He accepted the evidence of the 1st plaintiff and of his witness Nagaratnam Pillai but decided, with regret, that the action must be dismissed because in his opinion (1) the plaintiffs had not kept " a regular account of the loan " as required by section 8 of the Ordinance and (2) the note sued on did not comply with the provisions of section 10.

The plaintiffs are professional money-lenders and general merchants. The defendant carried on a business of his own, and borrowed money from time to time from the plaintiffs on the security of promissory notes. In addition, he purchased textiles either from their shop or from an establishment owned by them called " Kathiresan Cash Stores ". He in turn would deposit monies with them and transport their rice in lorries for hire. Details of all these transactions were faithfully recorded in books of account maintained by the plaintiffs.

The evidence which the learned Judge has accepted proves that the 1st plaintiff (on behalf of his firm) and the defendant met on 13th January 1952 for the express purpose of looking into accounts. Nagaratnam Pillai who was present at the time states that " the interest and other particulars were looked into ", and in due course the defendant signed a document P2 incorporating an agreed statement as to how their accounts stood at that date. According to P2, the defendant owed the plaintiffs (1) Rs. 5,000 being the aggregate principal amount of four earlier promissory notes which he had given them as security

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for loans, (2) Rs. 611·40 on another current account and (3) Rs. 1,106·93 due to the " Kathiresan Cash Stores " owned by the plaintiffs. These figures represent the balances struck and mutually agreed upon in respect of the cross items appearing in the plaintiff's books of account marked P3, P4, and P5 respectively. The document P2 also contains a record of the fact that on the date on which these various accounts were looked into a further sum of Rs. 194·17 was advanced to the defendant whose agreed liability thus amounted to Rs. 6,912·50. On this basis, the earlier promissory notes for sums totalling Rs. 5,000 were discharged and returned to the defendant who in exchange granted in favour of the plaintiffs a fresh promissory note for Rs. 7,000 representing the total amount of his agreed liability (together with Rs. 87·50 which was admittedly retained by the plaintiffs as interest in advance for 30 days at 15% interest). This is the promissory note P1 sued on in the present action. It was attested by the witness Nagaratnam Pillai after the defendant had confirmed in his presence that " the amount was correct ".

Although the learned Judge accepted this version of the circumstances in which the promissory note P1 was signed, he rejected the argument that it represented security for the amount of the defendant's liability to the plaintiffs upon an " account stated ". He decided that, on the contrary, the note was given partly as security for the " renewal of loans " within the meaning of the section 10 (6) of the Money Lending Ordinance. The basis of this decision was that, as Rose C.J. held in *Rodger v. de Silva* [1], there had been " no more than a looking into the accounts between the parties and not an account stated in the technical sense of the term. "

With great respect, I think that what took place between the 1st plaintiff and the defendant on 13th January 1952 immediately before the promissory note P1 was signed represented a very clear example of an " account stated " (as opposed to " a mere acknowledgment of a debt "). The true distinction was explained by Lord Atkin in *Siquera v. Noronha* [2], and was clarified by Lord Wright in *Firm Bush Chand v. Seth Girdhari et al.* [3]:

> " The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable : *such a transaction is in truth bilateral, and creates a new debt and a new cause of action.* "

This authoritative decision of the Judicial Committee has finally disposed of the earlier theory that an " account stated " can arise only in transactions where there have been either " cross items of claim " as opposed to mere " cross items of debit and credit. " *Annamalai Chetty v. Thornhill* [4]. As it happens, the relevant pages in the Account Book P2 contain items of both kinds, for instance, the defendant's claims for lorry hire

[1] (*1952*) *54 N. L. R. 246.*
[2] (*1934*) *A. C. 332.*
[3] (*1934*) *50 T. L. R. 465.*
[4] (*1935*) *36 N. L. R. 358.*

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and sums deposited on general account as well as his various payments in settlement or reduction of liability on contracts of loan. In respect of all these transactions, a balance was struck and an account stated, so that the earlier items of credit and debit were *pro tanto* extinguished and the balance only was mutually agreed to be due by the defendant. Moreover, the final entries in P2, P3, P4, and P5 make it clear that this was in fact the intention of the parties : the defendant's liability under each head of account was recorded as settled in full, and his earlier promissory notes given " as security for loans " were cancelled and returned to him. The promissory note for Rs. 7,000 which is the subject matter was therefore given as security for the " new debt " created in the place of the earlier liabilities which had been extinguished.

It follows from this analysis of what took place that the promissory note P1 was not given, either wholly or in part, " as security for a loan " within the meaning of section 10 of the Money Lending Ordinance. The circumstance that the amount of the new debt happened to include a sum equivalent to the principal amounts due under earlier money lending transactions does not alter the substance of the later transaction. Per Soertsz J., in *Marikkar v. Supramaniam Chetty* [1]. This does not mean, however, that the defendant thereby lost the remedy which was previously open to him under section 2 of the Money Lending Ordinance if (for instance) he could prove that the earlier loan transactions had been " harsh and unconscionable ", or induced by undue influence. Although the earlier debts were extinguished by reason of " the account stated ", the statutory right to have the loan transactions reopened was kept alive for six years commencing from 13th January 1952 (vide section 3). But the learned Judge has correctly decided upon the merits that there were no grounds upon which this remedy could be established.

But let it be supposed that no account was " stated " (in the strict sense of the term) on 13th January 1952, and that the promissory note sued on was in truth given partly as security for the original loans aggregating Rs. 5,000, and partly for the repayment of sums due on " non-loan " transactions. Does it follow that section 10 of the Money Lending Ordinance applies to the case ?

Section 10 (1) refers to promissory notes given as security for " the loan of money ", and section 10 (6) makes these provisions equally applicable to " renewals of any loan ". It is clear enough that the singular includes the plural in this context, so that the section also applies to a note given as security for more than one loan, or for the renewal of more than one loan. But the real difficulty arises when a note is given not merely as security for a loan but also for the repayment of money due on some other genuine (as opposed to merely colourable) non-loan transaction. Mr. Nadesan argued that a comprehensive note given in such a situation cannot be enforced unless there is entered on the face of the document a statement as to " the capital sum actually borrowed " under the loan transaction ; in other words, the promissory note for Rs. 7,000 ought clearly to have indicated that it was partly given to secure four " renewed " loans amounting to Rs. 5,000.

[1] *(1943) 44 N. L. R. 409 at 430.*

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Our combined researches have failed to bring to light any earlier decision of this Court in which this special problem has been discussed. The issue might well have arisen in *Rodger v. de Silva* (supra) where a promissory note for Rs. 13,062·50 had been given partly to secure the plaintiff's loans to the defendant and partly to secure a sum of Rs 5,062·50 due to the plaintiff as commission on other loan transactions negotiated by him for the defendant's benefit. But the Court decided that, on the facts of that particular case, " all the transactions were pure and simple loan transactions between the parties ". For this reason, and because there was no " account stated ", section 10 was held to apply.

I am not at all convinced that the draftsman of the Ordinance had in contemplation transactions other than what Rose C.J. described as " pure and simple loan transactions ". Even section 2 (4) makes it clear that a Court's jurisdiction to reopen a money lending transaction was extended to " any transaction, which, whatever its *form* may be, is *substantially* one of money lending. " This provision protects a borrower who has in truth borrowed money upon a colourable transaction which was designedly clothed in the disguise of a non-loan transaction. But the Ordinance does not provide expressly for promissory notes given in respect of several transactions only some of which can properly be described as contracts of loan.

I see no necessity to decide for the purposes of the present appeal whether Mr. Nadesan's argument is necessarily correct. Suffice it to say that, upon the learned Judge's findings of fact, the plaintiffs were not actuated by any sinister motives when they did not mention in the marginal column of the promissory note for Rs. 7,000 that the total consideration included principal sums aggregating Rs. 5,000 due on the earlier notes. If an honest money lender were to seek legal opinion as to what form a promissory note should take in a situation such as has arisen here, he might well receive conflicting advice. Some lawyers, adopting the view of Abrahams C.J. in *Abeydeera v. Ramanathan Chetty* [1], might consider that there had been "a notional lending and borrowing" of Rs. 7,000 (not merely Rs. 5,000) when the accounts were looked into on 13th January, 1952 ; others might prefer the view of Soertsz J. in *Marikkar's case* [2] " that a transaction cannot be a non-loan transaction in reality and a loan transaction notionally any more than a thing can both be and not be " ; yet another lawyer might think that the solution lies in the interpretation now suggested by Mr. Nadesan. Whichever view be correct, the legislature did not intend that an honest creditor, finding himself in this predicament, must discover the true answer at his peril. It is in just such a situation that the Court is empowered to grant relief under section 10 (1) of the Ordinance :

> " Provided that in any case in which the Court shall be satisfied that the default was *due to inadvertence and not to any intention to evade the provisions of this section*, it may give relief against the effect of this subsection on such terms as it may deem just. "

[1] *(1936) 38 N. L. R. 389.* [2] *(1943) 44 N. L. R. 409 at 430.*

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The earlier authorities as to the meaning of " inadvertence " in this context are not, perhaps, capable of perfect reconciliation. A professional money lender who deliberately refrains from advising himself as to the requirements of the Ordinance will not obtain relief if he fails to comply with some simple provision which no layman could misunderstand. On the other hand, " inadvertence " is certainly wide enough to cover errors of non-compliance made in good faith (i.e., after due care and attention) through a mistaken interpretation of the law.

I would respectfully adopt the interpretation given to the proviso by Garvin J., in *Fernando v. Fernando* [1]. The word " inadvertence " is sharply contrasted with the words " and not to any intention to evade the provisions of this section ", so that " the act which the law intends to penalise was the *intended evasion of the provisions of the section.* "

It is unnecessary to decide whether the promissory note sued on does in fact contravene the requirements of section 10. Even upon the assumption that it does, I am perfectly satisfied that all the circumstances show a complete absence of bad faith on the part of the plaintiffs. The note was taken as security for sums actually due and agreed to be due to them, and any suggested non-compliance with the requirements of section 10 was unintentional and therefore " inadvertent ".

Finally, I cannot agree with the learned Judge that the book P2 does not contain " a regular account of each loan " (within the meaning of section 8) in respect of which the earlier promissory notes amounting to Rs. 5,000 had been given. It is true that the various pages in which particulars of these loans were contemporaneously recorded also contain details of other transactions between the parties. But the loan transactions and the non-loan transactions are separable one from the other, and section 8 nowhere prohibits a professional money lender from keeping his books in such a way that they would show at a glance the exact amount of his debtor's liability upon a running account (including, but not confined to, loans). Mr. Nadesan pointed out that P2 does not specifically state how much interest was deducted at the time when each loan was originally granted. That is true, but P2 does contain in each case a cross reference to a relevant page in another account book in which particulars of " interest deducted " have been regularly recorded. The latter book is also " paged and bound in such a manner as not to facilitate the elimination of papers or the interpolation and substitution of other pages. "

For all these reasons, I have reached the conclusion that (whether or not the Ordinance applies to the facts of this particular case) the appeal should be allowed. I would enter judgment in favour of the plaintiffs as prayed for with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.

[1] *(1934) 36 N. L. R. 77.*

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[IN THE COURT OF CRIMINAL APPEAL]

1953 *Present :* **Nagalingam, S.P.J. (President), Gunasekara, J., and Pulle, J.**

THE QUEEN *v.* M. S. PERERA *et al.*

APPEALS 16–17, WITH APPLICATIONS 15–17, OF 1953

S. C. 48—M. C. Gampaha, 2,682

Evidence—Accused person's statement to police—Admissibility—Exculpatory statement—Admission—Previous or subsequent conduct—Evidence in rebuttal—When permissible—Evidence Ordinance, ss. 8 (2), 17 (1), 21, 25.

The 1st and 2nd accused were charged with robbery, and the 3rd accused was charged with abetment of that offence. The robbery was said to have been committed during the afternoon of the 7th September, 1951. When the 3rd accused was taken into custody he made two statements to the officer in charge of the police station. Evidence of the contents of both these statements was adduced by the prosecution at the trial. According to the police officer's version of the first statement, the 3rd accused gave the police an account of how he spent the afternoon of the 7th September, 1951. The police officer's version of the second statement was that the 3rd accused had refused an invitation on the 31st August to join in a conspiracy with the 1st and 2nd accused to commit the robbery on the 7th September. If the jury believed that the 3rd accused had been invited on the 31st August to join in a conspiracy with the 1st and 2nd accused and that after the robbery he gave the police a false account of how he spent the afternoon of the 7th September, they might well have found in those facts a ground for accepting the evidence of two accomplices implicating the 3rd accused, which they might otherwise have rejected.

It was contended that the statements to the police were inadmissible on the grounds that the one relating to the events of the 7th September was not relevant and that the other was a confession to a police officer and therefore barred by section 25 of the Evidence Ordinance.

Held (by the majority of the Court), that the first statement was relevant under section 8 (2) of the Evidence Ordinance, and that the second statement was an exculpatory statement and not a confession, although it was a statement which suggested an inference as to a relevant fact and was therefore an admission as defined in section 17 (1). Being an admission the second statement was admissible in evidence under section 21, to prove as against the 3rd accused that a week before the robbery he had been invited to join the other two accused in a conspiracy to commit that offence.

Held further, that evidence in rebuttal should not be permitted except in a case where a matter has arisen *ex improviso* or the evidence was not admissible before the prosecution was closed.

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

1st accused-appellant in person.

Srimath B. Lekamge, for 2nd accused-appellant.

M. M. Kumarakulasingham, with *J. C. Thurairatnam*, for 3rd accused-appellant.

L. B. T. Premaratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 1, 1953. GUNASEKARA, J.—

The three accused were tried jointly at the Colombo Assizes on an indictment charging the first accused, Solomon Perera, and the second accused, Piyadasa *alias* Banda, with robbery of a bag containing Rs. 12,283·70 in cash from one Dharmasena, and the 3rd accused Jayasoma, with abetment of that offence. All three were convicted, the first and second accused by a unanimous verdict of the jury and the third by a verdict of five to two, and they were sentenced to eight years' rigorous imprisonment each. At the close of the argument we dismissed the appeals of the first and second accused and reserved our judgment on that of the third.

Dharmasena was the manager of a co-operative wholesale store which had a depot in Veyangoda and had its head office at Mudungoda in Gampaha. Goods were sold at the Veyangoda depot on Tuesdays and Fridays, and the money received on each day was taken by Dharmasena on the same day to the head office at Mudungoda. It was his practice to take a train that left Veyangoda at 3 p.m., and he used to carry the money in a bag, in which he carried also a bill-book and two account books. The robbery is said to have been committed on the 7th September, 1951, which was a Friday, when he was taking the day's collection by this train as usual.

Dharmasena and another passenger, Gunawardana, gave evidence about the robbery. According to them, when the train was slowing down at an unprotected level crossing, about two miles from the Veyangoda railway station, the first and second accused, who had got in at that station, set upon Dharmasena and pulled at the bag of money that was in his hands, and the second accused managed to wrest it from his grasp.

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Dharmasena released his hold, according to him, after the first accused had struck him a blow on the chest with some weapon that was clenched in his fist. (A doctor who examined Dharmasena on the next day found an abrasion and contusion that could have been caused by such a blow.) Dharmasena stopped the train by pulling the communication cord, but the two accused had already got out and were running along a foot-path. He chased them for some distance but failed to overtake them, and he returned to the train and reported the incident to the guard.

The foot-path falls into the high road at a spot beyond the level crossing, about a third of a mile from where the train was stopped. According to the case for the prosecution, the third accused had arrived at that spot shortly before the robbery in a Morris Eight car driven by one Subasingha and waited for the other two, with the engine of the car running, and as soon as they turned up with the bag of money all of them left together in the car. Subasingha, who gave this evidence, also said that on the way the three accused divided the money among themselves before they got out at their several destinations, and that the third accused gave him Rs. 50 at the end of the trip, saying "Keep this Rs. 50. Don't tell anybody that I travelled in this car." He added that at the third accused's request he secretly threw into the jungle a bag that had been left on the rear seat. The third accused told him, he said, "Throw it into the jungle without letting anybody see you." He did so, but he later pointed it out to the police, and it turned out to be the stolen bag with the bill-book and the two account books still inside it. His evidence about the third accused's share in the arrangement that is said to have been made for the departure of the other two from the scene of the offence was supported by that of another witness, Ebert.

The learned presiding judge expressed the view that Subasingha and Ebert were accomplices. Upon a consideration of all the evidence we respectfully agree with that view and we do not doubt that it must have been shared by the jury. The case against the third accused depended on the credibility of these two witnesses, while against the first and second accused there was an entirely independent case. Against the first accused there was, besides the evidence of Dharmasena and Gunawardana, the evidence of a man named Karunaratna, who lived in a house by the foot-path and who stated that the first accused was one of the two men who were chased by Dharmasena. The first accused was pointed out by each of these witnesses at an identification parade that was held on the 10th September, 1951. His defence consisted in a statement from the dock to the effect that before the parade a police officer had shown him to the witnesses. He had not made such a complaint before the trial. The second accused was pointed out by Dharmasena and Gunawardana at an identification parade held on the 1st October. He did not give evidence at the trial or make a statement from the dock.

The third accused was an assistant teacher at a Central School at Dewalapola, in the neighbourhood of Veyangoda. On the 7th September, 1951, he left the school at noon, an hour before it closed, with the headmaster's permission, and on the morning of the following Monday he

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wired to the headmaster from Colombo asking for a day's leave on the ground of ill-health. In the meantime the police had looked for him in his house at Veyangoda on the night of the 8th and failed to find him. He presented himself at the Veyangoda police station at 1.15 p.m., on the 10th and was taken into custody, and on that occasion he made two statements to Inspector Dickman, the officer in charge of the station.

Evidence of the contents of both these statements was adduced by the prosecution. The inspector's version of the first statement is as follows :

> " I do not know anything about the robbery of cash of Rs. 12,000 on Friday. I was at Veyangoda at my house at 2.30 p.m. I went to Minuwangoda Central School Sports ground. I was with Ranatunga a teacher of the school from 3 p.m. to 6 p.m. I then returned home at 6.30 p.m. by bus. I slept at home. On Saturday I was at home and stayed there till Sunday morning. "

Ranatunga, who too was an assistant teacher at the Dewalapola school, gave evidence for the prosecution denying that the third accused had been in his company from 3 p.m. to 6 p.m. He said that he himself had been present at the sports meet of the Minuwangoda Central School from about 3 p.m. till about 5.30 p.m. but he had not seen the third accused there. The third accused giving evidence denied the accuracy of the inspector's version of his statement, although the inspector had not been cross-examined. He alleged that what he had said about Ranatunga was merely that he had seen him, and also that he had not said that he had been at home on Saturday and had been there till Sunday morning.

The inspector's version of the second statement is as follows :

> " On Friday the 31st August I went to the Dominion Hotel at about 12 noon and I saw Wilbert the Dominion Hotel Mudalali, Solomon and Banda who were upstairs. I went there to see William as he is well known to me. They were drinking arrack and discussing about some money case. Then Wilbert told me that they were talking about robbing the Co-op manager the following Friday when he takes the money of the Co-op stores to Gampaha. He asked me whether I would assist in keeping the money safe and I refused. The two servant boys, one about 7 and the other about 15 who were employed there can testify to this meeting. "

Solomon and Banda are the names of the first and second accused.

If the majority of the jury believed that the third accused had been invited on the 31st August to join in a conspiracy with the first and second accused to rob Dharmasena on the following Friday, that on the 7th September he left the school earlier than usual at a time that would have enabled him to help in the robbery at 3 p.m., and that after the robbery he gave the police a false account of how he spent that afternoon,

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they might well have found in those facts a ground for accepting the evidence of Subasingha and Ebert, implicating the third accused, which they might otherwise have rejected. It is contended for the appellants that the statements that are said to have been made to Inspector Dickman are inadmissible, on the grounds that the one relating to the events of the 7th September is not relevant and that the other is a confession to a police officer and therefore barred by section 25 of the Evidence Ordinance. The majority of the court are of the view that the former is relevant under section 8 (2) of the Evidence Ordinance, and that the latter is an exculpatory statement and not a confession, although it is a statement which suggests an inference as to a relevant fact and is therefore an admission as defined in section 17 (1).

Being an admission the second statement was, in the opinion of the majority of us, admissible in evidence under section 21, to prove as against the third accused that a week before the robbery he had been invited to join the other two in a conspiracy to commit that offence, and it was therefore open to the crown counsel to adduce evidence of it before the prosecution case was closed. He did not adopt this course, however, but adduced the evidence only after the close of the case for the third accused. The ground upon which this procedure was permitted appears to have been that the third accused had denied under cross-examination that he had made this statement, and the inspector was being called to rebut the denial with the sole object of discrediting the third accused as a witness. It does not appear to have been appreciated that the mode by which the prosecution sought to discredit him was by proving a relevant fact, namely an admission, which could have been proved before the close of the case for the prosecution. As this court pointed out in the case of *R. v. Thuraisamy* [1], to permit such a procedure would be a wrong exercise of the presiding judge's discretion ; for evidence in rebuttal should not be permitted except in a case where a matter has arisen *ex improviso* or the evidence was not admissible before the prosecution case was closed. But for the evidence that was improperly admitted in rebuttal the majority of the jury may well have agreed with the two jurors who were not prepared to accept the evidence of Subasingha and Ebert against the third accused. Though not agreed upon the grounds, we are unanimously of the opinion that the conviction of the third accused cannot be sustained ; we therefore quash the conviction of the third accused and set aside the sentence that has been passed on him.

We are also unanimously of opinion that the admission of evidence of the third accused's second statement to the inspector caused no prejudice to the other two accused.

Convictions of 1st and 2nd accused affirmed.
Conviction of 3rd accused quashed.

[1] *(1952) 54 N. L. R. 449.*

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1955 *Present :* **Weerasooriya, J.**

DE JONG, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 6 (with Application 159)—M. C. Colombo South, 38,322

Income Tax Ordinance (Cap. 188)—Proceedings under s. 80 (1)—Omission of Magistrate to order imprisonment in default of payment of tax—Effect thereof—Insolvency of assessee—Sections 78 (2), 81—Criminal Procedure Code, s. 312 (1) (b)—Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938, s. 12 (2).

In proceedings under Section 80 (1) of the Income Tax Ordinance, where the defaulter appears in Court in answer to the summons and has no cause to show why further proceedings for the recovery of the tax should not be taken against him, but the Magistrate makes no direction at the time that the defaulter should suffer a term of imprisonment in default of payment of the tax due, it is not open to the Magistrate to make such a direction subsequently.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

G. E. Chitty, with *J. V. C. Nathaniel* and *Daya Perera*, for the appellant.

Shiva Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 13, 1955. WEERASOORIYA, J.—

On the 25th January, 1952, the appellant appeared before the Colombo South Magistrate's Court in obedience to a summons issued on him in Case No. 38,322 to show cause why further proceedings should not be taken against him for the recovery of a sum of Rs. 9,993 certified by the Commissioner of Income Tax in terms of s. 80 (1) of the Income Tax Ordinance to be due from him as income tax. On the appellant admitting that this amount was due from him the Magistrate made the following order : " I fine the accused Rs. 9,993. Time till 1.2 for fine ". The time given under this order to pay the " fine " was further extended as a result of instalments paid by the appellant on various subsequent occasions in liquidation of the amount due. On the 27th November, 1954, the original liability had been reduced to Rs. 4,645 and the Court was informed that the appellant had been adjudicated an insolvent.

It appears from the copy of the proceedings (R1) in the insolvency case that the adjudication took place on the 2nd July, 1952. On the 10th December, 1952, the Commissioner of Income Tax filed in those proceedings a notice under s. 81 of the Income Tax Ordinance claiming

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payment of a sum of Rs. 6,445 as tax due from the appellant for the year 1949/1950. S. 78 (2) of the Income Tax Ordinance provides that a receiver shall pay out of the assets of the insolvent under his control the tax charged or chargeable for one complete year of assessment prior to the date of the insolvency, to be selected by the Commissioner of Income Tax, as a first charge on such assets and that any other tax charged or chargeable for periods prior to such date shall be an unsecured debt. The claim of the Commissioner of Income Tax was, however, not satisfied, even in part, as there were no assets of the insolvent in the receiver's hands.

On the 23rd June, 1953, the appellant was granted a certificate of conformity of the third class under the Insolvency Ordinance.

On the ground of the appellant's adjudication as an insolvent and the issue to him of the certificate of conformity an application was made to the Magistrate on the 11th December, 1954, for an order of discharge of the appellant from the proceedings in Case No. 38,322. After inquiry the learned Magistrate rejected the application and ordered the appellant to pay the balance sum of Rs. 4,645 giving him time to do so until the 31st December, 1954. The present appeal has been filed from that order.

S. 80 (1) of the Income Tax Ordinance provides that if a person who has been summoned to show cause fails to do so the amount of the tax in default shall be deemed to be a fine imposed by a sentence of a Magistrate on such defaulter for an offence punishable with fine only and the provisions of s. 312 (1) of the Criminal Procedure Code (except paragraphs (*a*), (*c*) and (*h*) thereof) then become applicable, and the Magistrate is empowered to make any direction which, by the provisions of that subsection, he could have made at the time of imposing such sentence. It is clear, I think that the tax due is deemed to be a fine only for the purpose of invoking the provisions of s. 312 (1) of the Criminal Procedure Code relating to the imposition of a term of imprisonment in default of payment of the tax.

While the appellant's admission when he appeared on the 25th January, 1952, in obedience to the summons may be regarded as meaning that he had no cause to show why further proceedings should not be taken for the recovery of the tax due, the Magistrate made no order under the relevant provisions of s. 312 (1) of the Criminal Procedure Code although it was open to him to direct that the appellant shall suffer imprisonment for a term not exceeding six months in default of payment of the tax. Instead, he gave the appellant time, in the first instance till the 1st February, 1952, and ultimately till the 31st December, 1954, to pay the amount due. I can see nothing either in s. 312 (1) of the Criminal Procedure Code or s. 80 (1) of the Income Tax Ordinance which authorises this course of action. In my opinion the power vested in a Magistate under s. 312 (1) (*b*) of the Criminal Procedure Code of directing that an offender shall suffer a term of imprisonment in default of payment of a fine to which he is sentenced can be exercised only at the time of the

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imposition of the sentence and not thereafter. Even where such a direction has been made by the Magistrate it is clear that in default of payment of the fine forthwith, the offender would have to be committed to prison unless time is allowed under s. 312 (4). It was, no doubt, to meet this situation that sub-sections 1B, 1C and 1D were enacted by a subsequent amendment of s. 80 of the Income Tax Ordinance. Under these sub-sections a Magistrate is empowered to allow time for the payment of the tax or direct payment by instalments, and also to enlarge the defaulter on bail, but it will be observed that these indulgences can be granted to a defaulter only after, and not before, a direction has been made that on failure to pay the tax he shall suffer a term of imprisonment.

The Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938, contains provision for time being given for the payment of a fine imposed by a Magistrate's Court, but s. 12 (2) of that Ordinance specifically provides that it shall have no application in a case like the present one.

The object of proceedings under s. 80 (1) of the Income Tax Ordinance is to ensure recovery of tax due from a defaulter by subjecting him to a term of imprisonment should he fail to pay the tax. Where at the time when a defaulter appears on summons he has no sufficient cause to show against the further proceedings contemplated in s. 80 (1) being taken, and the Magistrate merely makes an order that he should pay the tax, without giving any direction that in default of payment he should suffer a term of imprisonment, the object of the proceedings is defeated since, in my opinion, it is not open to the Magistrate to give that direction subsequently. This is precisely the position in the present case. In the result, although the appellant has failed to pay the tax on or before the 31st December, 1952, nothing further can now be done under s. 80 (1) of the Income Tax Ordinance for the recovery of the tax.

Mr. Chitty who appeared for the appellant made the submission that in view of the steps subsequently taken by the Commissioner of Income Tax in the insolvency proceedings the method of recovery of tax under s. 80 (1) of the Income Tax Ordinance is no longer available to him. Seeing, however, that the Commissioner's recourse to that method of recovery had already been rendered abortive by the failure of the learned Magistrate to follow the correct procedure, it is not necessary to consider the various arguments advanced by Mr. Chitty in support of his submission.

No appeal seems to lie from the Magistrate's order dated the 11th December, 1954. The appellant has also filed papers applying that this Court, in the exercise of its powers of revision, do set aside that order, but for the reasons given by me it does not seem that any useful purpose will be served in granting this application. The appeal is rejected and the application is refused. I make no order as to costs.

Appeal rejected.

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1955 *Present :* **Swan, J.**

HEEN APPU *et al.*, Appellants, *and* SALIH (Police Sergeant), Respondent

S. C. 710–714—M. C. Gampola, 12,377

Rural Court—Exclusive jurisdiction—Village Tribunals Ordinance, No. 12 of 1945, ss. 12, 13.

In a prosecution by a public officer in respect of an offence triable by a Magistrate's Court the accused cannot be convicted of a lesser offence which was not included in the charge and which is exclusively triable by a Rural Court.

APPEAL from a judgment of the Magistrate's Court, Gampola.

Colvin R. de Silva, with *M. L. de Silva*, for the accused-appellants.

Shiva Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 28, 1955. SWAN, J.—

The appellants were charged with (1) criminal trespass and (2) causing grievous hurt to one A. K. V. Daniel. Both charges were framed against the accused on the basis that they had acted in furtherance of a common intention. After trial they were acquitted on count 1, and on count 2 only the 2nd accused-appellant was found guilty. He was convicted and sentenced to a term of six months' rigorous imprisonment, and to pay a fine of Rs. 75 in default to serve a period of one month's imprisonment. The 1st, 3rd, 4th and 5th accused-appellants were found guilty of simple hurt under section 314 of the Penal Code and fined Rs. 50 each.

Learned Counsel for the appellants did not press the appeal of the 2nd accused-appellant. I see no reason to interfere with his conviction or sentence. His appeal is dismissed and the conviction and sentence affirmed.

As regards the 1st, 3rd, 4th and 5th accused-appellants it is submitted that their conviction is bad because the learned Magistrate had no jurisdiction to convict them of simple hurt inasmuch as a charge of simple hurt is exclusively triable by the Rural Court having jurisdiction over the area in which the alleged offence was committed. The only exception is where a public officer prosecutes—vide section 12 of the Village Tribunals Ordinance No. 12 of 1945. But that does not apply in this case as the proceedings initiated by the public officer who prosecuted were in respect of offences triable by a Magistrate's Court. There is a case exactly in

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point which is reported in *1 Ceylon Law Journal Notes of Cases* at page 44. That was decided under the old Ordinance No. 24 of 1924. But the new Ordinance makes no change.

Immediately the Magistrate found that the 1st, 3rd, 4th and 5th accused-appellants had committed an offence which was exclusively triable by a Rural Court he should have stayed proceedings and referred the parties to the Rural Court having jurisdiction as provided by section 13.

I quash the conviction of the 1st, 3rd, 4th and 5th accused-appellants.

Appeal of 2nd accused dismissed.
Convictions of the other accused quashed.

1955 *Present :* **K. D. de Silva, J.**

CHARLES PERERA, Appellant, *and* W. A. S. DE COSTA, Respondent

S. C. 72—C. R. Colombo, 46,975

Landlord and tenant—Sale of rented premises—Right of purchaser to recover rent from tenant—Attornment.

A purchaser from a landlord of the property leased is entitled to recover the rent from the tenant if he takes over possession of the property along with the vendor's tenant on it.

Zackariya v. Benedict (1950) 53 N. L. R. 311, not followed.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the defendant-appellant.

C. Ranganathan, for the plaintiff-respondent.

Cur. adv. vult.

July 18, 1955. DE SILVA J.—

This is an appeal in an action for rent and ejectment. The plaintiff instituted this action on July 29th, 1953, to eject the defendant from premises No. 23 1/1 situate at Kirillapone on the ground that he had failed and neglected to pay rent from May 18th, 1950. According to the plaintiff the premises in question belonged to one Piyadasa Perera and the defendant occupied the same on a monthly tenancy under the said Piyadasa Perera. On a writ issued against Piyadasa Perera the land on which the building stands together with everything standing thereon was sold by Fiscal on 20.5.'49 and purchased by the plaintiff. This sale was confirmed on 7.7.'49 and the plaintiff obtained Fiscal's conveyance P3 dated 18.5.'50. The plaintiff was placed in possession of the land on 4.10.'50. At that time the buildings standing on the land were in the

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occupation of the tenants of Piyadasa Perera. On 15.6.'50. the plaintiff gave an informal lease of the land and the buildings to Ratnayake. But as the tenants failed to attorn to Ratnayake this lease fell through. Thereupon the plaintiff asked those tenants including the defendant to pay rent direct to him. The defendant failed to comply with that request. Admittedly the defendant did not attorn to the plaintiff although he was asked to do so. It is in evidence that the defendant was present at the Fiscal's sale at which the plaintiff became the purchaser of the land in question. The defendant filed answer stating that premises Nos. 23 1/1 to 1/5 belonged to one K. D. Mithrasena and that he was in occupation of premises No. 23 1/2 as Mithrasena's tenant. He prayed that the plaintiff's action be dismissed with costs. After trial the learned Commissioner of Requests held that the defendant was in occupation of premises No. 23 1/1 and not 23 1/2 as alleged by him. He further held that the defendant entered into possession of premises 23 1/1 as the tenant of Piyadasa Perera and that the plaintiff had terminated the tenancy by a notice to quit given on June 26th, 1952. Accordingly judgment was entered in favour of the plaintiff. This appeal is from that judgment.

The learned Commissioner's findings of fact were not canvassed at the hearing of this appeal. Mr. Jayawardene who appeared for the defendant argued that the plaintiff was not entitled to sue the defendant on the basis of a tenancy as admittedly the defendant had not attorned to the plaintiff. In *Silva v. Silva*,[1] Pereira J. and Sampayo A. J. held that the purchaser from the landlord of the leased premises was entitled to sue on the contract of lease entered into between the landlord and the tenant and cited with approval the following passage from Wille on " Landlord and Tenant in South Africa." (221)

> " A purchaser from the landlord of the property leased steps into the shoes of the landlord, and receives all his rights and becomes subject to all his obligations so that he is bound to the tenant, and the tenant is bound to him, in the relation of landlord and tenant."

This principle was affirmed by Wood Renton C.J. and de Sampayo J. in the subsequent case *Wijesinghe v. Charles*.[2] In regard to these two cases Mr. Jayawardene submitted that the purchaser at a Ficsal's sale did not stand on the same footing as a purchaser from the landlord. I am unable to agree with that contention. There is authority for the proposition that the purchaser at a Fiscal's sale of the landlord's interest in the leased property stands in the shoes of the execution-debtor in regard to a contract of tenancy. It was so held in *Simon Morris v. Henry Mortimer*[3]. In that case the plaintiff had purchased the landlord's interest, in the premises of which the defendant was a tenant at an execution-sale. It was held that the tenant was bound to pay rent to the plaintiff. Dias J. stated in that case :—

> " He (tenant) seems to have been aware of the execution sale and the purchase by the plaintiff and he cannot now be allowed to set up a payment of the rent to the execution-debtor after the plaintiff had

[1] *(1913) 16 N. L. R. 315.* [2] *(1915) 18 N. L. R. 168.*
[3] *(1879) 2 S. C. C. 96.*

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purchased the land. The defence set up is that the execution-debtor's interest in the land was merely a life interest. This may or may not be true, but whether the execution-debtor had an absolute or conditional right, that right is now in the plaintiff, and the defendant is bound to pay the rent to the plaintiff who now stands in the shoes of the execution-debtor."

Mr. Jayawardene relied on the case of *Zackariya v. Benedict*,[1] a case decided by a single judge. The facts in that case were as follows :— Benedict took on rent certain premises from one Ahamed who was the owner of the same. Ahamed later gifted these premises to Zackariya the plaintiff. When the plaintiff requested Benedict to pay rent to him the latter refused to do so and even questioned the validity of the deed of gift. Thereupon the plaintiff sued Benedict for rent and ejectment. But his action was dismissed in the Court below. The plaintiff appealed, and the appeal too was dismissed. Swan J. who decided the appeal appears to have based his decision on certain observations made by de Sampayo J. in *Wijesinghe v. Charles*. Those observations were made by de Sampayo J. in regard to a purchaser who was not prepared to take over possession of the property along with the vendor's tenant. Such a purchaser the learned Judge stated,

> " May either stand on the strength of the title and sue the third party in ejectment, or he may at once bring the action *ex empto* against his vendor for failure to implement the sale by delivery of possession."

That this dictum applied only to a purchaser who was unwilling to take over possession of the property with a tenant on it, is clear, from an earlier statement made in the same judgment which reads :—

> " There is no doubt that under the Roman Dutch Law a purchaser has the right to recover the rent accruing since the sale from a tenant who had been let in by the vendor."

There is no doubt that there is a conflict between *Silva v. Silva* and *Wijesinghe v. Charles* on the one hand and *Zackariya v. Benedict* on the other. If I may say so with respect, the two earlier cases should be followed as each one of them was decided by a Bench of two judges. The position is also made clear in the judgment of Gratiaen J. in *de Alwis v. Perera*[2] where he stated :—

> " It would therefore seem that a tenant who remains in occupation with the notice of the purchaser's election to recognize him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish privity of contract between them."

In the instant case the plaintiff expressed his willingness to recognize the defendant as his tenant.

For the reasons set out above the judgment of the learned Commissioner is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

[1] *(1950) 53 N. L. R. 311.* [2] *(1951) 52 N. L. R. 433.*

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1955 *Present :* **Sansoni, J.**

J. C. MUNASINHA, Petitioner, *and* B. DEVARAJAN (A. G. A., Puttalam), Respondent

S. C. 148—In the Matter of an Application for Writ of Mandamus under Section 42 of the Courts Ordinance

Writ of Mandamus—*Availability against a servant of the Crown—Land Acquisition Act—Sections 16 and 27—Award of compensation—Mode of enforcing payment of it.*

A writ of *mandamus* does not lie against a servant of the Crown where the duty sought to be enforced is not one which is imposed on the servant himself but is imposed on him only in the capacity of agent for the Crown. It does not therefore lie to order an Assistant Government Agent to pay to a particular person money awarded as compensation for land acquired under the Land Acquisition Act. The proper remedy in such a case is a regular action against the Crown.

APPLICATION for a writ of *mandamus*.

S. J. V. Chelvanayakam, Q.C., with *A. C. Nadarajah*, *S. Thangarajah* and *C. V. Munasinghe*, for the petitioner.

V. Tennekoon, Crown Counsel, with *C. H. M. P. Fernando*, Crown Counsel, for the respondent.

Cur. adv. vult.

May 19, 1955. Sansoni, J.—

The petitioner applies for a writ of Mandamus on the Respondent who is the Assistant Government Agent, Puttalam, ordering him to pay the petitioner the balance sum due to him as compensation for his land which was acquired by the Government. Consequent on an agreement arrived at between the parties an award was made by the respondent under section 16 of the Land Acquisition Act, No. 9 of 1950. The petitioner now submits that under section 27 a statutory duty is cast on the respondent to tender and pay to him the sum now claimed as all the conditions stipulated in the Act have been satisfied.

The respondent in his affidavit showing cause against the grant of the application has explained why he failed to pay the petitioner the amount claimed. He has stated that the amount was retained by him at the request of the Director of Fisheries who claimed that the petitioner owed it as a debt due to the Department of Fisheries. The respondent has further stated in his affidavit that in tendering and paying compensation awarded under the Land Acquisition Act and in setting off the claim of the Department of Fisheries as a debt due to the Crown,

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he was at all times acting as an agent of the Crown. The claim of the Department of Fisheries is disputed by the petitioner and I do not intend to consider this aspect of the dispute ; nor need I deal with the objection that this application has been made in order to deprive the Crown of the amount said to be due to the Department of Fisheries.

It seems to me that this application must fail for the reason that a writ of Mandamus does not lie against the Crown, nor against a servant of the Crown where the duty sought to be enforced is not one which is imposed on the servant himself but is imposed on him only in the capacity of agent for the Crown. The principle on which the rule is based is stated in *9 Hailsham, page 761:*—" As no Court can compel the Sovereign to perform any duty, no writ of Mandamus will lie to the Crown. Where it is sought to establish a right against the Crown the appropriate procedure is by way of petition of right. Nor will the writ lie against a Secretary of State in his capacity as an agent for the Crown ; for in that capacity he is responsible to the Crown alone, and is under no legal duty towards a subject ". The same rule applies as regards other persons acting as servants of the Crown.

The position of the respondent in this matter is that of an agent or servant of the Crown within the meaning of the above rule. The petitioner's land was acquired by the Crown and the Crown accordingly became liable to pay him compensation. In paying the compensation awarded, the Crown acts through its servant who in this instance is the respondent. It is not, of course, the respondent's money that has to be paid to the petitioner under section 27 of the Act ; it is the money of the Crown which would come into and leave the hand of the respondent merely as a servant of the Crown.

The first case to settle the rule was *R. v. Lords Commissioners of the Treasury*[1], where it was held that money voted as a supply to the Crown for certain specific purposes and paid to the Treasury is paid to the latter as servants of the Crown and no Mandamus lies to order the Treasury to pay such money to a particular person. Lush, J., in the course of his judgment said :—" I think that the applicants have failed to make out that which is essential to entitle them to a writ of Mandamus, namely, that there is a legal duty imposed upon the Lords of the Treasury—a duty between them and the applicant—to pay over this sum of money. The only statute which can be brought to aid at all is the Appropriation Act ; and that, as it seems to me, clearly shews that the money is voted to the Crown upon trust that the Crown will dispense it for certain specified purposes. When the money gets to the hands of the Lords Commissioners of the Treasury, who are responsible for dispensing it, it is in their hands as servants or agents of the Crown ; and they are accountable, theoretically to the Crown, but practically to the House of Commons ; and in no sense are they accountable to this or any other court of justice ". The proper remedy in such a case is, in England, a petition of right and, in Ceylon, a regular action against

[1] *(1872) 7 Q. B. 387.*

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the Crown. In a later case, *R. v. Commissioners for special purposes of Income Tax*[1], Lindley, L.J., pointed out the distinction between an application to enforce payment of money by the Commissioners (which cannot be allowed) and one to enforce the making of an order by the Commissioners without which a repayment of tax cannot be obtained, and which it is the duty of the Commissioners to make (which was allowed by the Court). There is a dictum of Lord Herschell to the same effect in *Commissioners for special purposes of Income Tax v. Pemsel*[2].

These authorities are sufficient to answer Mr. Chelvanayakam's submission that in view of the peremptory terms of the Act the respondent was bound to pay the petitioner the compensation awarded. But I am by no means sure that this remedy would be available even where the duty to pay is imposed on one who is not acting as a servant of the Crown. In the case of *R. v. Hulf and Selby Railway Co.*[3], an Act provided that a railway Company " shall forthwith pay " a bridge Company compensation under certain conditions which existed in that case. It was sought to recover the compensation by way of Mandamus but the Court refused to grant the writ as an action lay and would be as effectual a remedy as Mandamus. The decision in *R. v. St. Katherine Dock Co.*[4] cited by Mr. Chelvanayakam proceeded on the ground that there was no other legal remedy.

I therefore dismiss this application with costs.

Application dismissed.

[1] *21 Q. B. D. 313.*
[2] *(1891) A. C. 531, at page 569.*
[3] *(1844) 6 Q.B. 70.*
[4] *(1832) 4 B. and Ad. 360.*

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

THE ATTORNEY-GENERAL, Petitioner, *and* K. GEETIN SINGHO, Respondent

S. C. 496—Application in revision in M. C. Nuwara Eliya, 11,588

Information Book—Statement of a complainant recorded therein—Right of accused to obtain certified copy of it—" Public document "—" Right of inspection "—Evidence Ordinance, ss. 74, 76, 123, 124, 125—Criminal Procedure Code, ss. 121 (1), 122—Proof of Public Documents Ordinance, ss. 2, 3.

An accused person is entitled to obtain a certified copy of a first complaint recorded by the Police under the provisions of section 121 (1) of the Criminal Procedure Code. The entry in the Information Book relating to the first complaint is a public document, which the accused has a right to inspect ; subject, therefore, to any claim of privilege under sections 123, 124 and 125 of the Evidence Ordinance, the accused is entitled to obtain a certified copy of such entry under sections 74 and 76 of the Evidence Ordinance.

Quaere, (i) whether the accused is entitled to the same right under sections 2 and 3 of the Proof of Public Documents Ordinance.

(ii) whether a Magistrate has jurisdiction to order the Police to issue a certified copy.

APPLICATION to revise an order of the Magistrate's Court, Nuwara Eliya.

Douglas Jansze, Acting Solicitor-General, with *L. B. T. Premaratne*, Crown Counsel, for the petitioner.

H. W. Jayewardene, Q.C., with *A. C. M. Uvais*, for the accused respondent.

Cur. adv. vult.

February 15, 1956. DE SILVA, J.—

This is an application by the Attorney-General to revise an order made on September 16, 1955, by the Magistrate, Nuwara Eliya, on a motion filed on behalf of the respondent to obtain a certified copy of the 1st complaint or 1st information made to the Police in this case. A. A. Saraph, police sergeant, officer-in-charge, Punduluoya Police Station, who is the complainant made a report to Court in terms of Section 148

2——J.N. B 53792-1,592 (3/56)

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(1) (*b*) on July 20, 1955, that the respondent did on July 17, 1955, cause hurt to one Sirisena with a sharp cutting instrument, an offence punishable under Section 315 of the Penal Code. On the same day the respondent on being charged with the offence pleaded not guilty and the case was fixed for trial on 18.8.'55, and later trial was refixed for 15.9.'55. On 3.9.'55 the respondent's proctor made a written application to the Assistant Superintendent of Police, Nuwara Eliya, for a certified copy of the 1st complaint. On the same day he also filed a motion in Court requesting that the Assistant Superintendent of Police be ordered to issue a certified copy of the 1st complaint. On this motion the learned Magistrate noticed the Assistant Superintendent of Police, "to show any reason why the application should not be granted". The matter came up for consideration on 15.9.'55 when Mr. N. D. T. Kanakaratne Crown Counsel who appeared for the Assistant Superintendent of Police opposed the application. The arguments urged by the learned Crown Counsel and the proctor who appeared for the respondent have not been recorded in detail. The respondent's proctor took up the position that the Information Book was a public document within the meaning of Section 74 of the Evidence Ordinance. The learned Crown Counsel conceded this but appears to have taken up the position that the Information Book was not a document which the respondent had a right to inspect and that therefore he was not entitled to obtain a certified copy of an entry in it. The learned Magistrate in his order has referred to this argument. He has stated that the prosecution argued that the defence had no right to inspect the Information Book except under the conditions mentioned in Section 122 of the Criminal Procedure Code. The learned Magistrate while conceding that the defence was not entitled to obtain certified copies of statements recorded under Section 122 (1) of the Criminal Procedure Code except for the purposes set out in sub-section 3 of that Section expressed the view that a first complaint recorded by the Police is not one which falls within the ambit of Section 122 (1). He also agreed, but subject to qualification, with the admission made by both parties that the Information Book was a public document. Then having commented on the fact that the prosecution had failed to establish under what provision of law a certified copy of the 1st complaint could be withheld from the defence he proceeded to make the following order :—

> "I hold therefore that the defence is entitled to a certified copy or a perusal of the 1st statement or information recorded in the Information Book. I consider that the prosecution cannot be heard to say that it can claim the privilege with regard to the issue of a certified copy of the 1st statement or its perusal by the defence."

It is this order that the Attorney-General asks this Court to revise. At the hearing of this application the learned Solicitor-General raised as a preliminary objection the proposition that the learned Magistrate had no jurisdiction to make the order in question. He submitted that the Magistrate had no power to order the Assistant Superintendent of Police to issue a certified copy of the 1st complaint and that the proper procedure that the Court should have followed was to summon the Assistant Superintendent of Police to produce the document in terms of Section

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66 (1) of the Criminal Procedure Code. Mr. Jayawardene replied that the learned Solicitor-General was not entitled to raise this point as it was not taken either in the Court below or in the petition filed in this Court. I agree with the submission made by Mr. Jayawardene. It is clear from the proceedings that both parties invited the Magistrate to decide whether or not the defence was entitled to obtain a certified copy of the 1st complaint. That was on the assumption that the Magistrate had the power to decide that question. The petition in revision is signed on behalf of the Attorney-General by the same Crown Counsel who argued the matter before the Magistrate. If an objection to the Magistrate's jurisdiction to decide the question had been taken in the Court below it is most likely that reference to it would have been made in this petition. After inviting the Magistrate to decide the particular question, thereby implying that he had the power to decide it, the Crown is not entitled now to question his jurisdiction. Apart from that the learned Magistate has not issued an order on the Assistant Superintendent of Police to issue a certified copy. He merely held that the defence was entitled to obtain such a copy. I would therefore deal with this application on the basis that the Magistrate had the power to make the order in question. The learned Magistrate's observation that a 1st complaint does not fall within the category of statements recorded under Section 122 (1) correctly sets out the position and cannot be questioned. The prohibition set out in Section 122 (3) of the Criminal Procedure Code against the use of statements recorded during the course of the investigation except for the limited purposes set out in that sub-section applies only to statements recorded under Section 122 (1); but different considerations would apply to a first complaint which is recorded under the provisions of Section 121 (1). In *Rex v. Jinadasa* [1] Dias S. P. J. commented on these two sections and proceeded to state :—

> "It is common ground that a 1st information or 1st complaint under Section 121, provided it is otherwise relevant and admissible, can be used as substantive evidence or for evidentiary purposes, e.g., to corroborate the evidence of the informant, &c.".

The Sections in the Indian Code of Criminal Procedure which correspond to our Sections 121 and 122 are 154 and 162 respectively. In the case of *Azimaddy v. Emperor* [2] Rankin J. considered Sections 154 and 162 and observed :—

> "The 1st information report against the accused is clearly not a statement within the contemplation of Section 162 because it is not made in the course of an investigation."

It is therefore clear that a statement under Section 121 (1) cannot be shut out under the provisions of Section 122 (3) as it appears to have been contended by the Crown Counsel before the Magistrate. However, I am not in agreement with the further observation of the learned Magistrate that the prosecution is not entitled to set up a claim of privilege in regard to the issue of a certified copy of the 1st statement or its perusal

[1] *51 N. L. R. 529.*

[2] *(1927) A. I. R. (Calcutta) 17.*

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by the defence. In my view in the matter of issuing certified copies the provisions of Section 123, 124 and 125 of the Evidence Ordinance cannot be ignored but must be given effect to.

Mr. Jayawardene who appeared for the respondent contended that the entry in the Information Book relating to the 1st complaint is a public document and that the defence is entitled to obtain a certified copy of such entry under Sections 74 and 76 of the Evidence Ordinance as well as under Sections 2 and 3 of the Proof of Public Documents Ordinance (Cap. 12).

Section 121 (1) of the Criminal Procedure Code provides, *inter alia*, that every information relating to the commission of a cognizable offence if given orally to the officer-in-charge of a Police Station or to an inquirer shall be reduced to writing by him or under his direction and every such information, whether given in writing or reduced to writing as aforesaid shall be entered in the " Information Book " prescribed for the purpose. Mr. Jayawardene argues that this entry in the Information Book is a public document within the meaning of Section 74 of the Evidence Ordinance which reads thus—

> The following documents are public documents :—
>
> (*a*) documents forming the acts, or records of acts—
>
> (i) of the Sovereign authority ;
>
> (ii) of official bodies and tribunals ; and
>
> (iii) of public officers, legislative, judicial and executive, whether of the Island or of any other part of His Majesty's dominions, or of a foreign country ;
>
> (*b*) public records, kept in the Island, of private documents ;
>
> (*c*) plans, surveys, or maps purporting to be signed by the Surveyor-General or officer acting on his behalf. "

The submission made by Mr. Jayawardene is that an entry in the Information Book made in terms of Section 121 (1) of the Criminal Procedure Code is an act or the record of an act of the public officer and falls within Section 74 (*a*) (iii). The learned Solicitor-General strongly opposes this view. Section 76 of the Evidence Ordinance reads as follows :—

> " Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies. "

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This Section makes it clear that a person is not entitled to obtain as a matter of right a certified copy of every public document. He is entitled thereunder to obtain certified copies of only those public documents which he has a right to inspect. The two questions which come up for consideration therefore are :—

(1) Is the entry recorded in the Information Book under Section 121 (1) of the Criminal Procedure Code a public document ?

(2) If so, is the party against whom such information is given entitled to inspect such entry ?

According to the Solicitor-General the answer to the 1st question must be in the negative and the 2nd question would not therefore arise. He relied on certain English and Indian authorities in support of his contention. One of these is *Sturla v. Freccia*[1] decided by the House of Lords. In that case Lord Blackburn stated :—

> " I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it 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 afterwards. "

The document which came up for consideration in that case was a report of a committee appointed by a public department in the State of Genoa and acted upon by that State. This view was followed by the Privy Council in *Ioannou v. Demetriou*[2]. In *Heyne v. Fischel*[3], Pickford J. held that documents kept by the Post Office showing the times of the receipt and delivery of telegrams were not admissible in evidence as public records for the reasons that they are kept only for a short time, are not accessible to the public are not the result of a public inquiry and do not deal with a general public right but are merely kept for the purpose of regulating the pay and the work of Post Office servants. In *Pettit v. Lilley*[4] it was held that regimental records were not public documents because the public had no access to them and were not kept for the use and information of the public. On the analogy of these cases the learned Solicitor-General argued that the Information Book is not a public document. I am unable to agree with that view. These English cases are not of much assistance in deciding the question as to whether or not this particular document is a public document according to the law of this country. In England there is no statutory law which defines or classifies " public documents ". In this country it is otherwise. Section 74 of the Evidence Ordinance sets out exhaustively the documents which fall within the category of public documents. Section 75 states that all

[1] *(1880) 5 Appeal Cases 623.*
[2] *(1952) 1 A. E. R. 179.*
[3] *30 T. L. R. 190.*
[4] *(1946) 1 A. E. R. 593.*

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other documents are private. The category of documents included in Section 74 is much wider than the class of documents treated as public documents in England. According to Section 74 (*a*) (3) documents forming the acts or records of acts of public officers, among others are public documents. But that does not mean that a person is entitled to obtain certified copies of all such documents. Before he can insist on obtaining a certified copy he must establish a right to inspect it. It is so provided by Section 76. There is no provision in the Evidence Ordinance or any other law which defines the right of inspection. There are of course Ordinances which expressly confer a right on certain persons to obtain certified copies of particular documents. Two such Ordinances are the Registration of Births and Deaths Ordinance and the Companies Ordinance. But there is no such provision in our Criminal Procedure Code in regard to entries in the Information Book. In the matter of right of inspection the English law, however, is of considerable assistance. The right of inspection and obtaining certified copies was considered in *Mutter v. Eastern and Midlands Railway Company* [1]. In that case Lindley J. made the following observations :—

> " When the right to inspect and take a copy is expressly conferred by a statute the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy and what is reasonably necessary for his protection of such interest. The common law right to inspect and take copies of such public documents is limited by this principle. "

There is no provision in the Criminal Procedure Code which confers a right on the defence to obtain a certified copy of the 1st information. Nor is there any provision in it which states that the defence is not entitled to use such information, although, in Section 122 (3) there is a specific prohibition against the use by the defence of statements recorded under Section 122 (1) except in the circumstances set out therein. The presence of such a prohibition in respect of statements recorded under Section 122 (1) and the absence of it in respect of 1st informations support the view that the use of 1st informations by the defence is legally permissible.

Has the accused person an interest in the first information given to the Police in regard to the commission of a cognizable offence ? There can be only one answer to that question and it must be in the affirmative. The first information is vitally necessary for the preparation of the defence. It would show the development of the prosecution case from step to step and additions to and deviations from the original story, if any, would stand revealed. When the prosecution is entitled to avail itself of the first information untrammelled by the restrictions which statements recorded under Section 122 (1) are subject to it stands to reason that the defence too should have the same right subject, of course, to any claim of privilege. Therefore adopting the principle laid down

[1] *(1888) 38 Chancery Division 92.*

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by Lindley L.J. in the case referred to earlier the defence is entitled to inspect and obtain a copy of the 1st information if it is a public document and is unprotected by special privilege. It was so held by a Full Bench of the Madras High Court in *Queen Empress v. Arumugam* [1] in respect of reports made under Sections 157, 168 and 173 of the Indian Code of Criminal Procedure which are analogous to our Sections 121 (2), 125 and 131 respectively. This is a case relied on by the Solicitor-General and I would have occasion to refer to it at a later stage.

Now I would proceed to consider the question whether an entry in an Information Book relating to the first information is a public document. This entry was made by a Police Officer who is undoubtedly a public officer. He did so in pursuance of the provisions of Section 121 (1) of the Criminal Procedure Code which requires such information to be recorded in the Information Book. Mr. Jayawardene contends that such an entry when made is a document forming the act or the record of an act of a public officer. The Solicitor-General maintains that it is neither. According to him an act in the context of Section 74 of the Evidence Ordinance means a completed act. In support of that view he relies on *Queen Empress v. Arumugam* referred to earlier. In that case the question whether reports made under Sections 157 and 168 of the Indian Criminal Procedure Code which correspond to Sections 121 (2) and 125 of our Code were public documents came up for consideration. That question was submitted by a Bench of two Judges consisting of Subramania Ayyar J. and Davies J. for consideration by a Full Bench consisting of four Judges. The reference was made in view of the decision in *Empress v. Venkataratnam Pantulu* [2] to the effect that the defence was not entitled to obtain certified copies of the reports in question at the beginning of the trial. In referring the matter for consideration by the Full Bench Subramania Ayyar J. and Davies J. took the definite view that those reports were public documents. The Full Bench however—Subramania Ayyar J. dissenting—took the contrary view. They held that these reports were not public documents. In regard to the report under Section 157 Collins C.J. stated that it contained only the reasons that the officer-in-charge of the Police Station has for suspecting the commission of an offence while the report under Section 158 contained only the result of an investigation. Neither of these reports according to the learned Chief Justice could be regarded as the act or the record of an act of a public officer. Shephard J. while agreeing with Collins C.J. took the view that the " acts " referred to in Section 74 of the Evidence Ordinance were " final completed acts " as distinguished from acts of a preparatory or tentative character. Subramania Ayyar J. however adhered to his original opinion and stated :—

> " lastly, the documents in question fall within the language of Section 74 of the Evidence Act seems to my mind to admit of no doubt. "

He also stated that these reports are records of a public servant's acts within the meaning of Section 74. It must be observed that this case

[1] *I. L. R. 20 Madras 189.*

[2] *I. L. R. 19 Madras 14.*

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did not deal with the question as to whether or not a first information is a public document. The learned Solicitor-General however relied on this case in support of his argument that the word " acts " appearing in Section 74 of the Evidence Ordinance contemplates " completed acts ". As I observed earlier all the learned Judges who decided that case took the view that if the reports in question were public documents the defence was beyond any doubt entitled to obtain certified copies of the same. If I may say so, with respect, the reasons given by the learned Judges for holding that the word " acts " mean " completed acts " are not very convincing. A contrary view appears to have been taken by Tapp J. in *Nawab Bibi v. Sher Zaman* [1]. In that case certain statements made to the Police were sought to be admitted on the ground that they were public documents. In holding that these documents were inadmissible the learned Judge said :—

> " I may however briefly note that I am inclined to the opinion that they would be inadmissible as they are not public documents within the meaning of clause (iii) sub-section (i) of Section 74 of the Evidence Act as reports of the nature in question are not covered by Sections 154 and 155 of the Criminal Procedure Code . . . . "

The implication of this observation is that statements recorded under 154 and 155 fall within Section 74 of the Evidence Act which is identical with Section 74 of our Evidence Ordinance.

A Bench of three Judges of the Madras High Court held in *Nara Sinha Rama Rao v. Venkataramyya* [2] that a profit and loss statement and a statement showing the net income filed by an assessee on a direction issued by an Income-tax officer in terms of Section 22 of the Income-tax Act was a public document within the meaning of Section 74 of the Evidence Act and the assessee was entitled to obtain certified copies of the same. In that case Leach C.J. stated :—

> " I consider that the record of an income-tax case must be regarded as the record of the acts of the Income-tax officer in making his assessment and therefore that any document properly on the record is just as much a public document as the final order of assessment. "

This decision does not support the view expressed by Shephard J. in *Queen Empress v. Arumugam* that the word " acts " in Section 74 of the Evidence Act contemplates " final completed acts ". In this case it was also held that a statement recorded by an Income-tax officer in the course of his examination of the assessee was a public document. That being so it is difficult to deny the same character to a first information recorded under Section 121 (1) of the Criminal Procedure Code. Chitaley and Annaji Rao in their commentary on the Indian Code of Criminal Procedure (3rd Ed. page 845) state that a statement recorded under Section 154 which is equivalent to Section 121 (1) of our Code is a public document and at page 847 they proceed to say :—

> " The accused is entitled to have a copy of the information but he can have it only under an order of a Court of Competent Jurisdiction or of an officer superior to an officer-in-charge of a police station. "

[1] *1930 A. I. R. (Lahore) 1067.* [2] *1940 A. I. R. (Madras) 768.*

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The authority for their view that the first information recorded under Section 154 is a public document is the case of *Abdul Raham v. Empress* which is a decision of the High Court of Upper Burma. The report in that case, however, is not available to us.

In *Chittar v. Singh* [1] Sulaiman J. took the view that a first information report taken down by a Police officer amounts to an entry in an official record made by a public servant in the discharge of his official duty.

That the entry made in the information book of a first complainant, in terms of Section 121 (1) of the Criminal Procedure Code, is the record of an act of a public officer admits of no serious doubt. Such an entry therefore is a public document within the meaning of Section 74 of the Evidence Ordinance. It is the Common Law right of the person against whom a complaint is made to inspect the record of that complaint, but it is limited to the extent that the Government is entitled to refuse to show the document on the ground of State Policy, privileged communication, and the like. That is to say the accused person is entitled to inspection subject to the provisions of Sections 123, 124 and 125 of the Evidence Ordinance. In this case those Sections would not apply as the learned Solicitor-General said that he is prepared to show the record of the first complaint if the person who made it is called as a witness. The Solicitor-General took up that position because the 1st complaint is admissible in evidence only if the person who made it is called as a witness. There is a flaw in that argument ; admissibility of a document is one thing and the right to obtain a certified copy of it is quite another. If a party to a case is entitled to receive a certified copy of the 1st complaint he may make use of it in more than one way. If the document is a public document and the person who applies for the certified copy establishes his right to inspect it he is entitled to obtain such copy at any time subject to the right of the Crown to claim privilege under Sections 123, 124 and 125 of the Evidence Ordinance. The Respondent's application for a certified copy of the first complaint though made before the trial, should therefore have been granted.

In view of my decision that the Respondent is entitled to obtain a certified copy of the first complaint in terms of Sections 74 and 76 of the Evidence Ordinance it does not become necessary to consider Mr. Jayawardene's other contention that his client is also entitled to the same right under the provisions of the Proof of Public Documents Ordinance.

Accordingly I dismiss the application of the Attorney-General.

SANSONI, J.—I agree.

Application dismissed.

[1] *1925 A. I. R. (Allahabad) 303.*

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1955 *Present :* **K. D. de Silva, J., and Sansoni, J.**

K. A. CHANDRASENA, Appellant, *and* I. KARUNAWATHIE, Respondent

S. C. 370—D. C. Colombo, 25,633

Breach of promise of marriage—Plea that defendant was already married at time of promise—Validity of such plea.

Under the Roman Dutch Law an action for damages for breach of promise of marriage cannot be founded on a promise made by a man who was already married at the time he made such promise.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant-appellant.

S. W. Jayasuriya, with *A. Nagendra*, for the plaintiff-respondent.

Cur. adv. vult.

December 13, 1955. SANSONI, J.—

The plaintiff appearing by her father as her next friend sued the defendant on two causes of action. On the first cause of action she claimed a sum of Rs. 1,000 as damages for breach of promise of marriage ; on the second cause of action she claimed a sum of Rs. 1,500 as damages for seduction. The defendant pleaded that he was a minor at the time he became acquainted with the plaintiff. He denied that he ever promised to marry her or that he was liable to pay her damages on either cause of action.

The learned District Judge after trial held in favour of the plaintiff on both causes of action, and gave her judgment as prayed for with costs. In appeal, the defendant's Counsel did not seriously contest the learned Judge's findings on the second cause of action. There was ample material on which the learned Judge could have found against the defendant, and the award of damages on this cause of action must stand.

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On the first cause of action however it was submitted on the defendant's behalf that the written promises of marriage on which the plaintiff relied were all, except the last, made while he was a minor ; and the last written promise, which was dated 20th July 1951, was made after he attained majority but when he was a married man, for he had got married to another woman on 31st May 1951. It is not disputed that all the promises which the defendant made while he was a minor are not actionable. As regards the last one, it was contended that it was invalid because at the time he made that promise he was a married man.

This legal objection was not taken at the trial but it seems to me to be a point of law which is a point of law and nothing else, and can therefore be raised for the first time in appeal. No disputed question of fact can arise in the circumstances of this case. The defendant's Counsel relied on *Viljoen v. Viljoen* [1] where Sutton J. held that an action for breach of promise cannot be founded on a promise made by a man who was already married. The reason is that as marriage was not possible between the parties, an action cannot therefore be based on the contract to marry. The following passage from a monograph on "*Breach of Promise and Seduction in South African Law*" by Mr. Justice Van den Heever, a Judge of the Appellate Division of the Supreme Court of South Africa, is to the same effect : "Since a subsisting marriage is an absolute impediment to marriage, a married person cannot contract a valid engagement even if the agreement contemplates fulfilment only after the impediment has ceased to exist."

It would, however, have been different if the action had been brought on the ground of the deceit which the defendant practised on the plaintiff, and the consequent injuria suffered by her. Such an action was held to lie in the judgment already cited. See also Wessel's *Law of Contract in South Africa, 2nd edition, Vol. 1, S.458.* The English law on this point is different, for it was held in *Shaw v. Shaw* [2] that an action for damages for breach of promise of marriage brought by a woman against a man who was married at the time he made such promise was maintainable, unless she knew that he was already married. In the latter event the contract would be void as being contrary to public policy.

I think we should follow the Roman Dutch Law on this matter and in that view the plaintiff's claim on the first cause of action must fail. I would therefore vary the judgment under appeal by reducing the damages awarded to a sum of Rs. 1,500. I would, however, award the plaintiff her costs in both Courts.

DE SILVA, J.—I agree.

Judgment varied.

[1] *(1944) C. P. D. 137.*

[2] *(1954) 3 W. L. R. 265.*

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1954 *Present :* **Gunasekara, J., and Fernando, A.J.**

M. J. W. COOREY, Appellant, *and* J. S. JAYAWICKREMA, Respondent

S. C. 355—D. C. Panadura, 2,565

Delict—Malicious abuse of process—Necessary elements—Trespass—Injuria—*Exemplary damages—Civil Procedure Code, ss. 287, 288.*

Wrongful entry into premises made in purported pursuance of a writ improperly obtained and the attempt to oust the occupants even without force constitutes trespass amounting to an *injuria*. In such a case the award of exemplary damages is justified.

APPEAL from a judgment of the District Court, Panadura.

Sam P. C. Fernando, with *G. C. Niles*, for the plaintiff appellant.

A. C. Gunaratne, for the defendant respondent.

Cur. adv. vult.

August 6, 1954. FERNANDO, A.J.—

The plaintiff-appellant sued the defendant-respondent for damages for the latter's alleged wrongful interference with appellant's possession of certain residential premises in the town of Moratuwa and for damages for pain of mind, humiliation and expenses arising from the defendant's conduct. The action was dismissed by the learned District Judge.

The following facts were established by evidence which stood uncontradicted. The appellant had for many years been the tenant of the house and garden No. 484 and 486 at Main Street, Rawatawatte, Moratuwa, under successive landlords, the last of whom was one Eric Fernando. The premises were sold in execution of a mortgage decree entered against Eric Fernando in an action in the District Court of Colombo and purchased by the respondent on 28th January, 1950, at the execution sale. On 28th January, 1950, the respondent informed the plaintiff by letter (P1) that he had purchased the house and property " on which you now reside " . . . . " as I have no place to stay " ; after referring to the need for considerable repair and renovation, the letter ends with the remarks :— " As there are lots of things to be attended to please sympathise with me and discuss with the brothers and give me the house. Do not harass me but give me the house with good means. Please consult good baas whether this work can be done when people are there. We all like to safeguard our respect. " The Proctor who had represented the respondent in the mortgage action then wrote (P2) to the appellant on 17th March, 1950, informing him of the purchase by the respondent and requesting him " as the tenant of the house " to " pay my client the rent " as from 1st March, 1950. The respondent obtained a conveyance

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in his favour through the Court on 1st April, 1950, and he moved (apparently in person and not through his Proctor) on 12th May, 1950, for an order of delivery of possession. In the affidavit filed for this purpose the respondent averred that Eric Fernando (the defendant in the mortgage action) " is still in occupation and possession of the property purchased and it is necessary that an order for delivery of possession be issued to have the said defendant ejected from the said property ".

From this stage onwards the evidence is contradictory and I shall state first the narrative contained in the evidence given for the defence.

The Fiscal's officer (who was called in the present action by the respondent) stated in evidence that after he got the writ he went to the premises on 22nd May, 1950, and requested the appellant to deliver up possession of the land, but to remain in the house for any length of time ; the appellant declining to agree, the officer left the premises. Prior to this visit on 22nd May, the Fiscal's officer had been informed by the respondent that owing to a mistake by the latter's Proctor, he could get possession of the land only, and not of the house. (I shall refer presently to the different version given by the appellant as to the visit on 22nd May.) The officer returned to the premises on the morning of 24th May accompanied on this occasion by the respondent, 2 Police Constables and one Hendrick, alleged to be a tree-climber. The officer's intention was to give symbolic possession of the land only, by having one coconut plucked, and he alleged that he had no intention of ejecting people from the house. The appellant was away at the time (on duty at Angulana Railway Station), but his interests were effectively protected despite his absence from home. His relatives, including his wife and sister, threatened the Fiscal's party with knives and effectively prevented them from even completing a symbolic delivery of possession.

The appellant's version of the visit by the Fiscal's officer on May 22nd is that the latter came together with the respondent who told the appellant " to clear out " of the premises. When shown the writ the appellant stated that the respondent had deceived the District Judge. He then produced the Proctor's letter P2 and in turn asked the respondent " to clear out ", whereupon the latter threatened to return with the Police. The appellant took urgent steps to protect his occupation and on the very next day (23rd May) filed in the District Court an affidavit D2 which contains a version of the incident of the 22nd very similar to that which he subsequently gave in Court. The allegation in D2 that the respondent had threatened to throw the appellant out with Police assistance was (in the light of the second visit on May 24th) either true or prophetic.

In regard to the events of the morning of May 24th, the appellant called his wife and sister who alleged that the respondent and the Fiscal asked them to leave the house, and threatened to throw their things out of the house as well as to drag them out by force. The witnesses fully admitted the action they took to defend their home. They alleged that a large crowd had collected, and the crowd could no doubt see and hear what was going on.

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The learned Judge has accepted the version spoken to by the defence and rejected the evidence of the appellant and his witnesses. He relies strongly on the evidence given by the Fiscal's officer to the effect that on both occasions his intention was to deliver possession, not of the house, but of the land only, and that in regard to the latter his purpose was to give symbolic delivery by having a coconut plucked. He points to the corroboration afforded to the officer's evidence by an affidavit D6 which the officer had submitted to his superior on 5th June, 1950. But the learned Judge takes no account of the fact that the affidavit was submitted only 12 days after the incident, and that the complaint alleged to have been made by the officer to the Police on 24th May was not produced in Court. It is at least strange that a case of such violent resistance to execution of a writ was not immediately brought to the notice of the superior officer. (I note here by way of contrast the speed with which the appellant made his complaints P6C to the Court and P7 to the Police and the fact that both were produced in evidence.) Nor has the learned Judge tested the Fiscal's officer's evidence by reference to the affidavit D 2 which the appellant filed in the District Court on 23rd May : If he did so, he might well have doubted the story that the visit on 22nd May was a peaceful one and unaccompanied by threats to return in force.

Moreover, the learned Judge in accepting the evidence given by the respondent has paid little or no regard to the significance of the documents produced by the appellant. He construes the letter P1 of 28th February as merely evidence of an intention to repair the house and ignores those points of it which clearly constitute a request for restoration of possession and he too easily accepts the respondent's explanation that the Proctor's letter P2 was written without instructions. More serious yet is the failure of the learned Judge to refer to the affidavit P6C of 11th May, 1950, upon which the District Court was moved to issue the writ. The uncontradicted evidence in this case establishes beyond doubt that the respondent deliberately made a false statement when he averred that Eric Fernando was still *in occupation and possession* and that a writ was necessary in order to eject him.

In my opinion the appellant has successfully proved :—

(*a*) that the respondents purchased the premises in question (because "he had no place to stay") with the object of entering into occupation, and that be failed to persuade the appellant to surrender possession peacefully ;

(*b*) that the appellant actually paid rent for two months to the respondent either directly or through his Proctor, and at the latter's written request ;

(*c*) that the respondent deceived the Court into issuing the writ for ejectment by making false statements in his affidavit of 10th May, 1950 ;

(*d*) that the respondent accompanied the Fiscal's officer on May 22nd and attempted by production of the writ to induce the appellant to surrender possession of both house and land, and that he thereafter threatened to return with Police assistance ;

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(*e*) that the threat was carried out on May 24th when the Fiscal's party, assisted and encouraged by the respondent, entered the land with the object of ejecting the occupants by force or by a show of force.

The defence version, that the appellant was requested to surrender the land but to remain in occupation of the house, even if it be true, does not assist the respondent. The appellant had been the tenant of the land and of the house standing thereon, and his right to continue in occupation of both was unaffected by the sale in execution. The only order which the respondent could properly have obtained was one under s. 288 of the Code for symbolic delivery of the land and buildings, and *an order under s. 287 could not properly have been made even in respect of the land alone*—a circumstance which must be presumed to have been within the knowledge of the Fiscal's officer, and which casts grave doubt on the truth of his evidence. Moreover, having regard to the fact that the appellant had already acknowledged the title of the appellant by paying rent to him and to his Proctor, it is doubtful whether the respondent could in good faith have believed it necessary to obtain even an order under s. 288, which serves only to give the occupant notice of the conveyance to the execution-purchaser. Respondent had recourse to judicial process, not in the due exercise of his rights as the purchaser, but with some other object ; and the only reasonable inference, in view of the other evidence in the case, is that he was attempting to obtain physical possession of the land and building otherwise than by the appropriate legal procedure.

I have little hesitation in reversing the findings in favour of the respondent, because the learned Judge apparently reached those findings without due regard to the documentary evidence, in the face of which considerations of demeanour or credibility are of little importance. In the absence, however, of a finding in that behalf, the allegations of physical violence made against the Fiscal's officer and the respondent must be regarded as not having been proved. Nevertheless, the entry by itself made in purported pursuance of a writ improperly obtained and the attempt to oust the occupants even without force, was a trespass amounting to an *injuria* proper. (Maasdorp, Vol. 3, p. 38.)

In an action for malicious abuse of process, the plaintiff must prove (1) that the defendant instituted the proceedings, (2) that the defendant acted without reasonable and probable cause and (3) that the defendant was actuated by malice (McKerron, Law of Delict 4th Ed. pp. 304, 305). By " reasonable and probable cause " is meant an honest belief founded on reasonable grounds that the institution of the proceedings was justified (*idem* p. 306). The question to be decided in a civil matter is whether the defendant in putting the law into motion acted as a discreet and prudent man would have done (Maasdorp 1909, Vol. 3, p. 87). As to the proof of malice, Maasdorp (p. 84) says that " If a man acts in a grossly negligent and reckless manner, acting in the furtherance of his own interests without due regard to the rights of others, and careless as to whether he interferes with the liberty of another person or not, the

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natural inference is that he is influenced by improper motives, a fact which will in law be regarded as equivalent to malice ". The following dicta of this Court in similar cases bear out the statement in Maasdorp :—

> " As regards the element of malice, it is, of course, well known that it does not mean ill-will. It has the import of *mala fides*, an intention to cause wrongful injury, or such reckless action that the party must be held responsible for the consequences. It is generally expressed as *animus injuriandi*, but the intention need not be express ". (de Sampayo J. in *21 N. L. R. at p. 430*). " But intent to obtain an object by means that cannot be justified is a wrong and improper intent, and what the law calls malicious ". (MacDonell C.J. in *33 N. L. R. at p. 329*).

The appellant in this case has in my opinion successfully established these three essential elements.

The writ granted by the Court did not in fact authorise the ejectment of the appellant and therfore the Fiscal's officer in attempting to eject the appellant was acting beyond the powers authorised by the writ. For this reason Counsel for the respondent invited us to take the view that the respondent cannot be held liable for the unauthorised act of the Fiscal's officer. Having regard, however, to the part played by the respondent personally, both in obtaining the writ and in the subsequent events, there is no doubt that he actively encouraged and assisted the Fiscal's officer to act in excess of the authority conferred by the writ and thus rendered himself liable for the latter's wrongful act.

A plaintiff in such a case as the present one has to show that the act of the defendant either caused him actual pecuniary loss or was of such a nature as to be calculated to injure his reputation. In regard to the first of these matters, the plaintiff's evidence was that he incurred expenditure amounting to Rs. 800 in his very proper efforts to protect his right to continued occupation of the property. But although it was open to him to recover the costs of his intervention in the proceedings in the mortgage action, he was content instead to agree in that action to a settlement of consent, and those costs cannot now be recovered in this action. In regard to the second ground for damages, there has been no satisfactory evidence to prove any serious prejudice to the appellant's reputation. *But where the defendant's conduct involves an element of injuria*, e.g., where the conduct has been high-handed, insolent, vindictive or malicious, the award of exemplary damages is justified. (McKerron p. 150).

I consider that in this case an award of Rs. 250 would be appropriate.

The decree dismissing the plaintiff's action must be set aside, and decree entered in favour of the plaintiff in a sum of Rs. 250 as damages together with the costs of this appeal and of the action in the District Court

GUNASEKARA, J.—I agree.

Appeal allowed.

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1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

K. MELIS *et al.*, Appellants, *and* K. ADONISA *et al.*, Respondents

S. C. 82—D. C. (Inty.) Gampaha, 1844/L

Issues—Belated application to add certain issues—Award of costs—Civil Procedure Code, s. 146.

The Court is not entitled to penalise a party in costs for suggesting belatedly an issue which arises on the pleadings.

APPEAL from an order of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *F. W. Obeyesekere*, for the 1 (*a*) to 1 (*f*) Defendant-Appellants and the 2nd Defendant-Appellant.

A. L. Jayasuriya, with *S. M. H. de Silva*, for the Plaintiff-Respondents.

July 7, 1955. BASNAYAKE, A.C.J.—

This is an interlocutory appeal from an order dated the 7th October 1952 ordering the defendants 1 (*a*) to 1 (*f*) to pay the plaintiffs as costs of the day 10 guineas. The order complained of was made in these circumstances. Mr. Obeyesekere, Counsel for the defendants 1 (*a*) to 1 (*f*), suggested five additional issues, the original issues having been framed earlier. Mr. Perera for the plaintiffs objected to two of the issues, marked 9 and 10, as they did not arise on the answer. After argument of Counsel, the learned Judge allowed the issues to which objection was taken and Counsel for the plaintiffs asked for costs. The learned District Judge granted the application for costs, and ordered the defendants 1 (*a*) to 1(*f*) to pay the plaintiffs 10 guineas.

We do not think that this is a case in which costs should have been ordered as the learned trial Judge accepted the issues which were objected to on the footing that they arose on the pleadings, for he did not order the answer of the defendants be amended. Under section 146 of the Civil Procedure Code, if the parties are not agreed as to the questions of fact or of law to be decided, it is the duty of the Judge " upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, (to) ascertain upon what material propositions of fact or of law the parties are at variance " and to proceed to record the issues on which the right decision of the case appears to the Court to depend. It would appear from the provisions of the Code cited above that the entire duty of ascertaining upon what material proposition of fact or of law the parties are at variance is placed on the judge. He should not therefore penalise a party for suggesting an issue, belatedly though it be, which arises on the pleadings.

We think that the defendants have been wrongly penalised in costs.

We set aside the order. The appellants are entitled to their costs of this appeal.

PULLE, J.—I agree.

Order set aside.

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1955 *Present :* **Fernando, J.**

KUTTAJEE, Appellant, *and* KANAPATHY CHETTY, Respondent

S. C. 101—C. R. Colombo, 51,611

Landlord and tenant—Requirement of premises for purposes of business of the landlord—Rent Restriction Act No. 29 of 1948, s. 13 (c).

A landlord cannot avail himself of section 13 (*c*) of the Rent Restriction Act to eject a tenant merely because he thinks it convenient that employees in a business carried on by him at a place not far from the rented premises should reside in the rented premises. The matter of the place where the employees in a business reside is generally unrelated to the efficient carrying on of the business itself.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, Q.C., with *N. C. J. Rustomjee*, for the defendant appellant.

Walter Jayawardene, for the plaintiff respondent.

Cur. adv. vult.

December 15, 1955. FERNANDO, J.—

The defendant appeals against a decree for ejectment which has been entered against him on the ground that the premises occupied by the defendant are reasonably required by the plaintiff landlord for the purposes of the landlord's business.

The defendant became the tenant of the premises in September 1951 at a rental of Rs. 13·70 per month and notice to quit was given to him in November 1953. The plaintiff allegedly requires the premises in order that workmen at his neighbouring rubber store and the clerks employed by him at a Petrol Station can be accommodated in the premises. In so far as the workmen at the rubber store are concerned Counsel for the plaintiff-respondent has admitted that the judgment cannot be supported on the ground that the premises are required for occupation by them. It remains to consider whether the plaintiff is entitled to eject the defendant on the ground that he requires the premises for occupation by the clerks employed at his Petrol Station.

There is no clear evidence as to the distance from the Petrol Station to the premises but it is clear that they are not in close proximity, the former being at No. 291 Skinners Road South and the latter at No.284 Grandpass Road. The plaintiff had admitted that the clerks work from 8 a.m. to 6 p.m. and then leave for their homes. No specific reason was urged to show that there is any necessity for the clerks to reside at the premises in question, but I will assume that the plaintiff reasonably considers it convenient in the interests of his business at the Petrol Station that the clerks should reside at a place owned by the plaintiff and not far distant from the Petrol Station.

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Even on that footing I do not think that section 13 of the Act contemplates that the landlord should have the right to eject a tenant merely because he thinks it convenient that some employees of his should reside on the premises occupied by the tenant. The matter of the place where the employees in a business reside is on its face so unrelated to the efficient carrying on of the business itself that there must first be, either some compulsion by law or some particular necessity or even ordinary usage in businesses of the type concerned, before it can be said that the purpose of providing accommodation for employees constitutes a reasonable requirement for the purposes of the business. In this case none of the three conditions which to my mind might be relevant has been shown to be present.

I would therefore allow the appeal and set aside the decree for ejectment of the defendant. He will be entitled to his costs in both Courts.

Appeal allowed.

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

S. K. MARIMUTTU, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 101—Indian and Pakistani Residents (Citizenship) Application No. Z 3,079

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Sections 9 and 20—Application for citizenship—Refusal under Section 9—Notice by registered post—Effect of non-delivery—" Shall be deemed ".

A registered letter was posted to an applicant for citizenship informing him, under section 9 (1) of the Indian and Pakistani Residents (Citizenship) Act, that unless he showed cause within three months his application would be refused. As the applicant was temporarily absent from his place of residence the letter never reached him and was returned to the Commissioner as " unclaimed ".

Held, that the words " shall be deemed to have been duly served " in section 20 rendered the mere act of posting the registered letter equivalent to personal service ; accordingly, the proved non-receipt of the letter could not assist the applicant in re-opening the matter of the refusal of his application for citizenship.

APPEAL under section 15 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949.

N. K. Choksy, Q.C., with *Lyn Weerasekara* and *Maureen Seneviratne*, for the appellant.

Walter Jayawardene, for the respondent.

Cur. adv. vult.

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February 2, 1956. GRATIAEN, J.—

The appellant had made an application on 25th July 1951 for the registration of himself, his wife and his children as citizens of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. The application was in the first instance referred to an investigating officer who furnished his report to the Deputy Commissioner under section 8 (2) (*b*). The Deputy Commissioner formed the opinion that a *prima facie* case for registration had not been established and took steps to call upon the appellant to show cause why his application should not be refused. Accordingly, a notice in the form prescribed by section 9 (1) was posted on 8th February 1955 in a registered letter addressed to the appellant at Lemas Estate, Koslanda, which was the address furnished by him (in his original application and in all subsequent correspondence with the department) as his place of residence. Unfortunately the appellant was temporarily absent from Lemas Estate throughout February 1955, and the registered letter containing the notice dated 8th February 1955 never reached him. It was returned to the Deputy Commissioner as "unclaimed" on 24th February 1955. Three months later, the Deputy Commissioner made an order under section 9 (2) refusing the application for registration on the ground that the applicant had failed, within the period specified in section 9 (1), to show cause against the provisional order made against him on 8th February 1955.

Notice of this decision was posted to, and was received by, the appellant at Lemas Estate, and he promptly applied to the Deputy Commissioner for the inquiry to be re-opened on the ground that he had in fact not received the notice dated 8th February, 1955. This application was refused and he now appeals to this Court for a mandatory decree directing the Commissioner to give him an opportunity to show cause (on the merits) against the refusal of his application for registration.

The provisions of the Act which must be examined for the purposes of this appeal are as follows :

Section 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.

9 (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.

Section 20 : Any order, notice or other document which is required by or under this Act to be served on an applicant or on a person who has lodged an objection 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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Mr. Choksy argued that section 20 merely raises a rebuttable presumption that the notice which was posted to the appellant had been received by him, and that in the present case the initial presumption had, to the knowledge of the Deputy Commissioner, been conclusively displaced before the order of refusal under section 9 (2) was made in May, 1955. Mr. Jayawardene's contention, however, is that the mere act of posting a notice in a registered letter to a person's " last known place of residence or of business " constitutes the statutory equivalent of personal service ; accordingly, the proved non-receipt of the document could not assist the appellant. The Act does not empower the Commissioner or a Deputy Commissioner to extend the time for showing cause under section 9 (2) if three months have expired since the date of personal service or alternatively, due posting (under section 20).

In some legislative enactments the words " shall be deemed " merely introduce a rebuttable presumption, but in other contexts the presumption is conclusive. It is " not an impossible conception to *deem* that a thing happened even when it is known positively that it did not happen ". per Romer J, in *Batchellor's case* [1]. Such a case arose in *The King v. The Westminster Unions Assessment Committee—Ex parte Woodward* [2]. Section 65 of the Valuation (Metropolis) Act of 1869 provided that, in lieu of personal service, any notice under the Act " may be served and sent by post, by a pre-paid letter . . . . and if sent by post, *shall be deemed to have been served and received respectively* at the time that the letter containing the same would be delivered in the ordinary course of post ". Lord Reading, C.J., rejected the argument that the section merely raised a presumption of fact until the contrary was proved. " It is ", he said , " a presumption of law which cannot be rebutted by showing that in fact the notice had not been received . . . . The intention is to treat as a fact something that has not been established as a fact—even something which can be shown not to be a fact. " Lord Justice Denning has explained the term " conclusive presumption " in his article entitled " Presumptions and Burdens " [3]. " It is a misuse of language, " he said ", to speak of any presumption being conclusive, but the meaning is clear. On proof of certain facts, the Court must draw a particular inference, whether true or not, and it cannot be rebutted. "

Conclusive presumptions or inferences of this kind sometimes work hardship to the individual, but I am satisfied that Parliament considered the application of the rule to be essential to the smooth working of the machinery of the Act now under consideration. In the absence, therefore, of some provision whereby relief may be granted to an applicant who can establish that the notice had failed to reach him through no fault of his own, the Courts are powerless to assist him. I would therefore dismiss the appeal with costs fixed at Rs. 105.

GUNASEKARA, J.—I agree.

Appeal dismissed.

[1] *(1945) Ch. 169.*
[2] *(1917) 1 K. B. 832.*
[3] *(1945) 61 L. Q. R. 379 at 381.*

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1955 *Present :* **Weerasooriya, J.**

FOOD AND PRICE CONTROL INSPECTOR, Appellant,
and PIYASENA, Respondent

S. C. 594—M. C., Matale, 4,316

Control of Prices Act, No. 29 of 1950—Section 4—Price Order—Prosecution thereunder —Proof of Minister's approval of the price order not essential—Mode of proof of the price order—Judicial notice—Evidence Ordinance (Cap. 11), ss. 57, 78 (3).

Where a person is charged with contravening a price order made and signed by the Controller and published in the *Government Gazette* under sub-sections 1, 3 and 4 of section 4 of the Control of Prices Act, it is not obligatory on the prosecution to place before the Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order has duly received the Minister's approval.

The Court may take judicial notice of a price order which is referred to in the *Government Gazette*. Alternatively, the price order, being a public document issued by a department of Her Majesty's Government, may be proved, under Section 78 (3) of the Evidence Ordinance, by a copy or extract of it contained in the *Government Gazette*.

APPEAL from a judgment of the Magistrate's Court, Matale.

H. A. Wijemanne, Crown Counsel, with *Shiva Pasupati*, Crown Counsel, for the complainant appellant.

G. E. Chitty, with *Daya Perera*, for the accused respondent.

Cur. adv. vult.

November 22, 1955. WEERASOORIYA, J.—

The respondent to this appeal was charged under the Control of Prices Act, No. 29 of 1950, with the commission of an offence the gist of which was that he sold two pounds of wheat flour at a price which, in terms of a certain price order referred to in the charge, was two cents in excess of the maximum retail price of forty-eight cents.

The price order in question was one made under S. 4 (1) of the Act. S. 4 (3) provides that an order under s. 4 (1) shall come into operation when it is made and signed. The Act contains further provision for an order when signed to be published in the *Government Gazette* and also to be submitted to the Minister, who is empowered either to approve or rescind it. Under S. 4 (6), where an order is rescinded notice of such rescission shall be published in the *Gazette* and the order shall be deemed to be rescinded with effect from the date of such publication " but without prejudice to anything done or suffered thereunder or any right, obligation or liability acquired, accrued or incurred thereunder " ; and under S. 4 (7)

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an order which has been approved by the Minister is, upon notification of the approval in the *Gazette*, deemed to be as valid and effectual as if it were part of the Act itself.

These provisions make it clear, I think, that once an order has been made and signed (and also, perhaps, duly published) it becomes fully operative independently of any further efficacy it may receive from the subsequent notification of its approval by the Minister. That the particular order under consideration was duly made, signed and published was sought to be proved by the *Gazette* notification P 4 which was put in evidence by the prosecution. The charge framed against the respondent also contained a reference to the *Gazette* in which the order was published.

At the close of the case for the prosecution although the defence was called upon to meet the charge no evidence was adduced on its behalf and counsel for the respondent, instead, addressed certain submissions to Court on an acceptance of one of which, at least, the Magistrate acquitted the respondent. The ground for the acquittal is set out in these terms in the Magistrate's order : " The failure on the part of the prosecution to produce the *Gazette* notification of the approval by the Minister of the price order made, or even to make mention or reference to it in the *plaint* is, in my opinion, a fatal irregularity which will enure to the benefit of the accused ". It would seem that the reference to the " plaint " in the above quoted passage was intended to be a reference to the charge as framed against the respondent, but whether the order of the learned Magistrate is regarded in its express terms or in the amended form suggested by me, it is clear that it is not one which can be supported. In my opinion the charge framed against the respondent (which follows the wording of the accusation in the plaint) contained all the particulars of the offence which need have been given under S. 167 of the Criminal Procedure Code. For the proof of the offence charged it was not obligatory on the prosecution to have placed before the court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order had duly received the Minister's approval, and it was therefore not necessary to refer to it in the charge or produce the *Gazette* notification of its approval. Indeed, Mr. Chitty who appeared for the respondent did not attempt to maintain that the ground given by the learned Magistrate for acquitting the respondent was valid. Nevertheless, he asked that this Court should not interfere with the order of acquittal since, in his submission, the prosecution had failed to adduce evidence that the price order had been duly made and signed. The basis of this submission (if I understood it correctly) is as follows : An order under S. 4 (1) of the Act is not a matter of which a Court is required to take judicial notice under S. 57 of the Evidence Ordinance. Therefore the *Gazette* notification P 4 purporting to contain a copy of the order in question did not constitute *prima facie* proof of that order, and the prosecution should have produced in evidence either the original order or a certified copy of it under The Proof of Public Documents Ordinance (Cap. 12). In support of this submission Mr. Chitty referred to the case of the *Solicitor General v. Aradiel* [1] where it was held that a closing order made under the Shops

[1] *(1948) 50 N. L. R. 233.*

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Ordinance, No. 66 of 1938, did not come within the classes of documents enumerated in S. 57 of the Evidence Ordinance and a Court is, therefore, not bound to take judicial notice of it and the prosecution should have produced it in evidence. But while S. 57 of the Evidence Ordinance deals with what facts a Court is bound to take judicial notice of, there is ample authority for the view that the Court may, in its discretion, take judicial notice of various other facts not enumerated in S. 57 though not bound to do so. See, for example, *Menon v. Lantine* [1] and *Bogtstra v. The Custodian of Enemy Property* [2].

In the present case there was publication in the *Gazette* (as proved by the production of P 4) of what purported to be an order under S. 4 (1) of the Control of Prices Act, No. 29 of 1950, and I see no reason why in the circumstances the Court should not take judicial notice of the order referred to in P 4 as one which was duly made and signed under S. 4 (1) of the Act. Alternatively, even if the Court were not disposed to take judicial notice of the order referred to in P 4, it seems to me that P 4 itself constitutes *prima facie* proof that such an order was duly made and signed, since under S. 78 (3) of the Evidence Ordinance the original order (being, in my view, a public document issued by a department of Her Majesty's Government) may be proved by a copy or extract of it contained in the *Government Gazette*.

I, therefore, set aside the order of acquittal and remit the case for a fresh trial before another Magistrate. But having regard to the nature of the offence charged and the allegation that it was committed as far back as the 6th of March, 1954, and the principle of law sought to be established in filing this appeal having now been fully vindicated, the complainant will, no doubt, consider whether the charge should be proceeded with or whether this is not a proper case for an application under S. 195 of the Criminal Procedure Code for its withdrawal.

The respondent will pay the Crown Rs. 105 as costs of this appeal.

Acquittal set aside.

[1] (*1941*) *43 N. L. R. 34.*

[2] (*1943*) *26 C. L. W. 5.*

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[In the Court of Criminal Appeal]

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

REGINA *v.* D. M. ARTHUR PERERA *et al.*

Appeals Nos. 105 and 106, with Applications Nos. 162 and 165 of 1955

S. C. 3—M. C. Colombo, 14,281

Criminal Procedure Code—Section 233—Meaning of words "all statements"—Non-summary inquiry—Election of accused to give evidence—Is his evidence a "statement"?—Liability of accused to cross-examination—Admissibility, at the trial, of accused's deposition—Sections 134, 157 (1), 160, 161 (2), 164, 233, 286 (1), 302 (1)—Evidence Ordinance, ss. 9, 17, 21, 157.

By section 233 of the Criminal Procedure Code, "All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution".

Held, that the evidence given by an accused person under section 161 (2) of the Criminal Procedure Code in the course of a non-summary inquiry is not a statement within the contemplation of the words "all statements" in section 233. Therefore, the prosecution is not bound to put in and read such evidence before closing its case at the trial of the accused.

The Queen v. Sathasivam (1953) 54 N. L. R. 541, overruled.

Held further, that, when the Clerk of Assize is called to prove certain statements which were put to witnesses in cross-examination, the deposition made by the accused under section 161 (2) of the Criminal Procedure Code is not admissible under sections 9 and 21 of the Evidence Ordinance in order to prove the fact that a statement, which had been made by the accused before a Magistrate under section 134 of the Criminal Procedure Code and which the prosecution has already put in as a confession of the accused, had been retracted by the accused in his evidence at the non-summary inquiry. It is, however, open to the accused to give evidence at the trial and rely on the deposition as corroborating his evidence under section 157 of the Evidence Ordinance.

Obiter : When an accused elects to give evidence on his own behalf at a non-summary inquiry, he is liable to be cross-examined under the provisions of Chapter XII of the Evidence Ordinance subject, however, to the provisions of section 54 thereof.

Joint trial—Principal and abettor—Confession by abettor—Separation of trials—Factors for consideration—Discretion of Court—Criminal Procedure Code, s. 184.

A confession made by a co-accused and admitted in evidence at the trial does not necessarily vitiate the joint trial of several accused if sufficient warning is given to the Jury that the confession is not evidence against the other accused.

Where several persons concerned in committing an offence are charged together, the question whether a separate trial should be ordered or not is a matter entirely at the discretion of the trial Judge and is governed by section 184 of the Criminal Procedure Code. Once that discretion has been judicially exercised, the Court of Criminal Appeal will not interfere, except when it

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appears to it that a miscarriage of justice has resulted from the prisoners being tried together. In considering the question of separation of trials it would be wrong to look at the matter exclusively from the point of view of the accused. The interests of justice demand that the Crown should not be unduly hampered in its presentation of the case.

Inspection of scene of offence—Propriety of conducting experiments during such inspection—Criminal Procedure Code, s. 238.

In the course of the trial, the Judge, Jurors and Counsel visited the scene of the offence. The 1st accused did not desire to join in the visit, but his Counsel was present on his behalf. During the inspection a police officer stood at a window and, introducing his hand through the grill, demonstrated that a person of the 1st accused's height could have shot the deceased from outside the window from which the deceased was alleged to have been shot. When the Court re-assembled after the inspection, the police officer gave evidence under oath explaining the demonstration.

Held, that the demonstration of the police officer at the scene of the offence was not obnoxious to the provisions of section 238 of the Criminal Procedure Code.

Confession—Voluntarily made before Magistrate—Subsequent allegation by accused that the statement was not voluntary—Admissibility—Criminal Procedure Code, s. 134—Evidence Ordinance, ss. 24, 80.

At an inquiry held by the trial Judge in the absence of the Jury the 2nd accused, who had made a confessional statement before a Magistrate, gave evidence that he was virtually in the custody of the Police at the time the statement was recorded under section 134 of the Criminal Procedure Code. The Judge, however, found that the statement was made by the accused voluntarily.

Held, that the evidence was admissible in evidence against the 2nd accused.

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

Colvin R. de Silva, with *J. C. Thurairatnam* (Assigned), for 1st accused-appellant.

G. E. Chitty, with *A. S. Vanigasooriyar*, *Daya Perera*, and *E. A. D. Atukorala* (Assigned), for 2nd accused-appellant.

H. A. Wijemanne, Acting Deputy Solicitor-General, with *A. C. M. Ameer*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 23, 1956. BASNAYAKE, A.C.J.—

The first appellant has been convicted of the offence of murder and the second appellant of abetment of that offence.

Although one of the grounds of appeal was that the verdict of the Jury was unreasonable learned Counsel who appeared for the appellants did not canvass the verdict on that ground. It would appear from the transcript of the proceedings that there was ample evidence which, if believed, proves conclusively the guilt of the appellants.

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Of the 18 other grounds raised in the notice of appeal of the first appellant Counsel argued only the fourth, sixth, and seventh. They are set out as follows :—

" (4) The failure to put in and read in evidence before the close of the case for the prosecution the statement made by the 2nd accused in the Magistrate's Court under section 161 of the Criminal Procedure Code rendered illegal the entire trial and in any event gravely prejudiced the accused ;

(6) It is respectfully submitted that there should have been a separation of trials ; and

(7) Portions of a statement alleged to have been made by the 1st accused to the Police were illegally admitted into the case ".

Of those grounds learned Counsel very strongly urged the first. It arises in this way. At the magisterial inquiry into the case, the second appellant, on being addressed under section 160 of the Criminal Procedure Code said " I am not guilty ", and on being immediately thereafter addressed under section 161 of the Code stated " I wish to give evidence here " ; but expressed no desire to call witnesses on his behalf. Thereupon the Magistrate proceeded to take his evidence. Earlier this appellant had made a statement which was recorded under section 134 of the Code. It was produced in evidence as document P38. In that statement this appellant described in elaborate detail how the first appellant whom he had known for twelve years planned and carried out the murder of the deceased and confessed the part he had played in the entire transaction. In his evidence he alleged—

(*a*) that he was assaulted by the Police and coerced into making the statement he made to the Magistrate,

(*b*) that the statement was false, and

(*c*) that he knew nothing about the crime.

At the trial, after the statement of the appellants under sections 160 and 161 had been read, but before the close of the case for the Crown, the pleader for the second appellant, in the absence of the Jury, made an application—

" that the evidence given by the second appellant before the Magistrate at the Non-summary proceeding be also led in evidence ".

He relied on the case of *Queen v. Sathasivam* [1]. Learned Counsel for the Crown said that he did not propose to put in the evidence of the second appellant and cited in support of his contention the judgment of this Court in *King v. Punchimahatmaya* [2]. The learned trial Judge after hearing argument ruled that the Crown was not bound to put in under section 233 of the Code the evidence given by the second appellant before the Magistrate at the inquiry under Chapter XVI of the Code.

[1] *54 N. L. R. 541.* [2] *44 N. L. R. 80.*

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Counsel contended that the evidence given by the second appellant before the Magistrate was a statement within the contemplation of the words " all statements " in section 233 of the Code. That section reads—

> " All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ".

Counsel's contention was that the expression " statement " includes both a statement on oath and a statement not on oath and evidence being a statement on oath is included in the expression " all statements ". But while the word " statement " may in certain provisions of law to which our attention was drawn be wide enough to include evidence, the question that arises for determination is whether in the context in which the expression " all statements " occurs in section 233 of the Code it must be given that wide meaning or whether it must be restricted to all statements made by an accused in the course of the non-summary inquiry in contradistinction to evidence given by him. That question has to be decided by reference to the provisions of the Code dealing with non-summary inquiries as contained in Chap. XVI thereof.

It is common ground that prior to the amendment of the law relating to non-summary inquiries by Ordinance No. 13 of 1938, the expression " all statements " in section 233 of the Code could only have meant statements of an accused recorded in the course of the non-summary inquiry other than evidence, since there was no provision then for an accused to give evidence on his own behalf at the inquiry. The amending Ordinance was designed to provide for direct committal by a Magistrate for trial by a higher Court of cases which a Magistrate has no power to try summarily. While retaining the existing provision under which, at the close of the evidence for the prosecution, when a *prima facie* case is made out on that evidence, the Magistrate is required to explain the charge to the accused and give him an opportunity of making an unsworn statement after cautioning him that whatever he says would be recorded and put in evidence at his trial, the legislature at the same time made provision enabling an accused to give evidence and for the recording of such evidence should he elect to give such evidence. It is clear from section 161 (2) that the object of the new provision was to enable the accused to place before the Court at that stage of the inquiry the evidence he would be able to give himself so that in deciding whether the case should be committed the Magistrate may, subject to the provisions of section 164 of the Code, take into account such evidence and also the arguments of his Counsel or pleader, and not to allow that evidence to be read at the trial in terms of section 233 of the Code.

We also wish to state that an accused electing to give evidence on his own behalf would be liable to cross-examination under the provisions of Chapter XII of the Evidence Ordinance subject, however, to the provisions of section 54 thereof. Although the question arose only incidentally, and it was not contended before us that the legal position is otherwise, we have thought it fit to express our opinion on the point as there appears to be uncertainty as to the practice hitherto adopted by Magistrates when an accused gives evidence at a non-summary inquiry.

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Learned Counsel relied strongly on section 157 (1) in Chapter XVI of the Code which refers to the evidence of witnesses as " statements on oath ", but it is not without significance that such statements are referred to in the subsequent provisions in the same chapter as either " depositions " or " evidence " while the expression " statements " is used only to denote statements other than evidence.

Section 157 deals with the manner in which the evidence of witnesses other than an accused at a non-summary inquiry shall be taken, and the fact that in sub-section (1) thereof that evidence is referred to as statements on oath is not, in our opinion, a convincing reason for interpreting the expression " all statements " in section 233 as including evidence given by an accused under section 161.

Learned Counsel for the second appellant, whose petition of appeal contained a ground of appeal in the same terms as the one under consideration, sought to reinforce the arguments addressed to us on this ground of appeal by reference to certain other provisions of the Code outside Chapter XVI where, in his submission, the expression " statement " includes evidence. In this connection he was able to refer us specifically only to section 286 (1) and section 302 (1). Even assuming that the expression " statement " in section 286 (1) includes any evidence given by an accomplice who, having accepted a tender of a pardon, is examined as a witness under section 283 (3), it does not follow that the same interpretation must be given to the expression " statements " in section 233. The meaning of that expression must, as already stated, be gathered from a consideration of the provisions of Chapter XVI of the Code. In regard to section 302 (1), although Counsel went to the length of saying that evidence given by an accused at an inquiry under Chapter XVI of the Code must be recorded in the manner set out in that section, in our opinion this argument is quite untenable since it is clear that the section deals (though not expressly) with statements other than evidence, and where an accused gives evidence at the inquiry the manner of recording it is governed by section 298 and not section 302 (1). Section 302 (1) is, thus, an instance where the expression " statement " is used in the Code in a sense other than evidence.

Although the Crown relied on the case of *The King v. Punchimahatmaya* (*supra*) both at the trial and before us the precise question under discussion did not arise in that case.

While the answer to the question which we are called upon to decide is not entirely free from difficulty, we have considered all the arguments which were addressed to us in support of the contrary view, and we are of the opinion that the expression " all statements " in section 233 of the Code means all statements of an accused, other than his evidence recorded under section 161, for the recording of which express provision is contained in Chapter XVI. This ground of appeal, therefore, fails.

The conclusion which we have reached seems to be in accordance with the English practice, as stated in Phipson on Evidence [1], of putting in at the trial, as part of the case for the prosecution, the statements (commonly referred to as statutory statements) made by an accused at

[1] *Phipson on Evidence, 9th Edn, pp. 532–533.*

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the preliminary inquiry whether such statements tell for him or against him. Although under the provisions of the Criminal Justice Act, 1925, relating to the procedure at the preliminary inquiry, some of which are closely analogous to the provisions in Chapter XVI of the Code, an accused is a competent witness for the defence, there appears to be no provision which obliges the prosecution to put in evidence at the trial any evidence given by the accused at the inquiry.

The next point learned Counsel for the first appellant argued was that the appellants should not have been tried jointly. At the trial no application was made for a separation of trials, but the learned Judge appears to have taken upon himself the question of considering the matter and deciding that the case did not call for separation. Whether a separate trial should be ordered or not is a matter entirely at the discretion of the trial Judge and is governed by section 184 of the Code. Once that discretion has been judicially exercised, as it has been done in the instant case, this Court will not interfere, except where it appears to it that a miscarriage of justice had resulted from the prisoners being tried together[1]. Where, as in this case, there has been no application to separate the trials, much less would it be possible to interfere [2]. In the instant case the joint trial has not resulted in a miscarriage of justice. As the question of separation of trials appears to need clarification, we wish to take this opportunity of making a few observations thereon. *Prima facie* when the essence of the case is that the accused persons were engaged in a common enterprise it is proper that they should be jointly indicted and tried, and generally speaking it would be as much in the interests of the accused as in the interests of the prosecution that they should be. There is no rule of law that where it appears that the essential part of one accused's defence amounts to an attack upon another there should be separate trials. The matter is entirely, as stated above, at the discretion of the trial Judge, exercised with due regard to the interests of the prosecution and the interests of the accused. In considering the question of separation of trials it would be wrong to look at the matter exclusively from the point of view of the accused. The interests of justice demand that the Crown should not be unduly hampered in its presentation of the case [3]. If it should appear that there is a real danger that a separation of trials may so hamper the Crown in its presentation of the case as to lead to a miscarriage of justice by the acquittal of guilty persons, that is a consideration which may outweigh the consideration of prejudice to the accused [4].

In this case the confession of the second appellant, the abettor, was admitted in evidence subject to the warning given by the trial Judge to the Jury that it was not evidence against the first appellant. The only ground on which it was contended that the trial Judge should have ordered a separation of trials was that this warning to the Jury, though admittedly given in adequate terms, would not have entirely removed

[1] *Rex v. Gibbin, 13 Cr. App. R. 134.*

[2] *Daniel Youth v. The King, (1945) A. I. R. Privy Council 140.*

[3] *Rex v. Kritzinger and another, 1952 (4) S. A. L. R. 651.*

[4] *Rex v. Marian Grondkowski and Henryk Malinowski, (1946) 1 All E. R. 559*

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the possibility of prejudice being caused to the first appellant. The same question was considered in the case of *Daniel Youth v. The King* [1] where the following observations were made by Lord Porter in delivering the judgment of the Privy Council :—

> " It is true no doubt that in all joint trials the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in this country has always been in a joint trial to admit such evidence, leaving it to the presiding Judge to warn the Jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible."

This ground of appeal, therefore, fails.

The last ground of appeal set out earlier was not pressed by Counsel for the first appellant and need not be discussed here.

Counsel also submitted that, in view of the fact that this Court had intimated in a recent judgment that it was proper for Counsel to draw the attention of the Court to any matter which affects the validity of the conviction even though it has not been raised in the petition of appeal, he wished to bring to the notice of the Court certain irregularities which, he alleged, occurred at the visit to the scene by the Jury though they were not included in the grounds of appeal. The visit was suggested by learned Crown Counsel who addressing the Court said—

> " My Lord, I think it is desirable to lead the evidence of the Government Analyst after visiting the scene. The evidence of Inspector Syms could also be led after that ".

The view of the scene was accordingly fixed for the next day at 9.30 a.m. Crown Counsel made the following further application :—

> " Your Lordship might instruct Mr. Syms to mark out the position in which the bed and the bedside table of the deceased were and also to put back these two flower boxes ".

The Judge made order as follows :—

> " The flower boxes could be taken there by the Fiscal officers. If there is anything else which you wish to suggest you could see me in Chambers ".

The Court then adjourned for the day. Thereafter in Chambers learned Counsel defending the first appellant made an application to the Judge which is recorded thus :—

> " Mr. Aelian Pereira on behalf of the 1st accused informs me that the 1st accused does not desire to join in the visit to the scene tomorrow morning, apparently because he does not wish to be seen by the crowd. Since his Counsel will be present on his behalf the 1st accused need not accompany the Court. He can be kept in custody in Court till our return ".

[1] *Daniel Youth v. The King*, (1945) *A. I. R. Privy Council 140.*

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When the Judge, Jurors, Counsel, the Court staff, and the appellants assembled at Hultsdorf the next day at 9.30 a.m. prior to the drive to the scene the learned Judge addressed the Jurors in the presence of the Clerk of Assize, in whose charge they were placed during the visit, and requested them not to discuss, except with him, any matter concerning the trial at the scene. What happened at the scene is thus recorded :—

> " The room in which the deceased slept on the night of the incident is pointed out by Inspector Syms who also indicates the position of the bed on which the deceased slept marked with chalk lines. The position of the bed-table on which was the reading lamp. The height of the bed is shown marked on the wall and the height of the bed-table just below the switch. The height of the window sill on the inside is indicated. The Inspector is asked to stand outside the window through which the shot is alleged to have been fired with the flower boxes placed in the position in which they were said to have been at the time of the incident, and insert his hand through the grill over the flower box at the left hand corner of the window.
>
> The lobby, and the lights in the lobby with the light switches are shown, the bell switches and the bell itself, the back door for the use of the servants, the lock of the door of the deceased's room are also shown. The Inspector is also asked to stand at the window outside and the Jury see the position from outside the house. The new building of Proctor Thenuwara, the brother of the deceased, is shown. The Clerk of Assize is asked to stand on the short parapet wall in front of the window of the deceased's bed-room, looking into it. The gate at the entrance to the sandy lane is shown and the lamp post opposite the gate. The gate of No. 108 at which the witness Gurusamy stood is also indicated. The Court then returns by the route said to have been taken by the accused's car on the return trip from the deceased's house after the shooting ".

When the Court re-assembled after the visit to the scene at 10.45 a.m. the same day, Mr. Sirimanne the Government Analyst was called as a witness. He said that he visited the scene of the offence, for the first time on the day after the murder and several times thereafter, and carried out certain experiments to test whether the deceased could have been shot from the place the prosecution alleged he was. His opinion was that a man of 5′ 9″ in height could have shot the deceased from outside the window from which the deceased was alleged to have been shot. The first appellant is 5′ 11″ and Mr. Sirimanne is 5′ 11½″.

Mr. Syms was called next. He said, that he entered the room of the deceased only at 5 a.m. of the day on which the deceased had been shot and that although he had come earlier he was unable to enter it as it was locked. He made careful observations of the room and its contents. Then he examined the outside, observed the windows, and the two flower boxes on the window sill at a height of 5′ 2″. He found the plants disturbed and some uprooted. Then he proceeded to describe the house by reference to certain photographs produced in evidence. The witness

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then described how he stood by the window and put his hand through the grill and he said he did it with a fair amount of ease. He was then asked—

"*Q.* Actually this morning when the Court visited the scene you introduced your hand into that room over the flower box ?

A. Yes.

Q. You could do it without much effort ?

A. Yes.

Q. Standing on the ground ?

A. Yes.

.....

Q. This morning you accompanied the court when they went to the scene ?

A. Yes.

Q. On the order of His Lordship you pointed out certain spots to the court ?

A. Yes.

Q. The position of the bed, the actual height and width of which you had actually marked on the wall at the bottom of the window ?

A. Yes.

Q. You showed the position of the bedside table on which the lamp P66 and the book and purse were found ?

A. Yes.

Q. You also indicated the switch-board which contained all the switches to the other parts of the house and the passage leading to Mrs. Thenuwara's room ?

A. Yes.

Q. And also the bells and bell switches ?

A. Yes.

To Court :

Q. You showed us the points where the bells ring ?

A. Yes.

Examination continued.

Q. You also showed the actual window through which it is alleged the shot was fired ?

A. Yes.

To Court :

Q. You stood at that window and introduced your hand while the Jury were inside the room and you remember standing there again outside the door so that the jury could see you standing ?

A. Yes.

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Examination continued.

Q. Could you introduce your hand without straining ?

A. Yes.

Q. You also pointed out the spot where the car was and the spot where Gurusamy said he was at the time he heard the shot ?

A. Yes. "

.....

Cross-examined by pleader for the second appellant, Inspector Syms gave the following evidence :—

" *Q.* You went and stood by the window-sill this morning and put your hand through the grill work ?

A. Yes.

Q. You did that with ease being 6 ft. 2 inches in height ?

A. Yes.

Q. You could only insert your hand up to about the wrist through the grill work ?

A. No. I could put my hand in as far as my arm extended.

Q. How much of your hand was protruding on the inner side of the bedroom ?

A. About 7 inches ".

Counsel submitted that what was done at the scene was open to serious objection on the ground that there was no authority in section 238 of the Code, for the taking of evidence or the carrying out of tests when the Jury views the scene of the offence. He further submitted that in this instance the illegality was even more serious as the tests were conducted in the absence of the first appellant. Before we discuss the submissions of learned Counsel it will be helpful if the section of the Code is first set out. That section reads—

" 238. (1) Whenever the Judge thinks that the Jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect ; and the Jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any of the jury ; and unless the Court otherwise directs they shall when the view is finished be immediately conducted back into Court ".

The section does not require that the Judge, Counsel, and accused should accompany the Jury. It only provides for a view of the scene by the Jury who will be conducted under the care of an officer of Court. As the officer of Court is not likely to know where the scene of the offence would be it also provides for the appointment by the Judge of a person who shall show the Jury the scene of the crime.

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The question which remains for consideration is whether the act of Inspector Syms in standing at the window and introducing his hand through the grill in the presence of the Judge, Jury, and Counsel at the instance of the Judge is irregular and if so whether it is such an irregularity as to vitiate the conviction. Learned Counsel for the second appellant strenuously argued that the irregularity was so serious that it, in the words used in *Ibrahim's* case [1], " tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future ".

Generally speaking the conducting of experiments at an inspection of the scene of the offence is fraught with danger and should be avoided unless it is necessary to do so in the interests of justice.

In the case of *The King v. Seneviratne* [2] the Privy Council declined to lay down as a general proposition that on a view by the Jury experiments should under no circumstances be conducted. In the case of *Samaranayake v. Wijesinghe* [3], the whole question of the scope of a visit to the scene of offence and the carrying out of experiments has been discussed. What was done in the instant case was a demonstration which was not intended to be evidence in itself but was designed to assist the Jury to better understand the evidence, for it was only after the visit that the evidence of the Government Analyst and Inspector Syms was taken. Both of them gave evidence bearing on the theory of the prosecution that the deceased was shot by a man of 5′ 9″ or over in height from outside the window shown to the Jury. Where, as in this case, a view of the scene has been followed by the evidence of the witness who gave the demonstration and indicated the various matters the Jury were expected to view there can be no valid objection to the procedure adopted even though the first appellant did not in person accompany the Judge or Jury. Though it is not necessary in every case that the observations made at an inspection *in loco* should be put before the Court in the form of a statement from a witness who is called, or recalled, after the inspection has been made, it is usual in some jurisdictions when the hearing is resumed, after an inspection, to call, as in this case, witnesses to give evidence in open Court under oath as to the demonstrations given, explanations made and as to the matters indicated by them at the inspection. Learned Counsel for the appellants relied on the case of *Samaranayake v. Wijesinghe* (*supra*) and *The King v. Seneviratne* (*supra*). What was done in the instant case does not come within the range of experiments which both those decisions have pronounced as irregular. The extent and scope of an inspection *in loco* is a much discussed subject [4]. But it is not necessary to elaborate the matter further for the purpose of this judgment.

[1] *Ibrahim v. King-Emperor, (1914) A. C. 599 at 615.*

[2] *The King v. Seneviratne, 38 N. L. R. 208.*

[3] *Samaranayake v. Wijesinghe, 52 N. L. R. 516.*

[4] *Vol. LXVIII South African Law Journal, p. 8—February, 1951; Vol. 213 Law Times Journal, p. 161—21st March, 1952.*

Scott v. Numurkah Corporation, (1954) 91 Commonwealth Law Reports 300 at 309 et seq.

Wigmore on Evidence, 3rd Edn. 1940. Vol. IV. p. 268 (Sec. 1162), et seq.

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Learned Counsel for the second appellant also submitted that the statement of the second appellant (P38) recorded under section 134 of the Criminal Procedure was a confession and was improperly recorded by the Magistrate and admitted by the learned trial Judge. His submissions under this head he classified as follows :—

" (*a*) It (the statement) was made while the 2nd accused was actually or constructively in Police custody and the Magistrate had not adequately ensured that the accused was free from duress or influence by the Police and had not adequately questioned the accused to ascertain whether any promise or inducement had been offered to him for the making of the confession.

(*b*) The circumstances under which the Police brought the 2nd accused before the Magistrate and remained in or about the precincts of the Court during the recording of the confession and before and after it and obtained immediately from the Magistrate a copy of the confession are strongly indicative that circumstances existed which vitiated the taking of the confession and which would serve also to exclude the confession by virtue of the provisions of section 24 of the Evidence Ordinance.

(*c*) The circumstances under which a Proctor purporting to represent the 2nd accused was present in the Magistrate's chambers during the recording of the confession far from ensuring that the 2nd accused had independent legal advice strongly suggest that he had no such advice and that his presence in no way enured to the benefit of the 2nd accused or served the purpose of his interests but rather served only to give the Magistrate an unjustified sense of confidence that the interests of the 2nd accused were adequately safeguarded by legal advice. Upon the admissions of this Proctor alone it is clear that he neither advised the 2nd accused nor gave himself an adequate opportunity of acquainting himself with the matters relevant to the interests of his client before he was present at the recording of the confession.

(*d*) It should have been obvious that a man who is allegedly confessing to murder could have had no interest to be served by the presence of a Proctor at the recording of the confession, even if the Proctor had as this Proctor had not, been fully instructed as to what the 2nd accused was about to tell the Magistrate. The presence of the Proctor provided him with neither protection nor independent advice nor could it have mitigated the full rigour of the consequences of such a confession ".

We are unable to agree with learned Counsel that the provisions of section 134 of the Criminal Procedure Code have not in this instance been satisfied. Section 134 reads—

" 134. (1) Any Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial.

(2) Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.

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(3) 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 ; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect :—

> I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.
>
> (Sgd.) A. B.
> Magistrate of the Magistrate's
> Court of . . . . ."

According to the record the learned Magistrate appears to have questioned the accused before he recorded the statement and satisfied himself that it was voluntary. These are the questions he asked him—

"*Q.* Are you making this statement due to any inducement ?
A. No.
Q. Have you been threatened or assaulted to make a statement ?
A. No.
Q. Have you been offered any relief if you make this statement ?
A. No.
Q. Why are you making this statement ?
A. Injustice has been done and I wish to make this statement ".

Thereafter the Magistrate proceeded to record the statement of the second appellant which runs into six and a half manuscript and eight and a half typewritten pages.

Under section 80 of the Evidence Ordinance whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

(i) that the document is genuine ;
(ii) that any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true ; and
(iii) that such evidence, statement, or confession was duly taken.

In the instant case the prosecution without relying on the presumption created by the section led evidence in order to prove that the statement was voluntary. At an inquiry held by the Judge in the absence of the Jury the second appellant gave evidence and stated that the statement was not voluntary and that he was forced to make it by the Police under threats and that the statement was false. It was urged on behalf of the second appellant that he was virtually in the custody of the Police at the time he made the statement because Police officers were about the

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place and were constantly using the telephone in the passage which gave access to the room in which the second appellant was detained till he was called into the adjoining room in which the Magistrate was.

It would appear from the learned trial Judge's order that all these matters were considered by him when he decided to admit the statement and we see no grounds for holding that he was wrong.

Counsel for the second appellant also complained that when the Clerk of Assize was called to prove certain statements which had been put to witnesses in cross-examination the trial Judge had refused to allow the second appellant's deposition before the Magistrate to be produced in evidence. The application of the second appellant's pleader and the ruling of the trial Judge are recorded as follows :—

> " At this stage Mr. Weerakoon makes a formal application to have the deposition of the second accused made a part of the defence case and read. The Court disallows the application ".

It was contended by Counsel for the second appellant that the disallowance of this application was wrong and that even if the deposition was not admissible under section 233 of the Code it was admissible in order to prove the fact that the statement P38, which the prosecution had already put in as a confession of the second appellant, had been retracted by him in his evidence at the non-summary inquiry. When asked to state under which section he sought to have the statement admitted he referred us to section 9 of the Evidence Ordinance.

Evidence given by a witness in a previous judicial proceeding, even though it be that of an accused person, cannot be admitted in evidence in a subsequent proceeding except in accordance with the provisions of the Evidence Ordinance or the Criminal Procedure Code. Learned Counsel for the second appellant did not seek to come under any provision of the Criminal Procedure Code. A previous deposition may be proved if relevant under sections 32, 33, 155 (*c*) and 157 of the Evidence Ordinance. It was not argued before us, however, that any of these provisions permitted the use of the second appellant's evidence in the manner in which it was sought to be put in at the trial. While the evidence in question would be an admission as defined in section 17 (1) of the Evidence Ordinance, it does not appear to be one which could have been proved on behalf of the second appellant under either of the paragraphs (*a*) or (*b*) of section 21 of that Ordinance. With regard to paragraph (*c*) of section 21, as stated above, section 9 was the only provision of the Evidence Ordinance under which Counsel urged that the evidence was relevant, otherwise than as an admission. That section declares as relevant, *inter alia*, facts " which rebut an inference suggested by a fact in issue or relevant fact ". In so far as the evidence of the second appellant at the inquiry may have been relevant under this section to rebut any inference that the Jury may have drawn against him from the alleged confession of his which had been put in evidence by the prosecution, its relevancy could have arisen only on the basis that the facts deposed to in that evidence were true, and not otherwise. Learned Counsel urged on us, however, that the evidence in question was relevant

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and admissible apart from the truth or falsity of the facts deposed to in it. But we fail to see how the Jury could possibly have been invited to assess the weight to be placed on the alleged confession by merely taking into account the bare fact that it had been subsequently retracted by the second appellant and without considering the truth or falsity of what was stated by him on that occasion. We are unable, therefore, to agree with the proposition of learned Counsel and we are of the opinion that the application made on behalf of the second appellant was rightly disallowed by the trial Judge.

It was plainly open to the second appellant to have given evidence at the trial and relied on the deposition as corroborating his evidence under section 157 of the Evidence Ordinance. Having chosen not to do so he could not be permitted to achieve a result in a manner not provided by the Evidence Ordinance, namely, by substituting for evidence which he might have given at the trial, the evidence which he gave before his commitment by the Magistrate.

If the second appellant had made only a statement from the dock when called upon for his defence at the trial and in that statement he retracted the confession, the terms of section 157 of the Evidence Ordinance would have precluded him from reading as part of the defence his evidence at the inquiry. If, as it happened, the second appellant did not even make an unsworn statement it would be surprising that he should be in a position to mark his evidence before the Magistrate as part of his defence at the trial.

For the above reasons the appeals are dismissed and the applications are refused.

Appeals dismissed.
Applications refused.

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

MRS. J. BRITTO, Appellant, *and* W. HEENATIGALA, Respondent

S. C. 432—D. C. Colombo, 6,532

Rent Restriction Act, No. 29 of 1948—Sections 13 and 27—Letting of co-owned premises—Partition sale thereafter—Does not terminate statutory tenancy—Partition Ordinance (Cap. 56), ss. 4, 8.

The statutory protection of a tenant under the Rent Restriction Act is not automatically extinguished if the leased premises are purchased (either by a co-owner or by a third party) in terms of a decree for sale under the Partition Ordinance.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *W. P. N. de Silva*, for the defendant appellant.

Sir Lalita Rajapakse, Q.C., with *C. G. Weeramantry*, for the plaintiff respondent.

Cur. adv. vult.

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February 27, 1956. GRATIAEN, J.—

The question for our decision on this appeal is whether the statutory protection of a tenant under the Rent Restriction Act No. 29 of 1948 is automatically extinguished if the leased premises are purchased (either by a co-owner or by a third party) in terms of a decree for sale under the Partition Ordinance. In *Heenatigala v. Bird* [1] Pulle J. expressed the opinion *obiter* that " the certificate of sale issued (under section 8 of the Ordinance) had the effect of terminating the relationship of landlord and tenant and of constituting (the purchaser) an independent title holder to whom the restriction contained in section 13 of the Act could not apply because the certificate conferred a title which was not subject to the tenancy agreement ". Swan J., who pronounced the principal judgment in that case, did not discuss this problem because counsel appearing for the tenant " did not think it worthwhile to pursue the matter, and stated that his client was willing to surrender possession if he was given time ". We are therefore free to examine the question afresh. In the rest of my judgment, I shall refer to the Partition Ordinance as " the Ordinance " and to the Rent Restriction Act, No. 29 of 1948, as " the Act ".

The premises to which this action relates are situated in an area in respect of which the Act is in operation. The defendant had entered into occupation of it as a tenant on 15th October 1947 by virtue of a notarial lease executed in her favour by the plaintiff (as co-owner) and by virtue of contracts of monthly tenancy granted to her by all the other co-owners. During the subsistence of these tenancy agreements, the plaintiff instituted an action against his co-owners for the sale of the premises under the Ordinance, a partition being admittedly impracticable. On 6th July 1950 a decree was entered under section 4 declaring the plaintiff and three others to be entitled to an undivided $\frac{1}{4}$ share each and ordering the premises to be sold under section 8 subject to the rights of a mortgagee. The premises were accordingly put up for sale by public auction on 12th October 1950 and the plaintiff was declared the purchaser. The sale was in due course confirmed by the Court, and on 5th February 1952 a certificate of sale was issued to the plaintiff under section 8 as evidence of his title as sole owner. Shortly afterwards he sued the defendant for ejectment on the footing that her former rights as tenant had been extinguished by the decree for sale and that, as purchaser, he was now vested with a title which brought to an end the statutory protection which she would otherwise have enjoyed under the Rent Restriction Act No. 29 of 1948. The learned District Judge upheld this contention and ordered a decree for ejectment as prayed for, awarding damages at Rs. 40/55 per mensem less a sum of Rs. 280/24 which the defendant had paid on the plaintiff's behalf as Municipal rates.

I have come to the conclusion that the propositions of law relied on in support of the plaintiff's cause of action must be rejected. The decree for sale entered under section 4 of the Ordinance certainly had the effect of bringing to an end the contractual relationship which previously existed

[1] *(1954) 55 N. L. R. 277 at 280.*

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between the defendant as tenant and the co-owners (taken collectively) as " landlord ". Nevertheless, the statutory protection conferred on the defendant by section 13 of the Act was not extinguished either by the decree for sale dated 6th July 1950 or by the certificate of sale dated 5th February 1952. The plaintiff is therefore precluded from claiming the ejectment of the defendant without the authorisation of the Rent Control Board because he has not established that the defendant's protection under the Act has come to an end for one or other of the reasons set out in the proviso to section 13.

It is important to realise that section 13 of the Act operates " notwithstanding anything in any other law ". This means that the " tenant " is protected even though his contractual rights may have been terminated (e.g., by due notice or by effluxion of time) or extinguished by operation of law (e.g., by virtue of the combined effect of sections 4, 8, and 9 of the Ordinance). In the context of section 13 the word " tenant " necessarily includes (and generally means) a person who continues to occupy the protected premises after his contractual rights under the common law have come to an end. *Gunaratne v. Thelenis* [1]. The observations of Lord Porter in *Baker v. Turner* [2] may usefully be quoted in this connection :

> " The rules of formal logic must not be applied (to the language of Rent Restriction legislation) with too great strictness. As Scrutton L. J. has more than once pointed out, they must be viewed in the light of their aim and object and it must always be remembered that the difficulty in construing them is enhanced by the fact that words and phrases apt to describe the relationship of a common law landlord and tenant one to another have been used without specific definition of another and statutory relationship viz. that of a protected tenant or sub-tenant to his immediate, or perhaps remote, landlord. "

Referring to this statutory relationship, Evershed M.R. observed as follows in *Marcroft Wagons Ltd v. Smith* [3] :

> " A few sentences from the judgment of Bankes L.J. in *Remon's case* [4] will illustrate as well as possible the strangeness, at any rate as it would have appeared to a pendantic lawyer of the nineteenth century, of this conception. Referring in that case to the person claiming to retain possession of the premises, the Lord Justice said : ' In no ordinary sense of the word was respondent a tenant of the premises on July 2nd. His term had expired. His landlord had endeavoured to get him to go out. He was not even a tenant at sufferance. It is however clear that in all the Rent Restriction Acts the expression *tenant* has been used in a special and peculiar sense, and as including a person who might be described as an ex-tenant, someone whose occupation had commenced as tenant and who has continued in occupation without any legal right except possibly such as the Acts themselves conferred upon him '. "

The further question arises in the present case as to whether the plaintiff, after purchasing the premises under the provisions of the Ordinance, could fairly be described as the defendant's " landlord " within the

[1] (*1946*) *47 N. L. R. 433.*
[2] (*1950*) *A. C. 401 at 417.*
[3] (*1951*) *2 K. B. 496 at 502.*
[4] (*1921*) *1 K. B. 49 at 54.*

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meaning of the Act. Section 27 defines the term as meaning " the person for the time being entitled to receive the rent of such premises . . . ". Under the common law, the word " rent " presupposes a subsisting contractual relationship whereby an agreed sum is paid by one of the parties for the occupation of the other's property. But here again the object of the Act would be defeated if we were to interpret the word " with too great strictness ". In my opinion, the reference to " rent " implies that " so long as a tenant enjoys a statutory right of occupation notwithstanding the termination of the earlier contract, a statutory obligation is imposed upon him to pay *rent* at the original contractual rate. " *Sideek v. Sainambu Natchiyar* [1]. In short, words such as " landlord ", " tenant " and " rent ", which are strictly appropriate only to describe a common law relationship, must all receive a meaning in the Act consistent with the conception (which is no doubt fictitious) that the old relationship still subsists during the period of statutory protection. The justification for this " broad, practical, common-sense interpretation " is that it provides the only means of giving effect to the intention of the legislature. *Read v. Goater* [2]. At the same time I agree entirely with Sir Lalitha Rajapakse that it would be quite wrong to include within the definition of a " landlord " any person other than the original lessor or someone who derives his title from the original lessor. If, therefore, the true owner of the leased premises vindicates his title against the tenant's contractual lessor, the statutory protection which the tenant enjoyed against the lessor would not be available against the true owner.

Sir Lalitha's main argument was that a purchaser at a sale held under the Ordinance acquires " a title paramount " which is not in truth derived from the person declared in the decree to be the co-owners, and that there is no *nexus* by derivation from the co-owners (the tenant's lessors) sufficient to give him the status of a " landlord " within the meaning of that Act. In support of this submission, much reliance was placed on de Sampayo J.'s frequently quoted observation in *Bernard v. Fernando* [3] that " partition decrees are not like other decrees affecting land, merely declaratory of the existing rights of the parties *inter se*. They create a new title in the parties absolutely good against all the world ". I would not presume to question the correctness of this analysis, and, with respect, I think that it admirably explains the effect of a final decree *for partition* whereby a co-owner receives, in lieu of his former undivided interests, absolute title to a divided allotment of the common property. But de Sampayo J. has nowhere suggested that this analysis is equally appropriate where a decree *for the sale* of the common property has been entered under section 4 of the Ordinance. A decree for sale under section 4 expressly declares that the common property belongs to certain specified co-owners in certain specified proportions, and then proceeds to order a sale of the property by public auction. In such a situation, it is the title of the persons declared to be co-owners which is put up for sale. The only substantial difference between a

[1] (*1954*) *55 N. L. R. 367, 368.* [2] (*1921*) *1 K. B. 611, 615.*
[3] (*1913*) *16 N. L. R. 438, 439.*

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sale under the Ordinance and an ordinary sale in execution proceedings is that in the former case section 9 declares the title to be unimpeachable and good against all the world.

Until the certificate of sale is issued to the purchaser " the common bond of co-ownership " continues between the persons in whose favour the decree under section 4 was passed. *Kahan Bhai v. Perera* [1]. " Upon the issue of the certificate of sale to the purchaser under a decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser . . . . " per Garvin J. in *Fernando v. Cadiravelu* [2]. Indeed, section 8 emphasises that the certificate of sale merely operates to pass the co-owners' title to the purchaser as effectively as if they themselves had executed a conveyance in his favour. Accordingly, the purchaser's title is in truth a title derived from the persons declared to be the co-owners of the property. If, therefore, they had been the tenant's " landlords " within the meaning of the Act, their statutory status was transferred to him by operation of law.

It is quite correct to say that the decree for sale under section 4 of the Partition Ordinance had the effect of wiping out the contractual rights of lessors and monthly tenants. *Samaraweera v. Cunjimoosa* [3]. Under the common law, therefore, the defendant could not have resisted the claim for her ejectment. But it is at this stage that the Act intervenes to give her protection. Although the common law relationship of landlord and tenant between the co-owners and herself was extinguished, a statutory relationship was created in its place which prevented them from ejecting her except upon one or other of the conditions permitted in section 13. In February 1952 the plaintiff, as purchaser, succeeded to the status of a statutory landlord.

Distinguished Judges have explained in different ways the protection granted to tenants by Rent Restriction legislation. Evershed M. R. in the *Marcroft Wagons Ltd. case* [4] speaks of a " statutory right of irremovability " and of a " right to occupy premises with many of the attributes of a tenancy without the essential qualifications of an interest in land " (page 503). Denning L.J. tells us in the same case that a " tenant " is clothed in " the valuable status of irremovability " (page 506). Whichever explanation be regarded as more appropriate in terms of jurisprudence, the legislature has found it necessary to impose a statutory fetter on the common law right of landlords and their successors in title to eject the tenant after the contract itself has (for whatsoever reason) come to an end. I would allow the appeal and dismiss the plaintiff's action with costs in both Courts. The defendant is entitled to credit in the sum of Rs. 280/24 previously referred to against sums due by her to the plaintiff as " rent " (which the learned Judge has rightly fixed at Rs. 40/55 per mensem).

GUNASEKARA, J.—I agree.

Appeal allowed.

[1] *(1923) 26 N. L. R. 204 (F.B.)*
[2] *(1927) 28 N. L. R. 492, 498.*
[3] *(1915) 18 N. L. R. 408 (F.B.)*
[4] *(1951) 2 K. B. 496.*

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1955 *Present :* **Gratiaen, J., and Sansoni, J.**

SARAVANAMUTTU, Appellant, *and* NADARAJAH, Respondent

S. C. 447—D. C. Chavakachcheri, 548

Thesavalamai—Debts of a deceased person—Right of surviving spouse to settle them by sale of deceased's property—Applicability of Roman-Dutch law.

Where the Thesavalamai is silent the Roman-Dutch law is applicable.

The rule of Roman-Dutch law that the surviving spouse may validly sell immovable property of a deceased person in order to pay his debts is applicable to parties governed by the Thesavalamai.

APPEAL from a judgment of the District Court, Chavakachcheri.

S. J. V. Chelvanayakam, Q.C., with *P. Somatilakam* and *C. Shanmuganayagam*, for the plaintiff appellant.

H. W. Tambiah, with *H. L. de Silva*, for the defendant respondent.

Cur. adv. vult.

March 15, 1955. SANSONI, J.—

The land which is the subject matter of this partition action was purchased by one Vairamuttu in 1917. He died in 1929 leaving his widow Sinnammah and his minor child Saravanamuttu, the present plaintiff, and it is common ground that each of them thereupon became entitled to a half share of the land. Vairamuttu had borrowed two sums of Rs. 150 and Rs. 170 on two mortgage bonds in 1925. In 1930 Sinnammah sold the entire land to one Velauthapillai for a sum of Rs. 500. The deed of sale contains recitals to the effect that two sums of Rs. 238 and Rs. 262 respectively were due on the bonds, and that the mortgagees were pressing her for payment. There is no question that the mortgage debts were settled by Sinnammah with the money she obtained by this sale. The plaintiff, however, claims that Sinnammah had no right to sell his half share and that the title to that share is still in him.

The parties are admittedly governed by the Thesavalamai, but there does not appear to be any statutory provision or decision of this Court dealing with the particular point under that special law. The Roman Dutch Law is therefore applicable—*Sabapathypillai v. Sinnatamby*[1]. Now there is an unbroken line of decisions to the effect that the surviving spouse may validly sell the movable and immovable property of a deceased person in order to pay his debts. The earliest case is *Fernando v. Fernando*[2] decided by a Full Bench, the principle applicable being that the survivor represented all the parties interested in the common estate and they must bear the burdens of the estate equally with the survivor ; they should therefore stand by an alienation bona fide made for the purpose of discharging that burden—See *Amaris Appu v. Sadris Perera*[3]

[1] *(1949) 50 N. L. R. 367.* [2] *(1859) 3 Lor. 235.*

[3] *(1883) Wendt 343.*

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Perera v. Pathumma [1]. Later cases have decided that the surviving spouse may be considered as acting in the capacity of an executor *de son tort* if the circumstances justify that conclusion, even though there may be only one act of dealing with the property. See *Prins v. Pieris* [2], *Babun Appu et al. v. Waidasekera* [3].

It is too late now for us to reconsider this matter. Mr. Chelvanayakam relied on the case of *Montford v. Gibson* [4] to support his argument that an executor *de son tort* has no power to sell immovable property, but that authority has been referred to in *Babun Appu et al. v. Waidasekera* (supra) so that the judges who decided that case were well aware of it. It follows that the plaintiff has no title to the land sought to be partitioned and his action was rightly dismissed. The appeal must therefore be dismissed with costs in both Courts.

GRATIAEN, J.—I agree.

Appeal dismissed.

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

SONNANDARA, Appellant, *and* DINGIRI ETANA *et al.*, Respondents

S. C. 453—D. C. Kegalle, 6,883

Kandyan Law—Death of person intestate and issueless—Inheritance—"Acquired property"—Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, proviso to s. 10 (1).

The proviso to section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance confirmed the earlier law when it declared :

"if the deceased shall not have left surviving him any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased."

APPEAL from a judgment of the District Court, Kegalle.

C. R. Gunaratne, for the plaintiff appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendants respondents.

Cur. adv. vult.

January 31, 1956. GRATIAEN, J.—

A Kandyan gentleman named Patabenda acquired the land in dispute by purchase in 1892. He died intestate leaving his widow, a son named

[1] *(1919) 21 N. L. R. 76.*
[2] *(1901) 4 N. L. R. 353.*
[3] *(1917) 20 N. L. R. 62.*
[4] *4 East. 441.*

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Appu, and three *diga* married daughters. Appu accordingly inherited the property subject to a life-interest in the widow Podimenike.

Appu died intestate and issueless in 1919 and a contest has arisen as to whether upon that event the property, for purposes of devolution under the Kandyan Law, constituted *paraveni* property or " acquired property ". We have not been referred to any decisions of this Court which precisely cover this question and it would be unsafe (without closer investigation of the problem) to assume that the proviso to section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 confirmed the earlier law when it declared :

> " . . . . if the deceased shall not have left surviving him any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased *shall be deemed acquired property of the deceased.* "

Learned Counsel agreed that, if the learned District Judge has correctly decided that the land must be regarded as the acquired property of Appu for purposes of succession to his estate in 1919, the judgment under appeal must be affirmed.

In the absence of earlier authoritative pronouncements of this Court, a problem of this kind cannot be solved with confidence. According to Dr. Hayley, " the somewhat fanciful division of the species of inheritance (i.e., under the Kandyan Law before it was codified) does not appear to provide any canons or principles for the elucidation of the rules of intestate succession. " " *The Laws and Customs of the Sinhalese* ", *page 220.*

The *Niti-Niganduwa* indicates at page 103 that, when a Kandyan dies intestate and issueless, any property which had previously passed to him by inheritance as the " newly acquired " property of his deceased father would not fall within the category of " paternal " or *paraveni* property. On the contrary, it must be regarded as his " acquired property " although in fact it had come to him by inheritance from his father. The reason, apparently, is that when a person dies issueless a broad distinction is drawn between his property which had previously " belonged to his father by *paraveni* right " and property which his father had " acquired by purchase or other means ". *Perera's Armour page 47.* This distinction has, in a slightly different context, been recognised in *Ukkurala v. Tillekeratne* [1]. When the direct line of descent is broken, the so-called " newly acquired " property of the deceased's father is not regarded as having at any time formed part of " the family lands ". *Hayley* (*supra*), *page 221.*

For these reasons, I take the view that the proviso to section 10 (1) of the Ordinance is in truth declaratory of the earlier law, and that the learned District Judge's conclusion must be affirmed. I would accordingly dismiss the appeal with costs.

GUNASEKARA, J.—I agree.

Appeal dismissed.

[1] (*1882*) *5 S.C.C. 46* (*F.B.*)

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1955 *Present :* **Fernando, J.**

K. MUTHIAH, Appellant, *and* K. A. L. PERERA (Police Sergeant), Respondent

S. C. 1,151—M. C. Nuwara Eliya, 11,454

Driving when drunk—First or second offence—Suspension of offender's driving licence—Motor Traffic Act No. 14 of 1951, ss. 138, 153, 218.

Under section 138 of the Motor Traffic Act a first offender's driving licence may be suspended for a period not normally exceeding six months for driving a motor vehicle when drunk, an offence punishable under section 218.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

J. C. Thurairatnam, for the accused appellant.

Shiva Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 13, 1955. FERNANDO, J.—

The accused in this case was convicted on his own plea of driving a motor vehicle under the influence of liquor, an offence punishable under section 218 of the Motor Traffic Act No. 14 of 1951. He was sentenced to pay a fine of Rs. 25 and his driving licence was suspended for a period of 18 months.

Counsel for the appellant has referred me to a judgment of my brother Swan in an unreported case *Caithan v. Sheriffdeen* (Application in Revision 389 ; M. C. Negombo 2103 ; S. C. Minutes 26.1.53). In that case Crown Counsel had conceded that the order suspending the licence for a similar offence had been made without jurisdiction, apparently for the reason that it was a first offence ; and the order of suspension was set aside apparently in view of that concession.

Sub-section (2) of section 138 of the Act provides that where a driving licence of a person convicted of contravening section 153 contains at the time of the conviction not less than two and not more than four previous convictions for the same offence, the Court *shall* either cancel the licence or suspend the licence for a period between six months and two years. The view taken by Crown Counsel in the case to which I have referred was apparently that in the case of a breach of section 153, the only power of suspension is that conferred by section 138 (2). But sub-section (1) of the same section provides that in the case of *any offence* under the Act the Court may suspend the licence for a period not exceeding two years. Sub-section (1) has to be read " subject to the provisions of sub-section (2) ", but in my opinion the effect of the sections read together is that whereas in the case of a first or second offence the power of suspension

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is discretionary, a suspension or cancellation is compulsory under sub-section (2) in the case of a third or subsequent offence. Sub-section (2) does not in my opinion qualify the discretion to suspend in the case of a first or second offence.

It should be noted that the Legislature deals with the case of a third offence by insisting on a suspension for at least six months and I think that the intention thus expressed should be a fair guide as to the appropriate period of suspension in the case of a first offence, and that accordingly, unless there are special circumstances of aggravation, the period of suspension, if any, ordered for a first offender should not normally exceed six months. I would therefore affirm the conviction but order that the period of suspension of the appellant's licence be reduced to one of six months commencing from 1st September, 1955.

Sentence reduced.

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1955 *Present :* **Gratiaen, J., and Fernando, J.**

W. H. BUS CO., LTD., Appellant, *and* S. M. HEEN BANDA, Respondent

S. C. (Inty.) 23—D. C. Kandy M. R. 3,656

Arbitration—Procedure—Section 676 of Civil Procedure Code— Compliance therewith —Scope of terms of reference.

(i) The parties to this action signed an agreement in which they expressly stated their desire to submit their dispute to arbitration. In the same agreement they authorised their proctors to apply to the Court for a reference. This agreement was filed in Court two days later, and, in the presence both of proctors and counsel, the Court entered a minute that a joint motion was filed, it being clear that every one had assumed either that there was in fact a joint motion or that the agreement already signed by the parties constituted the necessary joint motion

Held, that there was substantial and sufficient compliance with the procedure prescribed by Section 676 of the Civil Procedure Code.

Menike v. Ukku Amma (1915) 18 N. L. R. 413, followed.

Madasamy v. Amina (1951) 45 C. L. W. 40, not followed.

(ii) The arbitrator was required by the terms of reference to determine " all matters in dispute in this action and all other matters in dispute ". At the stage when the reference was made, issues had not been framed between the parties nor had answer been filed. The matters in dispute were therefore those upon which the plaintiff relied in his plaint. Notwithstanding that the arbitrator was authorised to determine other matters in dispute, every issue suggested to the arbitrator was one which arose upon the averments in the plaint, and the only matters ultimately determined by the award were matters arising upon those averments.

Held, that in the circumstances the validity of the award could not be challenged on the grounds that no specific issues had been agreed upon for adjudication by the arbitrator and that the reference related to matters outside the plaintiff's pleadings.

APPEAL from an order of the District Court, Kandy.

H. V. Perera, Q.C., with *H. W. Tambiah* and *H. L. de Silva*, for the plaintiff appellant.

C. Thiagalingam, Q.C., with *P. Somatilakam*, for the defendant respondent.

Cur. adv. vult.

July 21, 1955. FERNANDO, J.—

The plaintiff instituted an action against the defendant on 15th September, 1949, claiming certain declarations, orders and damages. Summons was served on the defendant, he failed to appear in response thereto and the matter was fixed for ex-parte trial ; but subsequently

2——J. N. B 54123—4,590 (4/56)

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of consent a date was given to file answer. The following entry (initialled by the District Judge) appears on the Journal for the date 12th December, 1949 :—

> "Joint motion filed referring all matters in dispute in this case (and also some other matters) to the arbitration of Mr. Alfred Fernando. Of consent, arbitrator's fees are to be paid direct by plaintiff in the first instance fixed at Rs. 600.
>
> Issue commission to arbitrator re'ble 22 Feb. 1950."

Subsequently various orders were made of consent, extending the time fixed for the making of the award and increasing the amount of the arbitrator's fees. The award of the arbitrator was ultimately filed on 8th January, 1951, and after certain steps had been taken, the defendant filed his objections as well as a motion that all orders had in the case be vacated, expunged and otherwise rescinded for the following reasons *inter alia* :—

(2) There was no application in writing to refer the matter to an arbitrator.

(3) There was no order in due form relating to the reference to arbitration.

(4) The reference, if any, was in general terms and did not state the particular matters in difference between the parties ; also such reference related to matters outside the plaintiff's pleadings in this case.

(5) The arbitrator had no jurisdiction to act. The entire proceedings are null and void.

It was argued before the learned Judge on behalf of the plaintiff that the objections were made out of time but he held that they were in time and can and have to be considered. He considered those objections (I shall refer to them later), but ultimately held that the matter was concluded on the general grounds set out in the motion. He held in effect that there was no written application by the parties to the action for a reference to arbitration, that the reference was therefore invalid, that the defendant's participation in the arbitration proceedings did not estop him from setting up the invalidity of the award, and directed that the next step was for the case to proceed *in Court* in the ordinary course and for the defendant to file answer.

The plaintiff has appealed against this order and the main question for decision is whether or not there was a valid reference to arbitration on 12th December, 1949. On that day, apart from the oral representations which must have been made to the Judge by counsel for both parties, there was before the Court a writing dated 10th December, 1949, signed both by the plaintiff and by the defendant which stated that the parties "are desirous that all matters in dispute in this action and all other matters in dispute between us be referred to the final decision of Mr. Alfred Fernando, Proctor, as arbitrator, and we bind ourselves and agree to accept the award of the said arbitrator" and further that the

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parties " do hereby specially authorise our respective Proctors, that is to say, Messrs Liesching and Lee on the part of the said Plaintiff-Company and Mr. V. M. Guruswamy and his assistant Mr. M. A. M. Naheem on the part of the said defendant, to apply to the said Court for an order of reference accordingly ". It has been argued in appeal that this document of 10th December, 1949, which was admittedly filed in Court, together with the matters orally before the Court upon which the Journal entry was founded, together constitute sufficient compliance with the requirements of section 676 of the Code.

The section provides as follows :—

Matter in difference in an action may by consent of parties be referred to arbitration.

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

Mode of submission.

(2) Every such application shall be in writing, and shall state the particular matters sought to be referred, and the written authority of the proctor to make it shall refer to it, and shall be filed in Court at the time when the application is made, and shall be distinct from any power to compromise or to refer to arbitration which may appear in the proxy constituting the proctor's general authority to represent his client in the action.

Section 676 requires firstly, that all the parties must apply to the Court for an order of reference either in person or by their respective proctors, each specially authorised to make the particular application. The importance of this special authorisation was stressed in the case of *Gonsales v. Holsinger* [1] where it was held (inter alia) that a general power of attorney given to a proctor authorising him in general terms to refer the matter in suit to arbitration if necessary did not constitute the special authorisation required by section 12 of the Arbitration Ordinance of 1866 (which corresponded to the present section 676 of the Code). The application then, for a reference, must be made either by each party in person or by their respective special agents ; and section 676 (2), which purports to deal with the " mode of submission ", requires that the application *shall be in writing* and that when it is made by the agent his special written authority shall be filed with the application. Many decisions have stressed the need for literal and rigorous compliance with the section, for such a compliance would ideally demonstrate to the Court the deliberate decision of all the parties both to proceed to arbitration and to move the Court for the requisite order.

As de Sampayo J. said in the *Alim Will Case* [2] at p. 406, " Where the Court is seised of a cause, its jurisdiction cannot be ousted by a private and secret act of the parties, and if they, after having invoked the authority

[1] *(1885) 7 S. C. C. 101.*

[2] *(1920) 21 N. L. R. 405.*

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of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator . . . . they must move in the same suit for an order of reference ".

Section 676 underlines the principle that the subject's right of recourse to the established Courts cannot be abandoned or be construed to have been abandoned except on the clearest possible material demonstrating that he has freely and voluntarily consented to abandon it, and except upon that consent being communicated to the Court in person or by a specially authorised representative. And once a Court becomes seised of the jurisdiction to determine a suit, the Court cannot be relieved of or relieve itself of that jurisdiction, unless all the parties to the suit have in the manner to which I have just referred communicated to the Court their free and voluntary consent to the transfer of the subject matter of the suit to the determination of some other tribunal. Indeed, it is even doubtful whether there can be complete abandonment, and the device of a reference to arbitration merely suspends the jurisdiction of the Court which continues to remain vested with the right to supervise and control the acts of the arbitrator and to declare his ultimate award ineffective in certain circumstances.

The question which the Courts have had to determine in several cases under section 676 is whether an order of reference is void on the ground that no application in writing for the reference was made either by the respective parties or by their proctors acting with the special written authority, and in many of them the decisions were for avoidance. But it is necessary to examine the facts of those cases in order to appreciate the *ratio decidendi*.

In *Ramaswamy Kangani v. Aiya Cutty Kangani* [1] there was a Journal entry " on a joint motion, referred to the arbitration of X ". The entry bore no signature (not even of the Judge) nor was there any signed motion. It was held that there was no valid reference to arbitration, and that no valid appointment having been made, the parties had not by appearing before X " waived all objections and irregularities " in connection with his nomination. I note (without comment for the present) this observation of Dias J. :—

"*If the parties had signed the entry of 8th August, probably a sufficient compliance with the provisions of the Ordinance might be held to have substantially taken place.*"

In *D. C. Galle 42,400* [2] there was a minute signed by the Judge : " parties present with their proctors ; referred to arbitration by consent of parties to X ". Here again there was neither an application in writing nor the signature of the parties to the minute. Dias J. in delivering the judgment of the Court (in a later case referred to as the " fully constituted Collective Court ") pointed out a difference from the circumstances in the earlier case namely, that the minute had been signed by the Judge. But he nevertheless said that the Legislature required that the reference to arbitration should certainly be the act of the parties themselves and that

[1] (*1879*) *2 S. C. C. 59.*

[2] (*1879*) *2 S. C. C. 85.*

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therefore the signature of the Judge did not cure the absence of an application in writing by the parties or their proctors. The learned Judge did not however either re-affirm or modify his observation in the earlier case as to the probable effect of the signature of the entry by the parties.

The next case of *Punchirala v. Medduma Banda* [1] was decided by Clarence J. sitting alone. That was a case between the plaintiff and five defendants ; the reference to arbitration was made upon a written motion signed by the plaintiff and his proctor, by the 1st defendant, by the 3rd defendant for himself and as curator for the 5th defendant as well as by the proctors for the 1st, 3rd, 4th and 5th defendants. In regard to the 4th defendant, he did not sign the motion but he subsequently signed a joint application to enlarge the time for the award. The award was ultimately made in favour of the plaintiff against the 1st, 3rd, 4th and 5th defendants but absolving the 2nd defendant. On these facts it was held that the objection to the award failed, Clarence J. not being " disposed to favour parties who contentedly waived technical objections to the proceedings of arbitrators until they discover that the award is against them ".

In *De Fonseka v. De Fonseka* [2] there was again a written entry signed by the District Judge that the questions at issue are by consent referred to arbitration. Cayley C.J. referred to the fact that the Ordinance (No. 15 of 1886) contemplated the use of a form of application given in the schedule and stressed the importance of insisting upon this formal application. Objection was also taken that there was no formal order of reference to satisfy the provision that the order should be in writing and fix the time for the delivery of the order. But he nevertheless upheld the validity of the order of reference in the following terms:— " In the present case there is an order duly entered and signed by the Judge. This order, if obtained irregularly or if defective in any particular, might have been appealed against and set aside, or amended. But a party, when he has full knowledge of an irregularity in the reference, and a proper legal course open to him for getting such irregularities corrected, cannot be permitted to lie by and take his chance of the award, and then finding it made against him try to escape from it on the ground of the irregularity (see *Bignall v. Gale*, 2, M and G. 830)." He distinguished the case of *Ramaswamy Kangani v. Aiya Cutty Kangani* [3] on the ground that there, there was not only no written application but also no order. Clarence J. in dealing with the same point also thought that the defendant "is estopped from now setting up the objection to the irregularity of the reference ".

It will be seen that while the cases last cited from the 3rd volume of the *Supreme Court Circular* decided in effect that the recording by the District Judge of the reference to arbitration together with the subsequent attendance by the parties before the arbitrator was held to have cured the failure to file a written application, the earlier case of *D. C. Galle 42,400* [4] was to the contrary effect. In this state of things the matter came up again before three Judges in *Bimbarahami v. Kiribanda Muhandiram* [5]

[1] *(1880) 3 S. C. C. 110.*
[2] *(1880) 3 S. C. C. 154.*
[3] *(1879) 2 S. C. C. 59,*
[4] *(1879) 2 S. C. C. 85.*
[5] *(1885) 7 S. C. C. 99.*

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where the earlier cases were all reviewed. Here too the minute (signed only by the Judge) was that " the parties consent to this case being referred to the arbitration of X. Let it be referred accordingly ". Referring to the case of *D. C. Galle* [1] as a decision of " the fully constituted Collective Court ", Fleming A.C.J. pointed out that " in that case it was distinctly held that the absence of an application in writing to refer the matters to arbitration as required by the Ordinance was not cured by a minute of the District Judge ". He felt bound as well as inclined to follow the decision of the Collective Court, and held that there was no valid appointment and that *the objection to the award was one which no subsequent conduct of the parties can waive or cure.* The case of *Ramaswamy Kangani v. Aiya Cutty Kangani* [2] was approved, but the Court, which included Dias J., made no reference to his observation as to the probable effect of the signature by the parties to the entry as to the reference.

The case of *Gonsales v. Holsinger* [3] was also one where there was only a minute signed by the Judge. The same Bench that decided *Bimbarahami v. Kiribanda Muhandiram* [4] decided this case also and on the same day ; and in setting out the brief facts relating to the reference it is significant that Fleming A.C.J. said that although the note as to the reference was signed by the Judge, " It is not pretended that it was signed by the parties ".

Casim Lebbe Marikar v. Samal Dias [5] is yet another case of a signed minute by the Judge without any writing by the parties or their proctors and it was held that the reference to arbitration was void. Bonser C.J. said " It is not sufficient that the parties being present in Court should signify their assent to the District Judge and that he should make a minute to that effect ".

In *Pitche Tamby v. Fernando* [6] Wood Renton J. held to be invalid an award made upon an application not signed by all the parties. Although the appellant himself had signed the application, he was not estopped from disputing the validity of the reference on the ground that some of the respondents had not themselves signed it. The learned Judge pointed out " how vitally important it is that the provisions of the Civil Procedure Code in regard to arbitration should be rigorously and literally complied with ".

An examination of the facts in all the cases to which I have so far referred reveals that in each of them the reference to arbitration had been made either upon an application which had been signed by some but not all of the parties, or else merely in pursuance of an entry made by the Judge whether signed by him or not. But in none of them was there an entry by the Judge countersigned by the signature of the parties or of their respective special agents. The first case of this description to which we have been referred was that of *Menike v. Ukku Amma* [7] decided in 1915. The entry was to the effect that " the parties agree to refer all matters in dispute to the arbitration of X whose award shall be final ". This agreement was " allowed " by the Judge, and the whole entry was

[1] *(1879) 2 S. C. C. 85.*
[2] *(1879) 2 S. S. C. 59.*
[3] *(1885) 7 S. C. C. 101.*
[4] *(1885) 7 S. C. C. 99.*
[5] *(1896) 2 N. L. R. 319.*
[6] *(1910) 14 N. L. R. 73.*
[7] *(1915) 18 N. L. R. 413.*

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authenticated by the marks of the parties to whom the entries were stated to have been explained by the Interpreter Mudaliyar. Having referred to the two cases I have last cited (which themselves refer back to the earlier authorities in *7 S. C. C.* and *3 S. C. C.*) the Court held that "the allowance by the Commissioner of Requests of the agreement of the parties and the authentication of that agreement not merely by his signature but by the marks of the parties themselves, seem to me to constitute good evidence that *there was here such an application to the Court as will satisfy even the letter, and certainly the spirit,* of section 676 of the Civil Procedure Code". I should add that this observation was made by Wood Renton C.J. who had in his brief earlier judgment stressed the need for *rigorous and literal compliance.*

An oral application to the Court for a reference to arbitration, followed by the signature of the parties to a minute of consent was held by Dalton J. to be sufficient compliance with section 676. (*Appuhamy v. Dingiri Mahatmaya* [1].)

The case of *Arachchi Appu v. Mohotti Appu* [2] is not in point since there, what purported to be a joint motion was found actually to have been signed only by the proctors for the plaintiffs. In this case too, the question of estoppel was raised, but Bertram C.J. felt compelled to yield to the current of opinion in earlier cases where the plea of estoppel had been rejected.

Despite certain observations to the contrary which were made *obiter* by Wood Renton J. in *Pitche Tamby v. Fernando* [3], Maartensz J. also thought that the plea of estoppel "could not be now raised"—(*Asia Umma v. Abdulla* [4]). Although the term estoppel itself does not occur in the judgments reported in the 7th volume of the *Supreme Court Circular*, I think it is clear that the three judges who decided those cases intended to decide that if an order of reference is void for the lack of the necessary application, then participation by a party in the arbitration proceedings does not estop him from subsequently challenging the order. As will presently appear, it is not necessary for us to re-consider that decision, even if it be open to a Bench of two Judges to do so.

The next case we have been referred to was that of *Girigoris v. Punchi Singho* [5] decided in 1949 by Basnayake J. The entry reciting the consent to the reference to arbitration in that case was signed by four of the eight plaintiffs and the four defendants, but was not signed either on that day or subsequently by the other four plaintiffs. In view of the fact that the entry was not signed by all the parties, the 1915 case of *Menike v. Ukku Amma* [6] was, if I may say so with respect, rightly distinguished, and would have been of no assistance to those parties who desired to sustain the validity of the reference.

De Silva v. Perera [7] a judgment of two judges, is of no assistance to Mr. Thiagalingam. There was a motion filed on 29th September, 1949, signed by the plaintiff and the defendant in person as well as by their proctors, in which the parties agreed to refer all matters arising in the action

[1] (*1928*) *30 N. L. R. 254.*
[2] (*1922*) *23 N. L. R. 500.*
[3] (*1910*) *14 N. L. R. 73.*
[4] (*1926*) *28 N. L. R. 391.*
[5] (*1949*) *40 C. L. W. 25.*
[6] (*1915*) *18 N. L. R. 413.*
[7] (*1950*) *44 C. L. W. 69.*

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to the sole arbitration of Messrs. Satchithananda, Schokman and de Silva, Chartered Accountants of Colombo. The learned District Judge made the following order : " Allowed, issue commission returnable 22/12/49 ". When the case came up in appeal it was held that " the proceedings make it clear that neither the application for reference to arbitration nor the order of Court has been made in accordance with the provisions of the Code ", and the order of reference was quashed. But clearly there was in that case a written application signed by the parties which fully complied with the literal requirements of section 676 , and the irregularity which avoided both the application and the order was that, in the opinion of the Court, the reference being one made to three arbitrators, there should have been provision made for a difference of opinion in accordance with the requirements of section *678* of the Code.

The only case brought to our notice which goes directly counter to that of *Menike v. Ukku Amma* [1] is *Madasamy v. Amina* [2] which was decided by Basnayake J. sitting alone. The Journal entry which records the agreement for arbitration was signed by the plaintiff and bore the left thumb impression of the defendant. It was held that " a *lis* may be taken away from the jurisdiction of the Courts to an arbitrator only in strict conformity with the prescribed procedure " and that " the absence of the application in writing contemplated by section 676 (2) rendered the reference void ". Although no express mention is made in the judgment to the 1915 case [1] it seems clear from the observation which had previously been made *obiter* by Basnayake J. in *Girigoris v. Punchi Singho* [3] that he was unwilling to follow the 1915 decision of Wood Renton C. J. and de Sampayo J. That decision of two eminent judges had apparently not been questioned in this Court until 1949, and was presumably followed in Courts of first instance during a long period. But that is far from being the principal reason for my opinion that the decision must be approved. It should be apparent from the examination of the authorities that there had been no case before 1915 in which the contrary view was expressed. In fact this Court had never until then had occasion to consider the validity of a reference made in pursuance of an oral agreement, the purport of which was recorded by the Judge in an *entry subsequently signed both by himself and by all the parties.* The possibilities of such a situation was however expressly referred to in *Ramaswamy Kangany v. Aiya Cutty Kangani* [4] where it was viewed with favour by Dias J., who subsequently delivered the judgment of the Collective Courts in *D. C. Galle 42,400* [5] and who was a member of the Collective Court which decided both the cases reported in the 7th volume of the *Supreme Court Circular.*

The remark of Fleming A.C.J. in the second of the latter cases— " It is not pretended that (the Judge's note) was signed by the parties " — was superfluous and misleading, unless the learned Judge thought that the affixing of the signatures would, or at least might, have made a difference. These observations of Dias J. and Fleming A.C.J. made as they were by Judges who were insisting upon strict compliance with the formal requirements of section 676, must undoubtedly have influenced the minds of

[1] *(1915) 18 N. L. R. 413.*
[2] *(1951) 45 C. L. W. 40.*
[3] *(1949) 40 C. L. W. 25.*
[4] *(1879) 2 S. C. C. 59.*
[5] *(1879) 2 S. C. C. 85.*

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Wood Renton C.J. and de Sampayo J. when the contemplated circumstances came up for consideration for the first time in 1915 ; nor could Wood Renton J. be fairly said to have ignored his own observation as to strictness which was made in *Pitche Tamby v. Fernando* [1].

While an actual written application signed by the parties or by their proctors acting in pursuance of a special authority filed of record would be the ideal mode of compliance with section 676, the question which has so often arisen is whether the ideal is the only mode of compliance. The obvious intention of the Legislature was that the Court is authorised to refer the dispute involved in a pending suit to arbitration only if—

(*a*) the minds of the parties have been clearly directed to the course of arbitration ;

(*b*) they voluntarily agree to the adoption of that course, and,

(*c*) their agreement is evidenced in the record in a manner which leaves no doubt that conditions (*a*) and (*b*) are satisfied.

I think that in the 1915 case decided by Wood Renton C.J., all these conditions were fulfilled.

The case before us, while not on all fours with that case, is perhaps a stronger one. The parties on 10th December, 1949, sign an agreement in which they expressly state their desire to submit the dispute to arbitration by a named arbitrator, and they proceed to give effect to that desire by specially authorising their proctors to apply to the Court for a reference. This agreement is filed in Court two days later, and, in the presence both of proctors and counsel, the Court enters a minute that a joint motion is filed, it being clear that every one had assumed either that there was in fact a joint motion or that the agreement already signed by the parties constituted the necessary joint motion. Upon facts somewhat similar to those existing in the case decided by Wood Renton C.J., there might conceivably be scope for the suggestion that the agreement of the parties was made on the spur of the moment in Court and therefore did not represent the free and voluntary decision of all the parties. Indeed, the judges who decided *Bimbarahami v. Kiribanda Muhandiram* [2] as well as *Casim Lebbe v. Samal Dias* [3] (both of which were cases of *entries unsigned by the parties*) were much influenced by the observation of Cayley C.J. in *De Fonseka v. De Fonseka* [4] that "*there is so much proneness on the part of the legal practitioners in this country to refer pending cases on the day of trial to arbitration*, that it is of great importance that the consent of the parties themselves should be formally, expressly and deliberately given". Such an observation, however, just at the time it was made and approved, could not perhaps be made with equal justification at the present time in a case where parties orally agree to arbitration in the presence of the Court *and subsequently sign a minute to that effect.* But such an observation would be quite out of place in a case like the present one where the parties have executed a document in the terms set out in the writing of 10th December, 1949.

[1] (*1910*) *14 N. L. R. 73.*
[2] (*1885*) *7 S. C. C. 99.*
[3] (*1896*) *2 N. L. R. 319.*
[4] (*1880*) *3 S. C. C. 154.*

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The Indian case of *Singh v. Mal Dhadha* [1] decided by the Privy Council is of much interest in this connection. There had been (as in the case before us) a written agreement by all the parties that the question in dispute in the suit be referred to arbitration ; the agreement was signed in person by each party to the suit, save that the guardian *ad litem* of one minor party signed on his behalf. Thereafter (as stated in the Privy Council judgment) " The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference ". Objection was subsequently taken to the award on the ground that the application for the reference was not signed by the guardian *ad litem* of the minor party. In rejecting this objection Viscount Haldane said :—" In the first place the Second Schedule to the Code of Civil Procedure, which provides, by s.1, that, where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, *does not require that the writing should of necessity be signed.* As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They (their Lordships) think, therefore, that there is no substance in the technical objection relied on ". The statement of the facts indicates that there was probably only an oral application in Court for the reference ; but even if it be assumed that the application was actually made in writing, the fact that it was unsigned was not held to constitute a material defect. As pointed out by the Chief Commissioner whose order was ultimately upheld at the appeal, the objection was not a good one " *having regard to the fact that the agreement itself was signed by all the parties concerned* ". If there is no prior signed agreement, and the parties themselves wish to apply for a reference, then clearly their signatures to a written application or else to an entry on the record would be essential in order to establish the fact of their consent. But where, as in the present case, there is both a signed agreement and a signed authorisation of the proctors, the fact of consent is already established ; and if thereafter (as held by the Privy Council) an unsigned motion is a sufficient compliance, can an oral motion by the authorised proctors be said not to be sufficient ? An oral statement made to the Court by a specially authorised agent is surely better evidence of his intention to move the Court than a mere writing which bears no signature.

Since I am relying on a Privy Council judgment in an Indian case on the subject of a reference to arbitration, I have thought it necessary to consult the Privy Council decision in *Government of the Province of Bombay v. Pestonji Ardeshir Wadia et al.* [2] which was cited in the judgment in *Madasamy v. Amina* [3] as authority for the statement that " provisions of Civil Procedure are imperative ". Some error appears to have crept into the citation, because I find it is not borne out by the report of the case. The case was one instituted against the Bombay Government by the trustees of a certain trust. In compliance with section 80 of the Indian Civil Procedure Code, the two persons who were trustees served notice of

[1] *(1915) A. I. R. (P. C.) 79.* [2] *A. I. R. (36). 1949 (P. C.) 143.*
[3] *(1951) 45 C. L. W. 40.*

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action on the Government in October, 1933. But one of them died in December, 1933, and two other persons were appointed trustees in his place, so that the suit which was ultimately filed in April 1934 was by *three trustees* as plaintiffs. It was held that the trust is not the plaintiff, as the Code does not permit trustees to sue in the name of the trust, and that as the notice given did not specify the names and addresses of all the three trustees who were the plaintiffs, the condition precedent to the filing of the suit was not fulfilled. This view of the High Court was approved by their Lordships of the Privy Council, who stated that "The provisions of *section 80* of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government ". I do not think that the 1949 decision (which contained no general observation as to the imperative nature of procedural provisions) in any way qualifies the judgment of the Privy Council in the earlier case of *Singh v. Mal Dhadha* [1].

For reasons which I have thought it proper to discuss at some length, I would hold that there has been in the present case substantial and sufficient compliance with section 676 of the Code and that the order of reference was therefore valid, and I would further respectfully agree with the decision in *Menike v. Ukku Amma* [2].

There remain for consideration the other objections to the validity of the award which were taken by the defendant. At the hearing before the learned District Judge it was contended —

(1) That due notice of the filing of the award was not served on the defendant.

(2) That no specific issues had been agreed upon for adjudication by the arbitrator and that the reference related to matters outside the plaintiff's pleadings.

(3) That the arbitrator had been guilty of misconduct in that he had asked for and received fees from the plaintiff alone before making the award.

No arguments were urged in regard to other objections taken in the filed statement of objections.

Upon the question of the want of due notice, the learned Judge held that there was a valid notice to the effect that the award had been filed in Court. Counsel for the defendant has not succeeded in persuading us that this finding was incorrect.

Upon the second mentioned objection we were referred to the case of *Fernando v. Fernando* [3]. The judgment there indicates that the reference was bad on its face because it purported to refer matters which were clearly outside the matters in dispute in the action. In the present case however, there is no mention in the order of reference of any specific matter falling outside the scope of the action. The arbitrator was required to determine " all matters in dispute in this action and all other matters in dispute between them ". At the stage when the reference was made,

[1] *(1915) A. I. R. (P. C.) 79.* [2] *(1915) 18 N. L. R. 413.*
[3] *(1951) 53 N. L. R. 486.*

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issues had not been framed between the parties nor had answer been filed. The matters in dispute in the action were therefore, all the matters upon which the plaintiff relied in his plaint. Notwithstanding that the arbitrator was authorised to determine other matters in dispute, he was not even requested by the parties to consider any other specific matter. Issues were suggested to him by counsel for both parties and every issue suggested was one which arose upon the averments in the plaint. Accordingly, the only matters ultimately determined by the award were matters arising upon those averments. It is not necessary therefore for the plaintiff even to rely on severability. I note also that, in the case last referred to, the objection that the reference contained extraneous matter was first taken before the arbitrator himself, but was disallowed by him. But in this case, the objection was only taken after the award was filed. The inclusion in the reference " of other matters in dispute " did not have the result that other matters were even mentioned at the hearing before the arbitrator. I think therefore that this part of the second mentioned objection must fail. As to the other part of it, namely that the reference did not specify the particular matters to be determined, I think the objection is purely a technical one. If issues had been framed, and " all the matters in dispute in the action " had been referred, the reference would have been tantamount to a specific recital of the issues as framed. But as no issues were framed, the reference was in my view tantamount to a specific recital of all the matters arising upon the plaintiff's averments. That being so, this part of the second objection must fail.

As to the objection thirdly mentioned, the record indicates that the Judge has found that there was no legal misconduct on the part of the arbitrator, and we were not invited to review the correctness of that finding.

Even assuming that the objections were taken in due time (which the plaintiff did not concede), they have all failed. No ground has been made out for correcting, remitting or setting aside the award. The appeal must therefore be allowed and the order of the learned District Judge set aside.

The case will now go back to the District Court, where, " on a day of which notice shall be given to the parties" (section 692), the Court will proceed to give judgment according to the award. The defendant must pay to the plaintiff the costs of the arbitration proceedings and of the subsequent proceedings in the District Court, as well as the costs of this appeal.

GRATIAEN, J.—

My brother Fernando has admirably distinguished the facts of this particular case from those which came up for consideration in the earlier decisions. He has by this means found a just solution to the problem before us without doing violence to the rules of *stare decisis*, and I agree to the order proposed by him.

The decisions in *Bimbarahami's* case [1] and *Gonsales'* case [2], though pronounced by a Collective Court, do not strictly possess the conclusive

[1] *(1885) 7 S. C. C. 99.* [2] *(1885) 7 S. C. C. 101.*

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authority which attaches to decisions of a Bench constituted under section 51 of the present Courts Ordinance. Nevertheless, they have consistently been followed ever since, sometimes without enthusiasm, in the later rulings referred to by my brother. It is therefore too late for a Bench of two judges to revive the controversy at this stage. At the same time, if they be construed too narrowly, we would fall into error by forgetting the true principle which underlies the provisions of section 676.

What then is the *ratio decidendi* which we must acknowledge as binding on us ? The answer is to be found in the observations made 40 years ago by Wood Renton C.J., with whom de Sampayo J. agreed, in *Menike v. Ukku Amma* [1]. The learned Chief Justice there pointed out that " the main object " of section 676 was to ensure " that there is on the face of the record affirmative evidence of the assent of both sides to a proposed reference to arbitration ". As Wood Renton C.J. had, on a previous occasion, considered himself bound by the ruling in *Gonsales'* case [2], his later clarification is of special value.

The principle of the thing is perfectly clear. Once a dispute is brought before a Court of Justice, the legal rights of the parties must generally be determined by the regular tribunal vested with jurisdiction in the matter. An exception arises when the parties, having themselves mutually agreed that the dispute should be referred to arbitration, invoke the jurisdiction of the Court to implement that agreement. Section 676 gives recognition to this fundamental principle and also prescribes the procedure which ought to be followed in order to give effect to it. Here, as in England, it is the free consent of the parties which is the foundation of the Court's jurisdiction to refer any dispute in a pending action to the decision of an extra-judicial tribunal (which acts, however, under the general supervision of the regular Court). But in Ceylon, a futher precaution is taken to eliminate the temptation to repudiate agreements which are not evidenced in writing. Accordingly, section 676 (2) requires that there should be incontrovertible proof on the face of the record (1) that all the parties (or their proctors specially authorised in the matter) had agreed that the reference to arbitration should be made, and (2) that they had formally requested the Court to implement their agreement. Provided that the consent of the parties to divert the proceedings to an arbitrator has been conclusively established, and provided also that the underlying principle of section 676 (2) has been substantially complied with, it is idle thereafter to challenge the authority of the Court to vest the arbitrator with jurisdiction over the dispute. An order for reference is not reduced to the status of a " nullity " merely because of some immaterial omission to cross a " t " or dot an " i " in the formal application.

In *Menike's* case [1] it was held that if an oral agreement communicated to the Court by the consenting parties was reduced to writing (in the form of a journal entry) by the Judge and signed by the parties in his presence, there was sufficient compliance with section 676 (2). As my brother Fernando observes, this is a much stronger case. The formal agreement dated 10th December, 1949, signed by both parties, was tendered to the Court by their proctors who had been specially authorised in the same document to make the application on their behalf under section 676.

[1] *(1945) 18 N. L. R. 413.* [2] *(1885) 7 S. C. C. 101.*

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The Court treated the document so tendered as "an applicaton in writing" within the meaning of section 676 (2), and both parties adopted that ruling as correct. It would therefore be monstrous to uphold the objection that (after both parties had submitted to the arbitrator's jurisdiction at every stage of the proceedings) the document was, for some hyper-technical reason, defective from a purist's point of view.

Appeal allowed.

[In the Court of Criminal Appeal]

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

REGINA *v.* P. M. SOMAPALA *et al.*

Appeals 66–68, with Applications 106–108, of 1955

S. C. 28—M. C. Walasmulla, 12,723

Mens rea—*Joint indictment—Several accused—Common intention—Guilty knowledge—Misdirection—Penal Code, ss. 32, 146, 294, 317.*

By Section 32 of the Penal Code—

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Held (by the majority of the Court), that the Section has only a limited scope in relation to offences in which guilty knowledge is an element. It does not constructively impute to one *socius criminis* the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts, has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence.

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

Colvin R. de Silva, with *M. L. de Silva*, *T. Velupillai* and *S. M. H. de Silva*, for the accused-appellants.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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February 13, 1956. GRATIAEN, J.—

There were three appellants in this case, the second and third being brothers-in-law of the first. They were jointly indicted for the murder of V. P. Sirisena who died at the Civil Hospital, Galle, on August 13th, 1954, in consequence of injuries inflicted on him two days previously in the 2nd appellant's house in Kirama. The appellants were acquitted of murder, but the jury unanimously found each of them guilty of culpable homicide not amounting to murder.

The appeal of the 1st appellant was not pressed before us and his conviction was accordingly affirmed. At the conclusion of the argument, however, the Court quashed the convictions of the other appellants for culpable homicide not amounting to murder and substituted in each case a conviction for grievous hurt punishable under S. 317 of the Penal Code.

The case for the Crown was largely based on certain statements (admissible under S. 32 of the Evidence Ordinance) which the deceased person had made to reliable witnesses as to the circumstances of the transaction which resulted in his death. His version was corroborated in part by the witness Charles who was present during the earlier stages of the incident. It is safe to assume that the jury was perfectly satisfied that, when the deceased and Charles were passing the 2nd appellant's house at about 8.30 p.m. on the night in question, all three appellants waylaid the deceased and dragged him forcibly into the house. Charles escaped, and was unable to say what took place thereafter behind the closed doors of the 2nd appellant's house, but, according to the dying declaration previously mentioned, all the appellants assaulted the deceased very severely with hands and with clubs.

The motive suggested for this high-handed conduct was that enmity had arisen between the parties owing to friction engendered during a recent election campaign ; there had also been bad feeling in connection with a trivial incident which took place three weeks previously in a neighbour's boutique.

After the assault, the appellants ran away, leaving their victim behind in the empty house. In the meantime Charles had spread the alarm in the locality and a crowd of neighbours collected outside the house, but none of them had the courage to enter it. At about 11.30 p.m. a Police Inspector who happened to be passing in a jeep arranged for the injured man to be conveyed to Walasmulla for medical attention. As surgical treatment was considered to be necessary, the man was taken to the Civil Hospital at Galle on August 12th, and a surgeon operated on him for compound fractures in both legs. On the following morning the patient died.

The nature of the injuries described by Dr. Udalagama who carried out the post-mortem examination made it clear that this unfortunate man had been severely " beaten up ". Several contusions had been caused by blows with fists ; he had also sustained, as a result of blows inflicted with one or more clubs, two simple fractures in his forearms and a comminuted compound fracture in the shin-bone of each leg. In addition, Dr. Udalagama found an " angular patch of abrasion " on the chest 4½ inches long

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and 1½ inches broad which had not apparently been considered sufficiently serious to call for any special investigation at the Hospital with a view to the detection of possible complications. The autopsy revealed, however, that, in consequence of the blow which caused this particular injury, the 7th rib had been fractured in such a manner as to pierce the right lung. According to Dr. Udalagama, it was this undetected complication that proved fatal. He pronounced that shock and haemorrhage from the injury to the lung was "the primary cause of death" to which the other injuries were contributory factors.

The Crown offered no proof that any particular injury had been inflicted by any particular appellant, so that, at the time when the evidence for the prosecution was closed, the Crown had to rely on the principle of vicarious liability laid down in S. 32 of the Penal Code.

The 1st appellant alone gave evidence in support of his own defence and that of his co-accused. He accepted sole responsibility for all the injuries inflicted on the deceased, and stated that the other appellants were not present at all at the time of the assault. At the same time he gave a version which, if true, would have entitled him either to an acquittal on the ground that he had acted justifiably in self-defence or at least to a verdict of culpable homicide not amounting to murder on the ground that he had exceeded that right. It is safe to assume, however, that the jury rejected this version of the circumstances leading to the assault and also of the *alibi* relied on by the 2nd and 3rd appellants.

The learned Judge gave adequate directions to the jury as to how the provisions of S. 32 of the Penal Code ought to be applied in relation to the charge of murder. Our decision must therefore be based on the assumption that, in acquitting the appellants of murder, the jury were not satisfied that any appellant, by causing one or more injuries which in fact resulted in the man's death, had acted in furtherance of a "murderous intention" shared by all of them. It is in the light of these findings of fact that we must examine the verdicts convicting the 2nd and 3rd appellants of the lesser offence of culpable homicide not amounting to murder on the basis of guilty knowledge.

Having pointed out to the jury that there was no evidence to prove that either the 2nd or the 3rd appellant directly caused any injury which resulted in the victim's death, the learned Judge correctly explained that a conviction would only be justified by a proper application of the provisions of S. 32 to the facts as found by the jury. Up to this point the summing up was free from error. Unfortunately there followed, in the opinion of the majority of the Court, misdirections in law as to the proper limits within which S. 32 could be invoked as the foundation of a verdict based on guilty knowledge. The reasons for the decision of the majority of the Court must now be explained.

There were several disconnected passages in which the learned Judge purported to explain the scope of S. 32 in relation to the lesser offence of culpable homicide not amounting to murder,—that is to say, if the jury were unable to conclude that the victim's death had been caused by acts committed in furtherance of a common intention to produce that result.

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Each direction was substantially to the same effect. Having correctly explained the elements of this lesser offence as distinct from the offence of murder, the learned Judge said :

> " If you find *that the offence actually committed by the assailant is culpable homicide not amounting to murder*, and if you find *that these three accused were actuated by a common intention to commit that offence*, then you cannot find them guilty of murder but you can find them guilty of culpable homicide not amounting to murder. "

These directions involve two distinct assumptions. The first was calculated to mislead the jury into thinking that in certain situations S. 32 imputes vicarious responsibility to a *socius criminis* not only for the " acts " but also for the " guilty knowledge " of his confederates. The second proposition was also incorrect. Where the death of a victim results from an act or series of acts committed by one or more confederates in pursuance of a common intention to do a criminal act of a kind which is known by them *collectively* to be likely to cause death, the proper conclusion is that all are guilty of murder as defined in the second part of S. 294 of the Penal Code.

S. 32 of the Penal Code has only a limited scope in relation to offences in which guilty knowledge is an element. The section which is the same as S. 34 of the Indian Code reads :

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. "

These words have been authoritatively explained by Lord Sumner in *Barendra Kumar Ghosh's* case [1]. The " act " includes " the whole action covered by the unity of criminal behaviour which results in something for which an individual would be punished if it were all done by him alone ", and liability is imputed to each individual *socius criminis* not merely for his own acts but for the totality of the acts committed by his confederates in furtherance of their common intention. Vicarious or collective responsibility attaches in such a situation for the result (e.g., death) of their united action. But S. 32 certainly does not, in addition, constructively impute to one *socius criminis* the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal *acts* has committed an *offence* involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence. See also *State v. Saidu Khan* [2].

The application of S. 32 to the facts of a given case does not necessarily lead to the conclusion that each confederate is guilty of the same offence. Let it be supposed that A and B agree to assault C with hands. A strikes the first blow in furtherance of their common intention, and causes C an injury which under normal circumstances would constitute simple hurt (being clearly insufficient in the ordinary course of nature to cause the

[1] (*1925*) *A. I. R. (P. C.) 1.* [2] (*1951*) *A. I. R. All. 21*

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death of a person in a sound state of health). But, unknown to A, C was labouring under such a disease that even a mild blow was sufficient to cause the death of C who dies in consequence of the blow. B, on the other hand, was perfectly aware of C's disease and fully realised that even a mild blow of the kind inflicted by A in furtherance of their common intention would have been sufficient to cause C's death. In such a situation, A who administered the blow is guilty only of simple hurt, but B, who is vicariously liable for A's act, is guilty of murder. If, alternatively, B knew that there was only a bare possibility of death resulting from the blow inflicted by A, he has committed the offence of culpable homicide not amounting to murder based on his guilty knowledge. But neither B's murderous intention in the first illustration nor his guilty knowledge in the second could be imputed constructively to A.

S. 32 does not go counter to the principle of the criminal law of this country that as a general rule the basis of a man's guilt is his own *mens rea*. One (and perhaps the only) exception to this rule is found in S. 146 whereby a member of an unlawful assembly is declared to be vicariously liable for an offence (committed by another) which he knew was " likely to be committed " in the prosecution of their common object. But S. 146 does not touch the present case.

The Penal Code has not adopted the English common-law doctrine of " constructive malice ", as explained in *R. v. Beard* [1] and *R. v. Jarmain* [2], whereby a man who inadvertently kills another in the commission of a felony by violent means is guilty of murder. Nor does it recognise the rule of vicarious responsibility for actual or " constructive " malice. See *R. v. Ridley* [3]. In that case, a principal of the second degree to an offence of burglary was held to be guilty of murder because his confederate, by killing someone in furtherance of their common design to commit the burglary by violent means, had produced a result which neither of them intended.

Under our law, the only acceptable basis for a verdict convicting any particular appellant of culpable homicide not amounting to murder in the facts of the present case would have been a finding that he personally knew that death, though not intended, was likely to result from the combined assault. In the absence of a proper direction on this crucial issue, the majority of us were quite unable to conclude that the jury had addressed their minds to the question whether the requisite guilty knowledge (actual and not constructive) was brought home to either the 2nd or the 3rd appellant individually. Accordingly the verdicts against the 2nd and 3rd appellants of culpable homicide not amounting to murder could not be supported.

On the other hand, it was implicit in the verdicts recorded against the 2nd and 3rd appellants that, in the opinion of the jury, both of them did at least share with the 1st appellant an intention to assault the deceased severely without legal justification. S. 32 of the Penal Code therefore imputes vicarious responsibility to each of them for the entire series of criminal *acts* involved in the combined assault. The cumulative injuries

[1] (*1920*) *A. C. 479.*

[2] (*1946*) *K. B. 74.*

[3] (*1930*) *22 C. A. R. 148.*

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described by Dr. Udalagama were clearly of such a character as to disclose the offence of grievous hurt (of which guilty knowledge is not an element). As some of these injuries had been inflicted with dangerous weapons, the aggravated offence of grievous hurt punishable under S. 317 was established. The Court accordingly substituted convictions for this offence against the 2nd and 3rd appellants, and passed sentence on them accordingly.

Conviction of 1st appellant affirmed.

Convictions of 2nd and 3rd appellants altered.

1956 *Present :* **Sansoni, J.**

EDWIN SINGHO, Appellant, *and* S. I. POLICE, KADAWATTA, Respondent

S. C. 171—M. C. Gampaha, 24,378

Charge—Alternative charge—Duplicity—Particulars of offence—Motor Traffic Act No. 14 of 1951, ss. 153 (2), 153 (3), 219 (1), 219 (2)—Criminal Procedure Code s. 169.

The accused was charged and convicted on two counts, viz., (1) with having driven a motor car recklessly or in a dangerous manner or at a dangerous speed, in breach of section 153 (2) of the Motor Traffic Act, (2) with having driven the same bus negligently or without reasonable consideration for other persons using the highway, in breach of section 153 (3) of the Motor Traffic Act.

Held, that the charges framed in the alternative were bad for duplicity.

Sansoni, J.—" I think the matter goes beyond the question of the accused being prejudiced by having to face a count which involves many different offences framed in the alternative : the more important consideration is that it is not clear, upon a conviction or an acquittal, of what offence he has been found guilty or acquitted. "

Held further, that, under section 169 of the Criminal Procedure Code, particulars setting out the details of each offence should have been mentioned in the charge.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

Frederick W. Obeyesekere, for the accused-appellant.

L. H. de Alwis, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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March 6, 1956. SANSONI, J.—

The accused-appellant was charged on two counts :

1. That he " did on 16th April, 1955, at Kadawatta, being the driver of bus Z 6730, on a highway, to wit, the Colombo-Kandy road drive the said motor bus recklessly or in a dangerous manner or at a dangerous speed in breach of S. 153 (2) of the Motor Traffic Act No. 14 of 1951, and thereby committed an offence punishable under S. 219 (1) of the said Act.

2. At the same time and place aforesaid .... drive the said bus ...., negligently or without reasonable consideration for other persons using the highway in breach of S. 153 (3) of the said Act, and thereby committed an offence punishable under S. 219 (2) of the said Act."

After trial the learned Magistrate convicted the accused on both counts and fined him Rs. 100 on the first count and Rs. 50 on the second count.

The chief witness for the prosecution said that when he had halted his car near the 14th milepost on the Colombo-Kandy road behind another car, the accused's bus came from behind him, flashed past him, overtook both cars and proceeded : at that time a lorry came from the opposite direction and the lorry driver had to swerve to his left to avoid a collision with the accused's bus. The witness further said that he followed the bus, driving at about 40 to 45 m.p.h., and was just able to get close enough to note the number of the bus.

The next incident which the same witness spoke to seems to have happened about three miles from where the first incident took place. The accused's bus overtook another vehicle while a car was coming from the opposite direction. The driver of that car had to drive on to the grass verge in order to avoid a collision. The witness complained at the Kadawatta Police Station, which is between the 9th and 10th mileposts.

Another witness called for the prosecution spoke to a third incident. He said that when he was standing outside his house, which is about 1/4 mile on the Colombo side of the Kadawatta Police Station, he saw this bus being driven very fast round a bend.

The accused gave evidence on his own behalf. He said that the 14th milepost is at Imbulgoda while Kadawatta is at the 10th milepost. He also said that he had been driving buses for eighteen years and had never been convicted of any offence. He was definitely of the view that this particular bus was so old that it could not be driven at more than 20 to 25 m.p.h., and if it was driven faster it " will come out in pieces "—to use his own words.

The learned Magistrate has accepted the evidence of the chief witness called for the prosecution, in preference to that given by the accused. He rejected the evidence of the other prosecution witness. I see no reason to interfere with his findings on the questions of fact.

Mr. Obeyesekera raised certain legal objections to the charge itself. He submitted

1. that the charges which were framed in the alternative were bad ;

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2. that no particulars were furnished ;

3. that the place of the alleged offences was wrongly set out in the charge.

With regard to the first objection, it is clear that the charges framed in the alternative are bad for duplicity. The first count is in respect of three different offences, while the second count is in respect of two different offences. It was held in *Police Sergeant, Lindula v. Stewart* [1] and in *S. I., Police, Dehiowita v. K. N. Perera* [2] by Jayewardena, A.J., that charges similar to the one in question were bad for duplicity, but he held that the irregularity may be cured under S. 425 of the Criminal Procedure Code if the accused has not been prejudiced. In the later case of *Pakir Saibo v. Nayar* [3], Wijeyewardene, J., also dealt with a case of duplicity, but did not say whether such duplicity was fatal. On the other hand, Schneider, A.J., in *Abeyasuriya v. Jayasekera* [4] seems to have been of the opinion that a charge which included several distinct offences was illegal.

In England the Court of Criminal Appeal has consistently quashed a conviction which followed upon a charge which was bad for duplicity. In *R. v. Wilmot* [5] the accused was convicted on a count in an indictment which charged him with having driven a motor vehicle " recklessly or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case ". In appeal, the objection was taken that the count was bad for duplicity. In upholding the objection and quashing the conviction Lord Hewart, L.C.J., followed the decision in *R. v. Surrey Justices, ex parte Witherick* [6] where a conviction of an accused charged with having driven a motor vehicle " without due care and attention or without reasonable consideration for other persons using the road " was quashed. The *ratio decidendi* was set out in the judgment of Avory, J., who said : " It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autrefois convict ". Lord Hewart in the later case said that there is a duty cast on the Court in the interests of justice to quash the conviction in such a case even though the point was not taken at the trial.

In my view the conviction of the accused in this case should be set aside on this objection alone. I think the matter goes beyond the question of the accused being prejudiced by having to face a count which involves many different offences framed in the alternative : the more important consideration is that it is not clear, upon a conviction or an acquittal, of what offence he has been found guilty or acquitted.

With regard to the second objection taken by Mr. Obeysekera, I think this is a case where particulars setting out the details of each offence should have been mentioned in the charge. The need for this was all the greater because the prosecution led evidence of three separate incidents at three different places on this highway, and in fairness to the accused he should

[1] *(1923) 25 N. L. R. 166.*
[2] *(1926) 27 N. L. R. 511.*
[3] *(1940) 42 N. L. R. 151.*
[4] *(1921) 22 N. L. R. 380.*
[5] *(1933) 24 Cr. App. R. 63.*
[6] *(1932) 1 K. B. 450.*

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have been given " particulars of the manner in which the alleged offences were committed " under S. 169 of the Criminal Procedure Code. The failure to do so has, in my opinion, occasioned a failure of justice. As a matter of practice such particulars are always stated in indictments and I have no doubt they are often stated in charges framed in Magistrate's Courts ; see, for instance, *Lourensz v. Vyramuttu* [1].

The third objection taken on behalf of the accused is in a manner connected with the second objection. In both counts the place of offence is mentioned as Kadawatta. The evidence disclosed that the prosecution was relying on acts of bad driving at three different places, only the last of which appears to have been Kadawatta itself. No indication of this was given to the accused, who may well have been misled as to the case which the prosecution intended to present against him. He was entitled to sufficient notice of that case, and such particulars as to the place of the offence as were given were inadequate if not misleading.

For these reasons I set aside the conviction of the accused and acquit him.

Conviction set aside.

1955 *Present :* **Gunasekara, J.**

SIRISENA PERERA, Appellant, *and* H. G. THEDIAS (Inspector of Police), Respondent

S. C. 785—M. C. Colombo, 2,916/B

Summary trial of non-summary offence—Appeal preferred by accused—Right of Crown to object to summary proceedings on ground of gravity of offence—Criminal Procedure Code, ss. 152 (3), 338 (2)—Penal Code, s. 457.

In a prosecution for forgery punishable under section 457 of the Penal Code the accused-appellant was tried summarily under the provisions of section 152 of the Criminal Procedure Code. The appellant had no objection to his having been tried summarily, and the Crown had no objection either until after the appellant had demonstrated that he was entitled to have his conviction set aside on the merits.

Held, that in the circumstances the gravity of the offence with which the accused was charged was not by itself a sufficient ground for remitting the case for a non-summary investigation.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Colvin R. de Silva, for the accused-appellant.

Arthur Kenneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1941) 42 N. L. R. 472.*

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July 11, 1955. GUNASEKARA, J.—

The appellant was tried summarily under the provisions of section 152 (3) of the Criminal Procedure Code on a charge of having committed an offence punishable under section 457 of the Penal Code by fraudulently or dishonestly using as genuine a document which he knew or had reason to believe to be a forged document. He was convicted of this offence and sentenced to one year's rigorous imprisonment.

According to the case for the prosecution the appellant had been occupying a house belonging to one M. E. Perera as the latter's tenant and had left it in August, 1953, after Perera had filed an action against him in the court of requests to recover arrears of rent and to have him ejected. The document in question (P1), which is dated the 4th August, 1953, purports to be signed by the appellant and M. E. Perera and states that the appellant had been living in a house belonging to Perera and had on that day " given over the keys to him without having to pay any arrears ". There is no evidence as to the custody from which P1 was produced before the magistrate's court, but it was stated in evidence by both Perera and the proctor who appeared for him in the civil action that it had been produced by the appellant at the trial of that action on the 23rd November, 1953, and Perera stated further that it was not a document signed by him or by his authority. Perera was also permitted to say in his evidence in chief that " P1 was sent to the E. Q. D. with some other documents ". (One surmises that the letters E. Q. D. stand for Examiner of Questioned Documents.) The only other witness called in the case was the record keeper of the Magistrate's Court of Colombo who produced, marked P2, the record of the action in the court of requests (without stating how he came by it) and also produced, marked P3, " the report of the E. Q. D." that was filed in that case.

The report P3 is inadmissible hearsay, and, no doubt for this reason, the learned magistrate does not refer to it in his judgment. The only matter to which he refers as evidence on the issue of forgery is that the existence of P1 is not mentioned in the appellant's answer in the civil action, which was filed in September 1953. He holds that if the document had been in existence at the time it would have been mentioned in the answer. With all respect to the learned magistrate, I am unable to agree that an omission to plead evidence can be a ground for a conclusion that the evidence did not exist at the time. Moreover, the answer filed by the appellant in the civil case was not in evidence in this case ; for although the entire record P2 was produced the only portion of it that was put in evidence was the report P3.

The only evidence there is in the case to prove that P1 is a forgery is Perera's statement that the document was not signed by him or by his authority. This evidence is not discussed or mentioned in the learned magistrate's judgment, and it does not appear whether he would have acted upon it without corroboration. The conviction must therefore be quashed.

It was conceded by the learned crown counsel that the conviction could not be supported, but he maintained that a charge of so grave an

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offence should not have been tried summarily and that the case should therefore be remitted to the magistrate's court for non-summary proceedings. In support of this contention he cited the cases of *Sheddon (Inspector of Police) v. Agosingho* [1] and *Sahabandu v. Wijeman Singho* [2], in which convictions of offences involving forgery or the dishonest use of a forged document were quashed on the ground that in those cases the charges should not have been tried summarily under the provisions of section 152 (3) of the Criminal Procedure Code, and the magistrate was directed to take non-summary proceedings. In each of those cases, however, the accused had appealed on this ground, contending in effect, that if he was to be tried he was entitled to the advantage of a trial on indictment after a preliminary magisterial inquiry. In the present case the appellant has no objection to his having been tried summarily, and the Crown had no objection either until after the appellant had demonstrated that he was entitled to have the conviction set aside on the merits. Until then it appears that both parties were satisfied with the procedure that the learned magistrate adopted in the exercise of his discretion. Neither of them raised any objection at the trial, the accused has not made it a ground of appeal that he should not have been tried summarily, and the Attorney-General has not appealed although he has a right of appeal in terms of section 338 (2) of the Criminal Procedure Code. I do not think that in these circumstances the gravity of the offence charged in this case is by itself a sufficient ground for making an order, in the exercise of the powers of revision vested in this court, remitting the case for a non-summary investigation.

The conviction of the appellant and the sentence passed on him are set aside and he is discharged.

Conviction set aside.

[1] *(1934) 1 C. L. W. 132.*

[2] *(1941) 22 C. L. W. 42.*

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1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

DHARMAWATHIE HAMINE, Appellant, *and* KIRA, Respondent

S. C. 237—D. C. Kegalle, 6,895

Vendor and purchaser—Covenant to warrant and defend title—Actio rei vindicatio *instituted by purchaser—Notice to vendor—Dismissal of action—Duty of purchaser to appeal—Liability of vendor to pay damages.*

Where a purchaser of immovable property fails to succeed in a vindicatory action instituted by him in respect of the property, his omission to appeal to the Supreme Court does not exempt the vendor from liability for damages for breach of his covenant to warrant and defend title, if the vendor was given sufficient notice of the action but did not induce the vendee to appeal.

APPEAL from a judgment of the District Court, Kegalle.

N. K. Choksy, Q.C., with *E. D. Cosme* and *O. M. da Silva*, for the Defendant-Appellant.

H. W. Jayewardene, Q.C., with *A. C. M. Uvais*, for the Plaintiff-Respondent.

July 28, 1955. BASNAYAKE, A.C.J.—

This is an action for damages in a sum of Rs. 3,500 for failure to warrant and defend title to a field called Kaththottiye Cumbura *alias* Andoluwe Kumbura which the plaintiff-respondent (hereinafter referred to as the respondent) purchased from the defendant-appellant (hereinafter referred to as the appellant). The respondent was never able to get possession of the field. He was first obstructed by one Chara. The respondent thereupon brought an action against him. In that action the respondent was declared entitled to the northern half of the field. When the respondent proceeded to take possession of the northern half to which he was declared entitled, two persons by name Sandara and Seelawathie obstructed him. He was thereupon compelled to institute a second action in the District Court, this time against Sandara and Seelawathie. The respondent failed in that action, but did not appeal. The instant action is the sequel to that failure.

The present appeal is by the respondent's vendor who has been cast in damages. Learned Counsel for the appellant contends that the notice served on her was defective in that she was not asked to intervene in the action. In support of his contention he has referred us to the case of *Appuhamy v. Singho et al.* [1]. He relies on the following passage in the judgment at page 98 :—

> "The demand to warrant and defend title need not necessarily be in writing, although, perhaps, it is the most convenient form of making the demand. The demand may be verbal where the vendor is asked by the vendee to intervene in the action and to establish the title that has been conveyed".

[1] *15 N. L. R. 97.*

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2——J. N. B 54769—1,590 (5/56)

He also relied on the case of *Jinadasa v. Duraya* [1]. In that case de Sampayo J. having referred to a passage from *Voet* 21, 2, 30, goes on to say :

> " The same passage in *Voet* shows that if the purchaser is defeated in the action and does not appeal, or, having appealed, does not press the appeal, in a case where the vendor has not intervened or undertaken the defence (absente venditore), he is likewise deprived of any remedy against the vendor ".

On the authority of that statement learned Counsel submits that the respondent should have appealed in the second action and as he did not appeal he is not entitled to the redress he claims in the instant action.

It is unsafe to rely on an isolated passage from *Voet* and base an argument thereon without examining the entire context in which it occurs. The passage in question occurs in the title " De Evictionibus et Duplae Stipulatione " (Bk. XXI, Tit. II)—" Of Evictions and Warranty of Title and the Covenant for Double Value ". None of the other commentators deals with this subject in as much detail as *Voet*. After discussing several aspects of eviction and warranty of title *Voet* goes on to say in paragraph 20 of that title :

> " It must now be observed that a person from whom a thing has been evicted cannot sue his *auctor* (i.e., vendor) or the other persons above mentioned on account of eviction unless he has given him timeous notice that the suit (for eviction) has been commenced, and, according to Our Usages, a copy of the plaintiff's libel ; not for the purpose of transferring the suit to him and to his *forum*, but rather in order that he may take part (intervene) in the litigation (*ut lite assistat*) and undertake the defence in the *forum* of the party sued, and establish his title . . . . This notice having been given, whether the " auctor " takes part in the suit in order to prevent collusion, or suffers that the purchaser constitute him " procurator in rem suam " (procurator in his own interest) or whether he does not openly associate himself with the suit, but supplies the defendant with assistance and proof for the assertion of the right,—or whether he does none of these after being cited once or oftener according to the usages of the place, but altogether neglects the suit (in all these cases) he (the purchaser) has recourse against his " auctor " after eviction provided the purchaser himself has not failed to defend it with all his power ; lest otherwise the " auctor " should be considered to have been defeated rather on account of absence than because he had a bad cause ".

The notice that should be given to the vendor need not be given through the Court. It can be given by the purchaser to the vendor in person [2] and may be given not only before but even after *litis contestatio* provided it be given before it is too late for the vendor to intervene, for until decree the vendor is entitled to an opportunity of defence [3]. Failure to give notice of proceedings to evict the purchaser is not fatal to an action

[1] *20 N. L. R. 158.* [2] Voet *Bk. XXI, Tit. II, para. 21.*
[3] *Ibid. §§ 22 & 23.*

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for breach of warranty if the purchaser can show a manifest want of right on the part of his "*auctor*" [1] or where it is agreed that notice need not be given or where the *auctor* has intentionally concealed himself in order to prevent notice being served on him [2].

It should be borne in mind that *Voet* discusses the subject of warranty of title and eviction mostly from the angle of the purchaser who is called upon to defend an action for eviction. The considerations governing the case of a purchaser who is called upon to defend an action in eviction cannot be applied indiscriminately to the case of a purchaser who plays not a passive but an active role in asserting his title by instituting legal proceedings. Judged by any standard the respondent is entitled to succeed.

The appellant was given notice of the second action which resulted in the respondent's eviction, both before and after its institution. She was not only summoned to give evidence but was also noticed through the Court in the following terms :—

> "You are hereby summoned to appear in this Court in person on the 12th day of December 1949 at nine o'clock in the forenoon to give evidence on behalf of the plaintiff in the abovenamed action and *to warrant and defend the title conveyed by you to the plaintiff* in the above as per copy of plaint sent herewith.
>
> "And you are not to depart thence until you have been examined or have produced the documents and the Court has risen or unless you have obtained the leave of the Court".

The appellant was called as a witness by the respondent in that action and was in Court throughout the proceedings.

Having had ample notice of the proceedings in which the respondent was evicted and after being afforded every opportunity of intervening in those proceedings the appellant is not entitled to escape her liability on the ground that the respondent did not appeal, without even endeavouring to show that he had a reasonable chance of success in an appeal and that she did all she reasonably could to bring that fact to his notice and induce him to appeal.

Learned Counsel for the respondent relied on two decisions of this Court, viz., *Wirawardane v. Ratnaike* [3] and *Punchi Appuhamy v. Rambukpotha* [4]. They do not call for any discussion as the view we have taken is in accord with those decisions.

For the above reasons we think that the appellant is not entitled to succeed in this appeal.

The appeal is accordingly dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed

[1] *Ibid* § 22.
[2] *Ibid* § 24.
[3] *22 N. L. R. 219.*
[4] *43 N. L. R. 333.*

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1955 *Present :* **Gratiaen, J., and Swan, J.**

THE ATTORNEY-GENERAL, Appellant, *and* G. N. RUSSEL, Respondent

S. C. 24 (Inty.)—D. C. Colombo, 32,425M

Delict—Action against public officer—Substitution of Attorney-General as party defendant—Effect—Civil Procedure Code, ss. 462, 463.

If in an action in tort against a public officer the Attorney-General is substituted under section 463 of the Civil Procedure Code in the place of the party defendant, the same issues arise as would have arisen in the action against the public officer himself ; if the plaintiff's cause of action against the public officer is established the decree is entered against the Attorney-General and will be satisfied in the same way as any other decree awarding relief against the Crown.

APPEAL from an order of the District Court, Colombo.

V. Tennekoon, Crown Counsel, for the petitioner-appellant.

S. J. Kadirgamar, for the plaintiff-respondent.

Cur. adv. vult.

November 11, 1955. GRATIAEN, J.—

This is an appeal by the Attorney-General against an order refusing his application under section 463 of the Civil Procedure Code (as amended by section 5 of the amending Act No. 48 of 1954) to be substituted as a party defendant in an action between private parties.

The plaintiff had sued Mr. R. G. Senanayake of Gregory's Road, Colombo, on 29th June 1954 to recover Rs. 6,600 as damages. The action is founded in tort, the allegation being that, shortly prior to 16th March 1954, Mr. Senanayake had "intentionally or knowingly and without legal justification" induced or procured the Galle Face Land and Building Company Ltd. to commit a breach of its subsisting agreement with the plaintiff for the tenancy of a residential apartment in Galle Face Court. Mr. Senanayake entered an appearance in the action on 16th July 1954 and was directed to file his answer to the plaint on 20th August 1954, on which date he applied for, and obtained, an extension of time until 3rd September 1954. A further indulgence was granted him until 8th October 1954, but on the previous day the Attorney-General made an application under section 463 (as amended) to be substituted as a party defendant on the ground that he (the Attorney-General) had "undertaken the defence of the said R. G. Senanayake". The application was supported by Mr. Senanayake's affidavit to the effect that he had held the office of Minister of Commerce, Trade and Fisheries at all times material to the cause of action set out in the plaint, and had continued to do so until 10th July 1954.

Section 463 of the Civil Procedure Code, in its original form, provided as follows :—

"463. If *the Government* undertake the defence of an action against *a public officer*, the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action."

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By virtue of section 5 of the amending Act No. 48 of 1954, which passed into law pending the present action, section 463 now reads :

> " If *the Attorney-General* undertakes the defence of an action against a *Minister, Parliamentary Secretary or public officer*, the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action."

The Attorney-General's application seems to have been viewed by the plaintiff with considerable apprehension. The action having been filed on the basis that Mr. Senanayake had personally committed an actionable wrong, it was feared that his sudden disappearance through "the trap-door", so to speak, of section 463 might leave the plaintiff (if he established his cause of action) without a judgment-debtor. Moreover, so Mr. Kadirgamar explained, doubts were entertained as to whether the substitution of the Attorney-General as defendant might not completely alter the character of the litigation so as to divest the plaintiff of his remedy against the only person who could be held directly liable under the law of this country for the tort complained of. Let me summarise the suggested consequences : the Crown enjoys complete immunity in Ceylon from liability for torts committed by one of its executive officers (be he a Cabinet Minister or only a subordinate servant of the Crown). Was it not therefore open to the Attorney-General, upon his substitution, to plead that no judgment could be entered against him (as legal representative of the Crown) in respect of Mr. Senanayake's personal tort ? In all these circumstances, the plaintiff expressed a strong preference for proceeding against Mr. Senanayake alone.

Having explained these apprehensions to the learned District Judge, Mr. Kadirgamar raised a number of objections to the Attorney-General's application, and relied in particular on the argument that section 463, having been amended only after the action commenced, could not operate retrospectively to deprive the plaintiff of rights which had previously accrued to him. This latter objection was upheld by the learned Judge.

During the argument in appeal, I pointed out that, upon a proper construction of section 463 (in its original as well as its amended form), there was no substantial reason for fearing the consequences which the plaintiff has in contemplation. The section, when invoked, can never operate to the detriment of a plaintiff who establishes that he has suffered injury at the hands of a public officer. It merely empowers the Attorney-General, in cases which seem to him appropriate, to indemnify a plaintiff against (for instance) actionable wrongs committed by public officers or servants. In reaching this conclusion, I am fortified by the statement made to us by learned Crown Counsel that no other interpretation is suggested on behalf of the Attorney-General. It is indeed a matter for regret that this assurance was not also given in the Court below.

The true scope of section 463 must be examined in the background of the Crown's continued (but much deplored) immunity in this country from liability for the torts of its public officers. This immunity is precisely the

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same as it was in England until the Crown Proceedings Act of 1947 passed into law. In Ceylon, therefore, what Lord Atkin (then Atkin L. J.) said in *Mackenzie v. Air Council* [1] is still correct :

> " The Crown itself can do no wrong, and the public revenue cannot be made liable without the Crown's consent to remedy wrongs committed by servants of the Crown. "

Only the individual public officer who commits or authorises the commission of a tort is answerable in law to the victim of his wrongful act ; and it is no defence for him to say in such a situation that he had acted in obedience to the orders of the executive government or of anyone else. " Since the King can do no wrong, he can authorise no wrong. "

In England, before the Act of 1947 was passed, government departments frequently resorted to a beneficial device for making the public revenue available for the settlement of claims for tort in situations where a moral obligation was considered to be imposed upon the Crown. The Treasury Solicitor would, on request, nominate a party against whom the plaintiff could institute proceedings. The Crown stood behind the " nominal " defendant in the litigation, and, if the plaintiff succeeded, the Crown made an *ex gratia* payment of the sum awarded as damages. But the Courts eventually refused to recognise this colourable device in *Adams v. Naylor* [2] and *Royster v. Cavey* [3]. Hence the Crown Proceedings Act, 1947.

But in Ceylon, the Code of Civil Procedure expressly provides machinery by which the Crown may do justice in similar situations without resorting to the subterfuges which had been found necessary to achieve that end under the earlier English practice. Section 463 in its original form contemplated a case in which " the Government " undertakes the defence of an action against a public officer. Once that has been done, the Attorney-General " shall " (the word is imperative) apply for substitution as a defendant, and the Court " shall " (the word is once again imperative) allow the application. By this means, effect was given to " the Crown's consent to remedy wrongs " committed by a public officer. In any action that is continued after the Attorney-General's substitution as defendant, the same issues arise as would have arisen in the action against the public officer himself ; if the plaintiff's cause of action against the public officer is established, a decree is entered against the Attorney-General. As any decree against the Attorney-General in his representative capacity is in truth a decree against the Crown, the judgment-debt is paid from public funds, although, procedurally, section 462 prohibits the issue of a writ of execution against the Attorney-General (either as an original or a substituted defendant).

It will thus be seen that the Government's decision to " undertake the defence " connotes a great deal more than a mere decision to provide legal representation for the public officer concerned. It involves the acceptance of responsibility by the Crown for the satisfaction of the decree which might otherwise have been awarded in favour of the plaintiff against the public officer individually.

[1] *(1927) 2 K. B. 517 at 531.*
[2] *(1946) A. C. 543.*
[3] *(1947) K. B. 207.*

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But was the learned District Judge correct in deciding that the substitution and addition of certain words which now appear in section 463 (as amended after this action commenced) have to some extent altered or enlarged the scope of its machinery? I do not think so. The section now applies if "the Attorney-General" undertakes the defence in the action against the public officer. This does not mean that the decision is the personal decision of "Mr. So-and-so who happens to be the Attorney General of Ceylon". On the contrary, it is made on behalf of and in the name of the Crown acting through its traditional and constitutional representative in any litigation in which the Crown is interested in our Courts. Before the amendment, the term "Government of Ceylon" was equivalent in this context to "the Crown": *Le Mesurier v. Layard*[1], and the later substitution of the words "Attorney-General" introduces a distinction without a difference.

Let us now consider the effect of the express inclusion of Ministers and Parliamentary Secretaries in the class of persons whose defences may be "undertaken" by the Attorney-General. I am perfectly satisfied that these words were also added out of an abundance of caution and in order to remove doubts as to what was always obvious. Ministers and Parliamentary Secretaries hold office under the Crown. *Podi Singho v. Goonesinghe*[2]. They are "public officers" within the meaning of section 463 in its original form, and the language of the amending Act serves only to emphasise their inclusion.

For these reasons, the amendment of section 463 after the present action commenced does not offend the *prima facie* rule against retrospective legislation; it has in no way enlarged the ambit of the Crown's right of intervention in a special class of private litigation. The Court had therefore no option but to allow the Attorney-General to be substituted for Mr. Senanayake as a party defendant. Indeed, Mr. Kadirgamar made it clear to us that, if the Crown's acknowledgment of the correctness of this interpretation of section 463 has been communicated to the plaintiff in the lower Court, the application would not have been resisted. The true position is now made clear, and I repeat it only to avoid the possibility of any misunderstanding as to the legal affect of the order which I propose. The defence which the Attorney-General has undertaken is in truth the *defence of Mr. Senanayake*. The real issues arising for adjudication will be whether Mr. Senanayake was personally liable in damages upon the cause of action pleaded in the plaint. If those issues be answered in favour of the plaintiff, the decree will be entered against the Attorney-General and will be satisfied in the same way as any other decree awarding relief against the Crown. Upon this understanding, I would allow the appeal, and direct that the Attorney-General be substituted as defendant in the place of the original defendant. In all the circumstances of the case, the costs of this appeal and of the argument in the Court below should be costs in the case.

SWAN, J.—I agree.

Appeal allowed.

[1] *(1898) 3 N. L. R. 227.*

[2] *(1948) 49 N. L. R. 344.*

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1955 *Present :* **Swan, J., and K. D. de Silva, J.**

L. E. CABRAL, Appellant, *and* R. A. ALBERATNE, Respondent

S. C. 241—D. C. Colombo, 25,212/M

Negligence—Accident—Application of maxim res ipsa loquitur*—Onus of proof—Nature of burden on defence.*

In a case where the doctrine of *res ipsa loquitur* is applicable, the burden on the defendant is not only to give a reasonable explanation of the accident in question but also to show that the specific cause of the accident does not connote negligence on his part.

A motor truck belonging to the defendant ran off the road into the plaintiff's house, which was about six feet away from the edge of the road and stood at a bend in the road. Defendant pleaded inevitable accident. He sought to rebut the presumption arising from the maxim *res ipsa loquitur* by merely stating that the immediate cause of the accident was that the steering-rod got out of its place at the crucial moment. He did not, however, adduce any evidence as to how and why the steering-rod came out of its place. There was no evidence whatsoever that the vehicle was regularly serviced or serviced at all. Even the Motor Car Examiner who examined the vehicle soon after the accident had not been summoned by the defendant to give evidence.

Held, that the fact that the steering-rod went out of control was no answer unless the defendant proved—and the legal burden was on him to prove—that it was no fault of his that the steering-rod failed. The defendant did not discharge, or even attempt to discharge, the burden that lay on him and was therefore liable to pay damages.

Wije Bus Co., Ltd. v. Soysa (1948) 50 N. L. R. 350, not followed.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiff appellant.

A. H. C. de Silva, for the defendant respondent.

Cur. adv. vult.

September 14, 1955. DE SILVA, J.—

This is an appeal from a judgment of the District Judge, Colombo, dismissing the plaintiff's action in which he sought to recover damages resulting from a motor truck belonging to the defendant running off the road into the plaintiff's house and causing damage to it owing to the negligence on the part of the driver of that vehicle. Admittedly, at the time of the accident, this truck was being driven by the defendant's driver acting within the scope of his employment. The house in question stands about six feet away from the left edge of the Kandy-Colombo road when facing Colombo. This building consists of a room, a kitchen and a front verandah and is a few feet below the road level. It stands at a bend in the road. At the time of this accident which was on the 27th June,

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1951, this house was in the occupation of the plaintiff's tenant Joachim Fernando. Joachim Fernando stated that on the day in question when he was standing on the road about 10 fathoms away from this house he saw this truck being driven past him at a fast speed. He then heard a crash and saw the front portion of the truck inside his verandah. The front pillars had come down and his father and daughter who happened to be in the verandah at the time were found injured. James Singho who was driving this truck at the time of this accident said that on the day in question he drove the vehicle a distance of 43 miles from Galapitamada and that when he approached this house he found his steering wheel "turned by itself" and that he then applied the brakes. On the application of the brakes the vehicle went down the slope in spite of his attempt to control it. He admitted that the front wheels of the truck entered the verandah of the house. He also stated that when he examined the truck after the accident he found that the steering-rod had come out of the joint where it meets the tie-rod. The defence, in short, is that this was an inevitable accident The learned trial Judge was of the view that there was no evidence to hold that at the time of the accident the vehicle was being driven at a fast speed He held that this was clearly a case where a sudden mechanical defect developed in the course of the journey which took the driver unawares. He rightly held that this is a case to which the maxim "res ipsa loquitur" applied. He was satisfied, accepting the evidence of the driver, that the truck ran off the road because the steering ceased to function. He held that the explanation given by the driver displaced the presumption which rose under the maxim "res ipsa loquitur". As the plaintiff had failed to establish negligence on the part of the driver, once the presumption was displaced, he dismissed the action with costs. He was of the view that the correct principle applicable to the facts of this case is set out in *Vijaya Bus Co. Ltd. v. Soysa* [1]. The plaintiff in that case was a passenger travelling in a bus and he sustained injuries as a result of that vehicle going off the road. He sued the Company which owned the bus to recover damages. The defence was that the bus ran off the road as a result of the steering lock giving way and that it was an inevitable accident. The learned District Judge following *Safenumma v. Siddick* [2] held that the defendant was liable to pay damages as the defence had not proved that the defect in the steering could not have been reasonably foreseen and remedied. In appeal, the judgment of the lower Court in that case was set aside. Windham J. held that the maxim "res ipsa loquitur" applied in that case and consequently a prima facie case of negligence had been made out against the defendant. But he proceeded to state that the burden cast upon the defence was not that of proving the absence of negligence but merely that of giving a reasonable explanation of the accident—"an explanation which would negative the presumption of negligence which the unexplained accident had raised". This judgment which was delivered in the year 1948, is clearly in conflict with the principle enunciated earlier by Dalton J. in *Safenumma v. Siddick* [2]. The facts in the latter case were that a boy standing on the doorstep of his house which was about 27 feet away from the middle of the road was knocked down and

[1] *(1948) 50 N. L. R. 351.*

[2] *(1934) 37 N. L. R. 25.*

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injured by a passing bus. The defence was that the accident was due to the fact that the steering-gear had broken. Dalton J. in dealing with that defence observed,

> " A statement of that kind of course in no way discharges the onus of the defendants or show there was no want of care on their part. Even assuming that the steering-gear was worn and defective but that the defendants had no knowledge of the defect, to place the bus on the road in that condition was a thing necessarily dangerous to users of the road and others and it amounts to negligence. "

It would appear that Dalton J. was of the view that the bare statement that the accident arose as a result of a particular part of the mechanism giving way at the crucial moment, does not displace the presumption which arises from the maxim " res ipsa loquitur ". The learned trial Judge took the view that the decision in *Vijaya Bus Co. Ltd. v. Soysa* [1] was in accord with the judgment of the House of Lords in *Barkway v. South Wales Transport Co. Ltd.* [2]. With respect, I am unable to share that view. In that case an omnibus belonging to the defendant Company ran off the road and fell over an embankment as the result of tyre-burst. The plaintiff's husband who happened to be travelling in that omnibus met with his death in consequence of the accident The plaintiff claimed damages from the defendant Company on the ground of negligence. It was established by the defendant that the tyre-burst was due to what is called an " impact fracture " due to heavy blows or impacts on the tyre as the result of the tyre coming into violent contact with some hard object. It was also proved by the defendant that the tyres of their vehicles were examined regularly, twice weekly, and that this particular tyre was examined two days before the accident by the person appointed to examine the tyres and no defect was discovered. However it was found that the defendants had not instructed their drivers to report heavy blows to tyres likely to cause " impact fractures ". Their Lordships held that it was the duty of the defendant Company to have instructed their drivers to report such heavy blows and the failure to do so rendered them liabl to pay damages to the plaintiff n account of negligence. In regard to the maxim " res ipsa loquitur " Lord Porter in his judgment in that case cited with approval the following observation of Erle C.J. in *Scott v. London Dock Company* [3].

> " Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose for want of care. "

The doctrine of " res ipsa loquitur " comes into operation when the facts regarding the accident are not sufficiently known. Lord Porter stated in that case that the explanation in order to rebut the presumption of

[1] *(1948) 50 N. L. R. 351.* [2] *(1950) 1 A. E. R. 392.*

[3] *1865 H. & C. 596.*

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negligence arising under this doctrine must be an adequate one. The judgment of the Court of Appeal in *Barkway v. South Wales Transport Co. Ltd.* [1] is reported in 1948 A. E. R. 460 where Asquith L. J. set out in very clear language the law regarding the onus of proof when the principle of " res ipsa loquitur " arises. He stated " The position as to the onus of proof in this case seems to be fairly summarised in the following short propositions :—

1. If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then " res ipsa loquitur "; there is a presumption that the event is caused by the negligence on the part of the defendants and the plaintiff succeeds unless the defendants can rebut this presumption.

2. It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent and equally consistent with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down . . . .

3. To displace the presumption the defendants must go further and prove (or it must emerge from the evidence as a whole) either (*a*) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable or (*b*) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres. "

These propositions were not dissented from by the House of Lords.

In the present action the defendant seeks to rebut the presumption resulting from " res ipsa loquitur " by merely stating that the steering-rod got detached from its joint. Undoubtedly, that is the immediate cause of the accident but how and why did the steering-rod come out of its place ? Motor vehicles which are regularly serviced and properly looked after are not generally subject to such defects. In order that the Court may ascertain whether it was due to any lapse on the part of the defendant that the steering mechanism gave way it is incumbent on the defendant to establish that all necessary precautions for the avoidance of a defect of this nature had been taken by him. There is no evidence whatsoever that this vehicle was regularly serviced or serviced at all. All that the driver says is that during this unfortunate journey of 43 miles from Galapitamada he did not find any defect in the engine or steering or in the tie-rod until the vehicle crashed into the plaintiff's verandah. Even the Motor Car Examiner who examined the vehicle, soon after the accident, had not been summoned by the defendant to give evidence. In these circumstances it is idle to suggest that prima facie case of negligence which arose in accordance with the doctrine of " res ipsa loquitur " has been displaced by the bare statement of the driver

[1] *(1950) 1 A. E. R. 392.*

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that the steering-rod gave way. In this connection the observations of Denning L.J. in *Southport Co-operation v. Esso Petroleum Co., Ltd.* [1] which read as follows are in point: —

> " Applying the *Merchant Prince* [2] we find here that the ship ran on to the revetment wall. If the steering-gear was in order, that was plain negligence. The ship seeks to escape from this charge of negligence by saying that her steering-gear had failed and she was out of control. But that is no answer unless she proves—and the legal burden is on her to prove—that it was no fault of hers that the steering-gear failed. She has not discharged that burden, or even attempted to discharge it. She is therefore liable. "

Adopting the language of Lord Denning I would say that the defendant in this case too has not discharged the burden that lay on him or even attempted to discharge it. The defendant is therefore liable to pay damages. I would also observe that the case reported in *51 N. L. R. 350* was decided before the cases reported in (*1950*) *1 A. E. R. 392* and (*1954*) *2 A. E. R. 561.*

The learned trial Judge has assessed the damages at Rs. 500 in the event of the plaintiff being entitled to recover them. There is now no dispute about the quantum of damages. Accordingly I allow the appeal and enter judgment for plaintiff in the sum of Rs. 500 with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.

1955 *Present:* **Basnayake, A.C.J., and Pulle, J.**

JINARATANA THERO, Appellant, *and* DHAMMARATANA THERO, Respondent

S. C. 350—D. C. Kegalle, 7,158

Buddhist Ecclesiastical Law—Viharadhipati—Renunciation of status—Proof.

An intention of a bhikkhu to renounce his status as Viharadhipati of a Vihare will not be inferred unless that intention is clearly expressed by facts and circumstances. A Viharadhipati does not forfeit his right to the office when he leaves the temple of which he is Viharadhipati and takes up residence in another of which he is also Viharadhipati.

The residence of a pupil in his tutor's Sanghika Vihare for whatever length of time cannot confer on him the right to be Viharadhipati of that vihare as against the senior pupil.

[1] (*1954*) *2 A. E. R. 561.* [2] (*1892*) *67 L.T. 251.*

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APPEAL from a judgment of the District Court, Kegalle.

C. V. Ranawake, with *U. B. Weerasekera*, for Plaintiff-Appellant.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *D. R. P. Goonetilleke*, for Defendant-Respondent.

Cur. adv. vult.

September 9, 1955. BASNAYAKE, A.C.J.—

This is an action between two bhikkhus in respect of their right to be Viharadhipati of Hungampola Vihare (hereinafter referred to as Hungampola). Degalathiriya Jinaratana, the plaintiff-appellant (hereinafter referred to as the appellant), and Kehelwatte Dhammaratana, the defendant-respondent (hereinafter referred to as the respondent), are the rival claimants.

The only question that arises for decision in this appeal is whether the respondent's tutor forfeited his right to be Viharadhipati of Hungampola.

It would appear that Hettimulle Sumana was the incumbent of the Hungampola. He died in July, 1855, leaving two pupils, Hapuwita Ratanapala (hereinafter referred to as Ratanapala) and Ambamalle Gunaratana (hereinafter referred to as Gunaratana), of whom Ratanapala was the senior. Shortly after the death of his tutor, Ratanapala was invited to reside in a vihare in his own village of Hatgampola and having accepted that invitation he continued to reside there visiting Hungampola, only on formal occasions. Gunaratana remained at Hungampola and conducted a pirivena and a school there. He acquired a reputation for Pali scholarship and attracted a large number of pupils, including the respondent, to his pirivena. Gunaratana himself had other temples ; but he resided at Hungampola on account of his educational work. Since 1916, the date of his higher ordination, the appellant resided in one of them known as Gurullawala Salawewatte. Ratanapala died in October, 1924, at Hatgampola, leaving as his pupil the respondent. Gunaratana died in August, 1942, at Hungampola. He had several pupils of whom the appellant was the most senior and Somaratana was the most junior. Prior to his death Gunaratana executed a deed of gift in favour of Somaratana. This led to litigation between Somaratana and the other pupils, including the appellant, after Gunaratana's death.

In December, 1948, Somaratana executed a deed assigning to the respondent all movable and immovable property belonging to Hungampola and the office of Viharadhipati of that Vihare. In 1950, Somaratana left the order. This event led to the present action. The appellant claims the vihare as the senior pupil of Gunaratana while the respondent claims it as the senior pupil of Ratanapala and also on the deed executed by Somaratana. It is clear that Somaratana had no right to dispose of the vihare and its adhipatiship in the way he did. His deed is of no effect or avail in law. If the respondent's claim had rested on that deed alone he would not be entitled to succeed.

His claim based on his succession to Ratanapala is one that the appellant has to meet. That the respondent is Ratanapala's successor

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is not denied ; but the appellant maintains that Ratanapala abandoned his rights to Hungampola when he took up permanent residence at Hatgampola and that upon such abandonment Gunaratana became Viharadhipati of Hungampola.

It has been held by this Court that a bhikkhu can renounce his right to be Viharadhipati of a Vihare and that the renunciation of the right need not be expressly made ; but may be inferred from facts and circumstances [1]. But an intention to renounce will not be inferred unless that intention clearly appears therefrom upon a strict interpretation of the facts and circumstances of the case. If the facts and circumstances leave the matter in doubt then the inference to be drawn is that there is no renunciation [2].

There being no presumption in favour of the renunciation of a right, the onus is on the appellant to prove facts and circumstances from which it can be clearly inferred that Ratanapala renounced his right to the office of Viharadhipati of Hungampola.

Learned Counsel for the appellant has not cited any authority in support of his contention that a Viharadhipati forfeits his right to the office when he leaves the temple of which he is Viharadhipati and takes up residence in another of which he is also Viharadhipati. The office of Viharadhipati is not one that can be abandoned by mere residence in another place. There is nothing in the Vinaya or the decisions of this Court which requires a Viharadhipati to reside in the temple of which he is Viharadhipati. A bhikkhu who is Viharadhipati of more than one temple must of necessity reside in one place at a time and the mere fact that he makes one of the temples his permanent residence does not operate as a renunciation of his right to the others.

The appellant has not gone beyond proving that Ratanapala took up permanent residence at Hatgampola and that Gunaratana remained at Hungampola and conducted a pirivena and a school and generally acted as if he were in charge of the vihare to the extent of even nominating his successor to it. But that is not sufficient. It is not denied that Hungampola is a vihare granted to the Sangha and that Gunaratana was entitled to reside there and carry on his educational work. The residence of a pupil in his tutor's Sanghika Vihare for whatever length of time can confer no right on him to be Viharadhipati of that vihare as against the senior pupil because every pupil is entitled to residence in the vihare so long as he conducts himself properly as a member of the Sangha. Scholarship, renown or the rendering of service in the field of education does not confer on a bhikkhu entitled to residence in a vihare any special right or claim as against the rightful Viharadhipati.

To succeed, the appellant must prove facts and circumstances from which a clear inference of a renunciation by Ratanapala can be drawn. This he has failed to do. His appeal must therefore fail and is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

[1] *Punnananda v. Weliwitiye Soratha, 51 N. L. R. 372.*

[2] *Voet Bk. 1 Tit. 4 s. 22.*

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1956 *Present:* **Sansoni, J.**

A. M. JAUFFER, Appellant, *and* N. W. ALEXANDER (S. I. Police), Respondent

S. C. 1,497—M. C. Kandy, 2,495

Betting on Horse Racing Ordinance (Cap. 36)—Section 17 (b)—Possession of instruments of unlawful betting—Not an offence.

Possessing instruments of unlawful betting is not *per se* an offence under Section 17 (*b*) of the Betting on Horse Racing Ordinance.

APPEAL from a judgment of the Magistrate's Court, Kandy.

P. Somatilakam, for the accused appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

March 21, 1956. SANSONI, J.—

I find that there is a charge-sheet in this case which charges the accused on two counts. On the first count he is charged with committing the offence of receiving or negotiating a bet on a horse race in breach of Section 3 (3) (*b*) of the Betting on Horse Racing Ordinance (Cap. 36). On the second count he is charged with having in his possession instruments of unlawful betting in breach of Section 17 (*b*) of the Ordinance. No offence is created by Section 17 (*b*), which only allows the Court to draw a presumption, under certain conditions when a person is found in possession of instruments of unlawful betting.

I find that this mistake as to what Section 17 (*b*) means is continually being repeated in cases that have come up in appeal. The learned Magistrate has fined the accused Rs. 250. I do not know whether he imposed this fine because he thought the accused had committed two offences or only one. One can only hope that in future there will be no such charge brought against an accused person as that he had in his possession instruments of unlawful betting.

The conviction and sentence on count 1 are affirmed. The conviction on count 2 is set aside.

Appeal allowed in part.

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1955 *Present :* **Gratiaen, J., and Fernando, J.**

R. BABEE *et al.*, Appellants, *and* P. NAIDA *et al.*, Respondents

S. C. 146—D. C. Kandy, 3,292

Fideicommissum—" *Warga paramparawe* "—*Express fideicommissum—Alienation—permitted between original donees—Effect.*

A deed of gift contained the following condition :—

" This property shall be held and possessed by my sons S—and H—or their descending heirs children and grandchildren unto *warga paramparawe* ; they shall have the right to dispose of same among the brothers only, but shall not offer as security mortgage or sell in any manner whatsoever to anyone outside."

Held, that the first part of the condition constituted a gift over in favour of the lineal descendants of the original donees and was sufficient to create an express *fideicommissum ;* the subsequent reference to alienation was merely a qualification of what would otherwise have been an implied total restraint.

APPEAL from a judgment of the District Court, Kandy.

W. D. Gunasekera, for the plaintiffs appellants.

No appearance for the defendants respondents.

Cur. adv. vult.

June 10, 1955. FERNANDO, J.—

This is an appeal against the refusal of the learned District Judge to hold that a *fideicommissum* was created by a deed of gift which was subject to the following conditions :—" This property shall be held and possessed by my sons Setuwa and Hawadiya the two of them or their descending heirs children and grandchildren unto *warga paramparawa ;* they shall have the right to dispose of same among the brothers only, but shall not offer as security mortgage or sell in any manner wharsoever to anyone outside ".

The Judge thought that the restriction against alienation is partial and not complete and assumed that " What is not expressly prohibited is implicitly allowed ". It is apparent that the only question to which he sought an answer was whether a tacit *fideicommissum* was created by reason of a prohibition against alienation imposed on the beneficiaries. Where that is the only question which properly arises, then vagueness or ambiguity as to the extent of the restraint or a failure to give a clear indication of the persons in whose interests it is imposed might each negative the intention to create a *fideicommissum ;* and such I think was the case in *Lushington v. Samarasinghe* [1] upon which the learned Judge relied.

The real question which arises in the present case however, is whether the first part of the condition is sufficient to create an express *fideicommissum*, in which event the subsequent reference to alienation is merely a qualification of what would otherwise have been an implied total restraint. The language of the condition is very similar to that construed in *Sopinona v. Abeywardene* [2] ;—" I do further direct that the

[1] (*1897*) *2 N. L. R. 295.* [2] (*1928*) *30 N. L. R. 295.*

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property bequeathed to the parties named, who are the legatees of this last will and testament, are hereby authorised to possess among themselves and their descending heirs, and they are hereby prohibited from selling, mortgaging, or gifting to others, save and except among themselves and their descending heirs ". Neither side there contested the existence of the *fideicommissum*, and the only point argued for the respondent was that the prohibition was personal and not real and had therefore lapsed by reason of a permitted alienation. His counsel rightly conceded that " the testator whilst imposing a *fideicommissum* intended to permit an alienation under certain conditions ".

It is scarcely necessary to point out that no particular formula, and not even the use of the word *fideicommissum*, is necessary in order to create one, so long as the intention is clear. That intention is manifested in the deed under consideration by the words " shall be held and possessed by my sons or their descending heirs children and grandchildren under *warga paramparawa* ", which constitute a gift-over in favour of the lineal descendants of the original donees. Nothing more would have been necessary, but for the desire of the donor to permit alienations between the original donees ; and " where there is an express *fideicommissum*, the apparent nudity of the express prohibition imposed on the fiduciaries is immaterial to the existence of the *fideicommissum* ". (cf. *Nadarajah* at p. 107).

I would therefore hold that the deed under consideration created a valid *fideicommissum* in favour of the plaintiffs in respect of the half-share of the property donated to their father. The appeal has to be allowed and the decree of dismissal set aside. The case is remitted to the District Court for decree to be entered declaring the plaintiffs to be entitled to the half-share and for adjudication upon the issues relating to damages and the claim for compensation for improvements. The defendants must bear the costs of appeal and of the proceedings in the District Court which preceded the appeal.

GRATIAEN, J.—I agree.

Appeal allowed.

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

J. H. WANIGASEKARA (Food and Price Control Inspector), Appellant, *and* K. SIMON, Respondent

S. C. 934—M. C. Matugama, 21,356

" *Acquittal* "—" *Discharge* "—*Right of appeal—Criminal Procedure Code, ss. 2, 190, 191, 330, 336—Control of Prices Act, No. 29 of 1950, s. 8 (1).*

The inadvertent use by a Magistrate of the word " discharge " in describing an acquittal cannot deprive the accused person of the protection of sections 330 and 336 of the Criminal Procedure Code.

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A Magistrate may in certain situations enter a verdict of acquittal under section 190 of the Criminal Procedure Code even before the case for the prosecution has been closed—provided that the Magistrate is satisfied that any further evidence which the complainant proposes to lead would not suffice to establish a *prima facie* case of guilt against the accused.

The accused was charged with contravening a price order made under the Control of Prices Act. The Magistrate, without calling for a defence and when the case for the prosecution had been virtually closed, upheld wrongly (but within the scope of his jurisdiction) an objection raised by the defence that the price order was bad in law as it had not received the necessary Ministerial approval. Accordingly, he made order " discharging " the accused.

Held, that the Magistrate recorded in fact a verdict of acquittal on the merits. No appeal could therefore be entertained except upon compliance with the requirements of section 336 of the Criminal Procedure Code.

Held further, that if a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

APPEAL from a judgment of the Magistrate's Court, Matugama.

A. C. Alles, Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, for the complainant-appellant.

H. W. Jayewardene, Q.C. with *G. P. J. Kurukulasuriya*, for the accused-respondent.

Cur. adv. vult.

January 16, 1956. GRATIAEN, J.—

This is an appeal by the complainant (a Food and Price Control Inspector) against an order purporting to " discharge " the accused who was tried for an alleged contravention of section 8 (1) of the Control of Prices Act, No. 29 of 1950. Mr. Jayawardene raised a preliminary objection to the maintainability of the appeal, his argument being that the so-called order of " discharge " was in reality " a verdict of acquittal " under section 190 of the Criminal Procedure Code, and that no appeal could be preferred against it except at the instance or with the written sanction of the Attorney-General. The inadvertent use by a Magistrate of the word " discharge " in describing an " acquittal " admittedly cannot deprive an accused person of the protection of section 336.

The charge framed against the accused was to the effect that he had on March 1st, 1955, sold 2 lbs of wheat flour to a bogus customer at a price in excess of the maximum retail price fixed for that commodity in terms of a statutory " price order " applicable to the area in which the transaction took place. This " price order " (P4) had been duly published in the *Government Gazette* No. 10,510 of 20th March, 1953, and was described in the charge with sufficient particularity to comply with the requirements of Chapter 17 of the Code.

The accused having pleaded not guilty, the prosecution led evidence at the trial to prove the alleged sale (for 56 cents) of 2 lbs. of a commodity which the Government Analyst had certified in his report P6 to be wheat

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flour. The controlled price was 48 cents, and all that remained to establish *prima facie* the commission of the offence was proof that the wheat flour referred to in the Government Analyst's report was the identical sample taken to him for analysis by a Police constable on the orders of the Magistrate. This witness was not available in Court, however, and a postponement of the trial was asked for in order to lead his evidence on another date. The appellant expressly stated that he would then close the case for the prosecution.

Under normal circumstances a postponement for this limited purpose would probably not have been refused. The defence objected, however, that no useful purpose would be served by putting the trial off for another date in order to record evidence of a fact which (for the purposes of the argument) might be regarded as conceded by the accused. The defence submitted that in any event the case for the prosecution must necessarily fail because (1) food price orders become operative only after they have been approved by the Minister of Agriculture and Food, and (2) the appellant's omission to lead evidence of such approval was therefore fatal to his case ; in other words, a verdict of acquittal, without calling for a defence, would inevitably have resulted at the close of the case for the prosecution even if the identification of the sample referred to in the Analyst's certificate was established.

In reply to this submission the appellant conceded that " price orders become valid only after they are approved by the Minister ". He claimed, however, that he had in fact sufficiently established the Minister's approval of the price order P4 and, presumably for that reason, offered no further evidence on that particular issue. The learned Magistrate (in my opinion wrongly) upheld the objection raised by the defence and made an order " discharging the accused at this stage ".

Mr. Alles cited an unreported decision of this Court in *Food and Price Control Inspector v. Piyasena* S. C. Minutes of 22.11. 55 (594—M. C. Matale, 4,316) [1] where Weerasooriya J. pointed out that " once a price order has been made and signed (and also perhaps duly published) it becomes fully operative independently of any further efficacy it may receive from the subsequent notification of its approval by the Minister ". Mr. Jayewardene did not challenge the correctness of this ruling, and was also prepared to concede that the prosecution had already satisfactorily established by admissible evidence the fact that P4 had received Ministerial approval. Nevertheless, he submitted, the order in his client's favour, right or wrong, was a " verdict of acquittal " against which no appeal could be entertained except upon compliance with the requirements of section 336.

It is not always easy to distinguish between an " acquittal " under section 190 and a " discharge " under section 191, and the apparent conflict of authority in some earlier rulings of this Court has perhaps added to the confusion. We are bound by the majority decision of the Full Bench in *Senaratne v. Lenohamy* [2] to the effect that a " discharge "

[1] *See 57 N. L. R. 310—Ed.* [2] *(1917) 20 N. L. R. 44.*

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under section 191 signifies " the discontinuance of criminal proceedings " but " does not include an acquittal ". (Section 2). In other words, a discharge under section 191 connotes an " *inconclusive order* " which falls short of a decision resulting in " *a definite verdict* " (per De Sampayo J.). The distinction between a judgment upon the evidence in a civil action and the vexatious " non-suit " sanctioned by the procedure of former times seems to suggest a helpful analogy.

In *Silva v. Rahiman* [1] Jayawardene J. held that an order abruptly terminating a summary trial " without allowing the prosecution to lead any evidence " amounted only to an order of " discharge ". In *Gabriel v. Soysa* [2] Garvin J. decided, by way of contrast, that an accused person who was charged with unlawfully obstructing arrest under a warrant had in truth been " acquitted " when the Magistrate, without calling for a defence, upheld an objection that (in view of the evidence led by the prosecution) the warrant was bad in law. Garvin J. explained that " the Magistrate *intended to acquit* because in his view the whole prosecution failed " with the result that the continuation of the trial was purposeless.

Some of the dicta in *Gabriel v. Soysa* (supra) were later criticised by Soertsz J. in *Sumangala Thero v. Piyatissa Thero* [3] but, with great respect to the doubts expressed on that occasion, I would adopt Garvin J.'s ruling that it is unobjectionable in certain situations to enter a verdict of acquittal under section 190 even before the case for the prosecution has been closed—provided that the Magistrate is satisfied that any further evidence which the complainant proposes to lead would not suffice to establish a *prima facie* case of guilt against the accused person. In such an event, the verdict is based on a judicial decision (be it right or wrong) that the case for the prosecution has (for one reason or another) already collapsed irreparably—so much so that, as in the well-known precedent of *Humpty Dumpty's case*, no amount of ingenuity could " put it together again ". Indeed, Soertsz J. himself agreed in *Fernando v. Rajasooriar* [4] that an " acquittal " at this earlier stage would be justified where, in the view taken by the Magistrate, any further evidence would be of no avail; see also the more recent judgments of Nagalingam A.C.J. in *Don Abraham v. Christoffelsz* [5] and *Dias v. Weerasingham* [6]. It stands to reason, however, that premature acquittals of this kind are generally inadvisable: if based on misdirection, they might well result in a re-trial being ordered on appeal, thereby putting the accused person to further expense and anxiety.

Much confusion is likely to arise if the issue " *acquittal* or *discharge* ? " is allowed to be complicated by irrelevant considerations as to whether, upon the merits of the particular case, the Magistrate's decision was wrong or premature. The true test is whether (at whatever stage the decision was made) the Magistrate actually intended to record *a verdict of acquittal on the merits*. If that was clearly the intention, no appeal lies

[1] (*1924*) *26 N. L. R. 463.*
[2] (*1930*) *31 N. L. R. 314.*
[3] (*1937*) *39 N. L. R. 265.*
[4] (*1946*) *47 N. L. R. 399.*
[5] (*1953*) *55 N. L. R. 92.*
[6] (*1953*) *55 N. L. R. 135.*

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except at the instance or with the written sanction of the Attorney-General, and the acquittal, unless reversed, is a bar to a fresh prosecution to the extent indicated in section 330.

It has been suggested in *Solicitor-General v. Aradiel* [1] that our Code makes " no distinction between an acquittal on the merits and an acquittal on any other ground. " On the other hand, Soertsz J. in *Fernando v. Rajasooriar* (supra) held that, *as far as section 190 is concerned*, a verdict on the merits is essential to support a plea of *autrefois acquit* ; see also the judgment of the Court of Criminal Appeal in *The King v. William* [2]. As at present advised, I take the view that under our Code, as in England, a plea of *autrefois acquit* presupposes that the indictment or accusation in the earlier proceedings was sufficient in law to sustain a conviction for the offence charged on the second trial. *Archbold (Edn. 33rd.) p. 153.* Similarly, an order " discontinuing " the proceedings against an accused person on the ground that the charge is defective operates only as a " discharge " under section 191. In such an event, the purport of the Magistrate's decision is that there is no charge upon which a verdict (either of conviction or of acquittal) under section 190 can properly be based.

We are now in a position to analyse the order which the learned Magistrate intended to make in the present case. The charge itself was unexceptionable and was admittedly sufficient in form and content to sustain a conviction. When the case for the prosecution was virtually closed, the Magistrate decided wrongly (but within the scope of his jurisdiction) that the prosecution had failed to establish one of the assumed elements of the offence charged—namely, that the " price order " alleged to have been contravened had come into operation at the relevant date by virtue of Ministerial approval. Accordingly, he upheld the submission raised by the defence that the only additional evidence which the prosecution proposed to lead (for the purpose of establishing a different element of the defence) would be of no avail. It is therefore clear that the learned Magistrate intended to record a verdict of acquittal on the merits, and not merely to make " an inconclusive order of dis-discharge " which would expose the respondent to the risk of a fresh trial (for the same offence) at which the prosecution would be given another opportunity to supply the assumed gaps in the earlier evidence.

For these reasons, I reject the petition of appeal for non-compliance with the requirements of section 336. Although the order of acquittal was wrong, I am not disposed to quash it in the exercise of my revisionary powers. If a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

Appeal rejected.

[1] *(1978) 50 N. L. R. 233.* [2] *(1942) 44 N. L. R. 73.*

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1956 *Present :* **Sansoni, J.**

MIHINDUKULASURIYA, Appellant, *and* L. DAVID (S. I. Police), Respondent

S. C. 1,471—M. C. Matara, 41,894

Betting on Horse Racing Ordinance (Cap. 36), as amended by Ordinance No. 55 of 1943—Prosecution thereunder—Quantum of evidence—"Instruments of unlawful betting"—Sections 2, 3 (3), 10, 17—Newspapers—Evidentiary value of their contents—Evidence Ordinance, s.81.

The accused was charged with unlawful betting on a horse race in breach of section 4 (3) of the Betting on Horse Racing Ordinance. It was proved by the prosecution that a police officer arrested the accused and on searching him found betting slips and copies of three different newspapers each of which contained the race programme in Colombo for the day in question.

Held, that, although section 81 of the Evidence Ordinance created no presumption that the contents of a newspaper or journal are true, the fact of publication of the race programme containing the names of the horses mentioned in the betting slips could be considered in interpreting whether the betting slips were records of unlawful betting on a horse race within the meaning of the definition of "instruments of unlawful betting" in section 2 of the Betting on Horse Racing Ordinance.

APPEAL from a judgment of the Magistrate's Court, Matara.

Vernon Wijetunge, for the accused appellant.

Daya Perera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 27, 1956. SANSONI, J.—

The accused-appellant was charged with having committed the offence of unlawful betting on a horse race in breach of s. 3 (3) of the Betting on Horse Racing Ordinance (Cap. 36), an offence punishable under s. 10 of the Ordinance. The prosecution evidence, which the learned Magistrate accepted, showed that Sub-Inspector Abrahams, on receipt of certain information, noted down his reasons as to why a search warrant could not be obtained to search a certain garage in Matara. He then went with some other Police officers in a Land Rover which was stopped opposite the garage in question. When he got down from it the accused ran away from the garage. The Sub-Inspector arrested him and on searching him found two betting slips, a copy of the "Times of Ceylon" containing the Colombo race programme for the day in question, a copy of "Aanis Sports News" and a copy of the "Sporting News", both of which contained the same race programme. The two betting slips had the names of horses which, according to the published race programme, were due to run in the Colombo races to be held on that day, and the details on those slips indicated that those horses had been backed for Wins and Places.

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The accused gave evidence and called a witness in an attempt to show that no such documents were found on him, but his Counsel did not challenge the Magistrate's findings of fact.

It was urged, however, that the evidence led for the prosecution did not establish that the horse races, in respect of which the accused was charged with unlawful betting, were in fact run or proposed to be run on that day. It was argued that, as the only evidence which the Magistrate had before him on this point were the newspapers I have referred to, there was no proof of an essential ingredient of the offence.

The question whether the production of a newspaper containing a race programme is sufficient to prove that the particular races mentioned in that programme were races which were proposed to be run was considered by Soertsz, J., in *Iyer v. Karuneratne*[1]. The learned Judge held that the production of "The Racing Guide Sporting News" which had been registered as a newspaper established a prima facie case that the races appearing in its race programme were races proposed to be run. He applied the presumption which was said to arise under s. 81 of the Evidence Ordinance. Now that Section requires the Court to presume the genuineness of every document purporting to be a newspaper or journal. In other words, the newspaper or journal is admissible in evidence without formal proof. There is no presumption that the contents of the newspaper or journal are true, for, as Fforde, J., said in *Bawa Sarup Singh v. The Crown*[2], "the paper itself is not proof of its contents. It would merely amount to an anonymous statement".

Since the case of *Iyer v. Karunaratne* was decided, however, the Ordinance has been amended in certain respects by Ordinance No. 55 of 1943, and among other changes a new s. 17 has been added. That Section provides that any person who is found in possession of an instrument of unlawful betting on the occasion of his being searched under the Ordinance shall be presumed, until the contrary is proved, to be guilty of the offence of unlawful betting on a horse race. On the evidence of the prosecution witnesses the accused, who was proved to be a person who had been searched under the Ordinance, was clearly a person against whom this presumption could be drawn if the betting slips in question were "instruments of unlawful betting".

When we turn to s. 2 of the Ordinance, as amended, we find that expression defined as meaning :

> "any article or thing used or intended to be used as a subject or means of unlawful betting on a horse-race, or any document used or intended to be used as a register or record or evidence of any unlawful betting on a horse-race."

The Sub-Inspector in his evidence explained what the betting slips meant, and on that evidence the learned Magistrate was entitled to hold that those slips were documents used or intended to be used as a record or evidence of unlawful betting. The prosecution had, however, to prove that such betting was on a horse-race. It sought to prove that by the

[1] *(1941) 21 C.L.W. 123.*

[2] *A.I.R. (1925) Lahore 299.*

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production of the three newspapers, all of them containing the race programme for the day in question. The fact of publication of the race programme containing the names of the horses mentioned in the betting slips must be considered in interpreting what those betting slips meant. The only possible interpretation, I think, is that those betting slips were records of unlawful betting on horse races. The use of the newspapers for this purpose does not depend on the contents of the newspapers in regard to the race programme being true. One is entitled to attach some meaning to what appeared in the newspapers in order to throw some light on the meaning of the betting slips.

The accused was not, of course, precluded from showing that the information contained in the newspapers was quite false, in that no such races were scheduled to be run, or that no such horses were entered for such races. But the production of the betting slips and the prima facie proof that they were records of unlawful betting on horse races shifted the burden to the accused to prove his innocence.

Although the accused gave evidence he made no attempt to suggest that the documents said to have been found on him had nothing to do with betting on horse races. He contented himself with a complete denial that any such slips of paper and newspapers were found in his possession. When the learned Magistrate rejected this evidence, the presumption created by s. 17 remained unrebutted.

For these reasons the appeal is dismissed.

Appeal dismissed.

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1955 *Present :* **Gratiaen, J., and Swan, J,**

IRANGANIE BOANGE, Appellant, *and* C. V. UDALAGAMA, Respondent

S. C. 444—D. C. Kegalle, 7,873

Breach of promise of marriage—" Written promise "—Dowry as condition—Quantum of evidence—Marriage Registration Ordinance (Cap. 95), s. 19 (3).

An action for damages for breach of promise of marriage lies if, in a letter addressed by the defendant to the plaintiff, there is either confirmation or at least an unqualified admission of a subsisting oral promise of marriage.

Where there is a written promise to marry, the party who made the promise is not entitled to resile from it on the ground that a dowry, which both parties had confidently anticipated but was not a condition to the promise, was not settled in due course.

APPEAL from a judgment of the District Court, Kegalle.

A marriage had been " arranged " for the plaintiff and the defendant by their respective parents according to Kandyan custom. The terms of the contemplated marriage so arranged between the respective parents acting through an intermediary were that a dowry of Rs. 5,000 in cash and 5 acres of tea were to be given over to the intended bride by her father on the day of the betrothal ceremony. The defendant was aware of the terms agreed upon by the parents. The plaintiff also, according to the conclusion of the learned trial Judge, " did acquaint herself at an early stage of the proceedings with the dowry she was to get ".

Soon after the aforementioned transaction between their parents, the plaintiff and defendant met each other frequently and wrote letters. One question in the present action for damages for breach of promise of marriage was whether one of the letters written by the defendant established a " written promise " to marry within the meaning of the proviso to section 19 (3) of the Marriage Registration Ordinance. The evidence disclosed that the defendant had informed the plaintiff's father that if the dowry was not given before May 21, 1951 (the date fixed for the betrothal ceremony), " the marriage was off ". The plaintiff's father did not make over the dowry on or before that date. The defendant, however, admitted that the first occasion on which this " condition " imposing a time limit for the dowry was communicated by him to the plaintiff's father was at a time subsequent to the date of the defendant's letter which, it was submitted on behalf of the plaintiff, constituted a written promise to marry. Further, the new " condition " imposed by the defendant on the plaintiff's father was not communicated to the plaintiff herself.

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2——J. N. B 50 [illegible]—1,500 (5/56)

C. Thiagalingam, Q.C., with *I. Misso* and *A. Nagendra*, for the plaintiff appellant.

E. G. Wikramanayake, Q.C., with *H. W. Jayewardene, Q.C.*, *J. N. Fernandopulle*, *P. Ranasinghe*, *W. Wickramasinghe* and *Daya Perera* for the defendant respondent.

Cur. adv. vult.

November 25, 1955. GRATIAEN, J.—

This is an action for breach of promise of marriage. The parties are well-educated Kandyan gentlefolk, and each of them is the child of parents who hold conservative ideas on the subject of marriage. The plaintiff, who was born in 1930, had done very well at Hillwood School in Kandy from which she passed out in 1949 as Head Girl after a good scholastic career. It is common ground that she is a well-mannered, good-looking young lady of unquestionable good character.

The defendant was enrolled as an Advocate of the Supreme Court in 1944, and within five years had established himself in a promising professional practice at Kegalle. In 1949, his father, a retired Government servant, decided that the time had arrived to "arrange" a suitable marriage for the young man, who was then about 31 years of age. The procedure which Mr. Udalagama senior proposed to follow in this connection is best explained in his own words :

> " Among the class of persons to whom I belong, marriages come about in this way ; we ordinarily send a man first, and he speaks to the parents of the girl and finds out whether the proposal would be accepted. Thereafter a day is fixed and the father goes there and negotiations are carried on. The first thing in my case is the dowry. I will tell you the reason : I have been so many years in the Government Service, and if the dowry is not properly fixed, the result is in the Divorce Courts. Once the dowry is finalised, a visit is made, and they visit us and a day is fixed. As a matter of fact, in arranged marriages, young couples are not in any way consulted because the parents know whom their sons should marry. "

One gathers from the evidence that, after the dowry has been " finalised ", a formal betrothal ceremony takes place on an auspicious day in the presence of the close relatives of both families ; the intended bridegroom puts a chain round the neck of the intended bride, and she in turn gives him a ring. Thereafter the young couple (being virtually strangers) are given some latitude to get to know each other ; in due course the marriage ceremony takes place.

Negotiations on these lines were initiated by Mr. Udalagama senior with the wealthy parents of a young Kandyan girl whose name was disclosed at the trial. A considerable dowry was " finalised ", and 24th November 1949 was fixed for the betrothal ceremony or, as some witnesses called it, " the formal engagement ". But shortly before that date, the defendant saw the girl for the first time and persuaded his father to discontinue the negotiations : he apparently considered her ill-favoured and insufficiently educated. Accordingly, Mr. Udalagama senior wrote a letter to the girl's father on 10th November 1949 postponing the ceremony on some shadowy pretext, and requesting that no further preparations

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be made " until you hear from me again ". The request was understood in the spirit in which it was intended. The matter was dropped, presumably without ill-will on either side. Let it be recorded to the credit of the procedure adopted that no hearts were broken on that occasion.

Very soon afterwards, Mrs. Nanda Udalagama (who was related to both the plaintiff and the defendant) wrote to him from Kandy inviting him to call on her as she thought she had found a more suitable " match " for him. It was on this occasion that the defendant first saw the plaintiff, and he later indicated that he was " interested ". Nanda made certain tentative proposals to the plaintiff's father (Mr. Boange) without success. Eventually, the defendant invoked the more mature advocacy of his sister-in-law Mrs. C. H. Udalagama who agreed to help, having first obtained the consent of Mr. Udalagama senior. In due course, as the result of negotiations carried on primarily through Mrs. C. H. Udalagama, the parents on both sides agreed that the plaintiff should be " given in marriage " to the defendant. The horoscopes were compared with favourable results and, after some haggling, the dowry was " finalised " at Rs. 5,000 in cash and 5 acres of tea. The significant reduction in the amount of the dowry stipulated in this case (i.e., from about 2 or 3 lakhs to about Rs. 10,000) is perhaps the best indication of the assessment by the Udalagamas of the plaintiff's suitability as a wife for the young Advocate who had by now applied for appointment as a member of the Ceylon Judicial Service.

The terms of the contemplated marriage so arranged between the respective parents acting through an intermediary need to be elaborated a little further. Mr. Udalagama senior had first consented to the dowry being made over to the intended bride after the wedding, but it was later stipulated that it should be given on the day of the betrothal ceremony. Mrs. C. H. Udalagama, whose evidence was accepted by the learned trial Judge as true on all material issues, explained that the defendant was well aware of the terms agreed upon by the parents ; the plaintiff, on the other hand, " did not know anything : it is not usual to talk to the girl about dowry matters. " She was certainly not a party to the agreement, but I accept, for the purposes of my decision, the conclusion of the learned Judge that she " did acquaint herself at an early stage of the proceedings with the dowry she was to get. "

I now proceed to relate the history of " the arranged marriage " and its ultimate frustration. Formal visits between the two parties were paid and returned. In due course, " experts " were again consulted for advice as to the selection of alternative auspicious times and dates in April and May 1951 for the customary betrothal ceremony. Two dates in April and three in the following month were submitted on 19th March 1951 to the defendant who by then had assumed duties as Magistrate of Point Pedro. He chose the latest point of time suggested, namely, " 6.01 a.m. on 21st May 1951 ", which, according to the editor of the ephemeris almanac maintained by a school of astrology at Peradeniya, was " auspicious for exchange of rings ". The plaintiff had herself written to the defendant on 6th March 1951 pleading that he should select an earlier but equally auspicious date, namely, 11th April, and

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expressing a fear that " if we have it in May, he (her father) may delay over the wedding ". This plea was ignored by the defendant. The evidence which the learned Judge has accepted is to the effect that, in selecting 21st May for the betrothal ceremony, the defendant orally explained to Mrs. C. H. Udalagama and later to Mr. Boange himself, who visited him at Point Pedro on 20th April, that if the dowry was not given before that particular date, " the marriage was off ". The defendant admits that this was the first occasion on which this condition precedent was imposed by him and communicated to Mr. Boange.

The defendant seems to have suspected that Mr. Boange would not make over the promised dowry before the stipulated date, and secretly communicated his prophecy to his father in a letter dated 7th May 1951. " Hence ", he advised, " without kicking up a row, slowly drop it ; keep everything to yourself, and communicate everything only with me. Don't tell anyone anything, even those at home for they cannot keep their tongues quiet ". One gathers from this attitude that the defendant, knowing Mr. Boange's tendency to procrastination, was not averse to considering himself released from his obligation to marry the plaintiff. A week later he wrote another letter to his father in the same strain, and raised the question of an alternative plan for marriage. " If some other proposition is to be arranged, " he said, " I want a minimum dowry of Rs. 25,000. The girl must be educated, good-looking, respectable and young . . . . Please keep anything you do to yourself and me. "

As prophesied, Mr. Boange did not make over the dowry on or before the 21st May 1951. In the result, the defendant adopted the attitude (which was not, however, notified to the plaintiff) that he was again free to enter the " arranged marriage " market ; and his father, unknown to other members of the family circle, made discreet inquiries for another candidate answering to the description given in the defendant's letter dated 14th May. On this occasion, everything went smoothly and according to plan. On or about 20th July 1951 a marriage was arranged with the parents of Miss Nugawela. But the present action relates to the mutual promises which, according to the plaintiff, were contemporaneously but independently made by herself and the defendant to marry each other. She alleges that in or about August 1951 the defendant wrongfully repudiated his personal promise to marry her and she claimed Rs. 20,000 as damages on this account.

The defendant, who had married Miss Nugawela before he filed his answer, pleaded by way of defence that he at no time made any promise, orally or in writing, to marry the plaintiff. His position was that he had merely " intimated " (whether to Mr. Boange or to the plaintiff was not expressly stated in his pleadings) that he " would be willing to become engaged to or to promise to marry " the plaintiff in a certain eventuality which did not arise.

In the sharp conflict of testimony which characterised a protracted and bitterly contested trial, the learned Judge was called upon to decide whether the young couple, quite independently of the transactions which took place between their parents, had in fact bound themselves by mutual promises to marry one another ; and if so, whether the defendant's promise

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had been made " in writing " within the meaning of the proviso to section 19 (3) of the Marriage Registration Ordinance (Cap. 95). In the absence of such writing, of course, the claim for damages would not be enforceable.

For the purposes of our decision we must be guided generally by the learned trial Judge's findings of fact, based on his assessment of the credibility of witnesses. What is the effect of the evidence which the learned trial Judge believed ?

It would appear that, shortly after the plaintiff left school, she was persuaded early in 1950 by Mrs. C. H. Udalagama to accept an appointment as a teacher in a well-known Government school in Kegalle, of which Mrs. Udalagama was the Principal. Tentative arrangements had also been made for the plaintiff to attend a school in Colombo in May 1950 with a view to offering herself as a candidate for the University Entrance examination.

During the first school term of 1950 the plaintiff resided at the teachers' hostel at Kegalle, visiting Mr. and Mrs. C. H. Udalagama's home during the week ends. But from about May 1950 she stayed with this couple in their bungalow opposite that in which the defendant lived with his father. By this time, the dowry conditions agreed upon between the parents had been "finalised" and Mr. Boange had been invited to fix the betrothal ceremony " for any date convenient to him " (P11). On 15th June 1950 formal visits between the families were also exchanged.

It was now confidently assumed by everyone that the marriage between the young couple, as arranged between their respective parents, would take place in due course. Pending that anticipated event, the plaintiff continued to be a school teacher at Kegalle, having abandoned the idea of entering the University for higher studies. And, from this point of time, the plaintiff and the defendant, who met frequently at the home of Mr. and Mrs. C. H. Udalagama, fell violently in love with each other. The romantic courtship which followed, though perfectly proper and honourable according to modern standards of behaviour, was apparently contrary to what is expected in conservative Kandyan circles from young persons who are not yet " formally engaged ". Mrs. C. H. Udalagama took the matter up with the defendant who, being an Advocate of 6 years standing, was in a better position to understand the delicacy of the situation than a girl who had just left school. Mrs. C. H. Udalagama's version of this conversation is to the following effect :

> " I thought Teddy (i.e. the defendant) should not come so often to my house. I thought there should be a formal engagement before Teddy continued to meet the plaintiff so frequently in my house. Teddy replied ' You need not mistrust me '. I understood by that that he would not let down the girl. "

Mrs. Udalagama accepted the defendant's assurance as to his intentions, which were certainly quite honourable at that stage. The young couple continued to meet regularly on this basis throughout the rest of the year 1950, and, indeed, until the defendant left Kegalle at the end of February 1951 in order to take up his first Judicial appointment in Point Pedro.

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The learned Judge was satisfied that during the period May 1950 to February 1951, many acts of endearment passed between them; the defendant gave her presents (all of which she produced at the trial); they promised eternal loyalty to one another, and discussed their plans for their future happiness together as man and wife.

The defendant denied that he had given the young lady the presents referred to, or that any "acts of endearment" had taken place between them. He was disbelieved on these points and considerable significance should be attached to these false denials. It suffices only to quote his own words of explanation :

Q.—"Why didn't you give her presents ?"

A.—"Because there was no formal engagement."

The inference to be drawn from these denials is to my mind irresistible. The defendant was well aware that much that had taken place (though perfectly innocent) in anticipation of the betrothal ceremony would be regarded in the conservative society to which he belonged as appropriate only to couples who were in fact bound to one another by mutual promises of marriage. Having regard to the evidence which the learned trial Judge has accepted, it is purposeless to speculate further as to whether the defendant had "in so many words" promised to marry the girl. The proved conduct and behaviour of these two young persons towards one another establishes more convincingly than any "express words" which passed between them that they now regarded themselves as solemnly engaged to be married.

Let it be said in fairness to the defendant that this conclusion is far more favourable to his sense of honour than the inference which he himself had invited the Court to draw from his own version of the facts. He admitted in re-examination that he had no doubt in his own mind at any time of his courtship that the marriage "arranged" by the parents would ultimately materialise. It occurred to nobody that Mr. Boange (unwisely, as things turned out) insisted on postponing the betrothal ceremony until he had renovated his house so as to entertain his guests on a far more lavish scale than was necessary. The learned Judge's theory that the defendant had merely agreed to marry the plaintiff "subject to the condition that the promised dowry would be provided" is unacceptable for more than one reason. In the first place, this was not the defendant's case. In the second place, the theory was categorically put to him in the witness box, and he repudiated it :

Q.—"Did you make it clear to the plaintiff that you would marry her only if you got the dowry ?"

A.—"No."

Finally he admitted that the purported imposition of a condition as to the settlement of dowry did not arise until the end of April 1951 :

Q.—"Did you ever tell Mr. Boange or his wife that unless the dowry was given by a particular date the marriage was off ?"

A.—"I told Boange."

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Q.—" When ? "

A.—" *When he came to see me at Point Pedro (i.e. on 20th April 1951)* ".

I am perfectly satisfied that long before 1st March 1951 the defendant had on many occasions promised the plaintiff at Kegalle that he would marry her, and that she in turn promised to marry him. The promises were not conditional but were made at a time when both parties confidently anticipated that the dowry would be settled in due course. In other words, they agreed to marry *when* (and not if) the dowry was forthcoming ; and the question of either party being free to resile from the engagement was neither discussed nor contemplated. There is no doubt that by the end of 1950 they were growing increasingly impatient over Mr. Boange's delay. But they still regarded the ultimate implementation of his part of the bargain with Mr. Udalagama senior as certain. It is in this context that one must examine the letters D7, D8 and P1 which were relied on by the plaintiff as constituting a " written promise " sufficient to support the present action.

The plaintiff had returned to her parents' home for the Christmas holidays, and she kept her promise to write to the defendant who remained at Kegalle but was himself expecting to visit Nuwara Eliya for a few days. This correspondence is the best evidence of the state of mind of the parties and of their sincerity at the time. In D7 dated 18th December 1950 she writes :

> " It has always been my one idea to love only one. Take my word for it. I am not a person who is easily tempted. I have always aimed at having a pure character and *you can be sure that in rain or sunshine I will stand by you till the end of my life.* It was my ambition to find a man too with a pure character and I have found it in you. Therefore don't fear. *I will always be faithful to you, my darling.* "

To this part of the letter the defendant replied as follows in P1 of 21st December :

> " Girlie dear, I have been missing you very badly these days. Indeed the evenings are very dull and boring without you . . . . I am much thankful to you and for the kind thoughts you have been thinking about me. Girlie, *I don't think I need repeat all what you have written to me, because I feel just the same way as you have explained. I can assure you that all the expectations and the dreams you have of your future will not be in vain ; you can confidently hope. The sooner it is the better, I think.* "

The defendant's suggestion that these words of reply, read in conjunction with what the plaintiff had written, should be construed as a mere " intimation that he would be willing to be engaged to, or promise to marry the plaintiff *if and when* the (father's) agreement with regard to the dowry was finalised " was quite fanciful. I find myself equally unconvinced by the learned Judge's theory that the promise of marriage contained in P1 was unenforceable because it was qualified by a condition which has not been satisfied.

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Does P1, read in conjunction with the letters D7 and D8, constitute a " written promise " within the meaning of the proviso to section 19 (3) ? The Ordinance does not declare that oral promises of marriage are null and void ; it merely renders them unenforceable unless they be evidenced in writing. The object is to avoid the risk of vexatious actions based on perjured testimony. The earlier authorities of this Court were all discussed during the argument, and it is settled law that an action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is either confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage. This is the effect of *Jayasinghe v. Perera*[1], *Missi Nona v. Arnolis* [2], and *Karunawathie v. Wimalasuriya* [3]. The letter P1 completely satisfies this minimum test.

After the letter P1 was written, the young couple met frequently in Kegalle. She accepted an invitation from his parents to join them and the rest of the family in celebrating his appointment to the Judicial Service, and, as Mrs. C. H. Udalagama explained, everybody present " considered her as the person whom Teddy was going to marry ".

The relationship in March 1951 between the newly-appointed Magistrate of Point Pedro (aged 33) and the young school teacher of Kegalle (aged 21) was perfectly clear. A marrige had been " arranged " for them by their respective parents according to Kandyan custom ; at the same time there was a subsisting private agreement whereby they were pledged to become man and wife. On 6th March 1951 he wrote from Point Pedro professing his love for her, and expressing the wish that she should visit him during her Easter vacation chaperoned by his brother and sister-in-law. She replied confirming how much she missed his companionship, and mentioning that she had summoned sufficient courage to persuade her father to fix tentative dates in April and May for the betrothal ceremony. She expressed a personal preference for April 11th, and promised that if he agreed to that date " I will see that we get married soon . . . . If April is convenient for you, why not have it then ? In any case in your next letter to me please let me know about your arrangements. "

The defendant's reply of 16th March evaded this special request and merely stated that he was expecting a letter from Mrs. C. H. Udalagama on the subject. However, he indicated that he would not be able to leave Point Pedro during the Easter vacation, and hoped that she would accompany the C. H. Udalagamas on their visit to him in April.

This was the last letter which the defendant wrote to his fiancee. He did not directly communicate with her regarding the fresh condition which (so he says) he had subsequently imposed on Mr. Boange to the effect that the marriage would not take place unless the dowry was deposited before 21st May ; nor did he give her the slightest indication that he had in anticipation advised his father " slowly " to let the matter drop. This behaviour would have been less inexcuseable if his obligations towards the girl were regulated solely by the terms of a " quasi-commercial " contract arrived at for his benefit between his parents and hers. But, examined

[1] *(1903) 9 N. L. R. 62.* [2] *(1914) 17 N. L. R. 425.*
[3] *(1941) 42 N. L. R. 390.*

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in the light of his commitments voluntarily undertaken under a private agreement with the young lady herself, his behaviour deviated from a course of conduct which had previously been honourable. He gave the plaintiff no opportunity to exercise her personal influence over her father to deposit the cash and the title deeds before 21st May. His sister-in-law, who had been the intermediary in the dowry arrangements, was also kept in the dark as to the new plans which were on foot—so much so that even in August 1951 Mrs. C. H. Udalagama re-assured the girl concerning rumours that the defendant was now contemplating marriage to Miss Nugawela.

In August 1951, the defendant received three letters from the plaintiff which admittedly led him to realise that she was heartbroken by his silence. He ignored them all. Mr. Boange's letters to the effect that the house would soon be ready for the betrothal ceremony, and that the dowry would be made over, were treated with equal discourtesy. In September, he became formally engaged to another lady and a few months later he married her. This was an unequivocal repudiation of the solemn promise of marriage which he had given to the plaintiff. In her shame and humiliation, she left Kegalle and returned to her parents' home. He had irrevocably put it out of his power to redeem his pledge, and the plaintiff's cause of action was complete.

The learned Judge seems to have taken a most unfavourable view of Mr. Boange's conduct. But the gentleman concerned was not a witness in the case, and the plaintiff did not need to call him to rebut an issue as to whether the defendant's *personal* promise to marry the plaintiff was qualified by any conditions. Nor was the question raised as to whether a reasonable time for implementing the dowry arrangements had elapsed so as to release the defendant from his obligations. The plaintiff's objections to the admissibility of certain statements alleged to have been made by Mr. Boange were over-ruled on the ground that he was her agent with implied authority to make admissions that bound her under section 18 of the Evidence Ordinance. I really cannot understand how anything that Mr. Boange said or did could fairly be construed to have any bearing on the terms of a private contract of which he was completely unaware.

Let it be recorded in fairness both to Mr. Boange and to Mr. Udalagama senior that neither parent had the slightest idea that, apart from the "arranged marriage" which they had negotiated, the young couple had independently pledged themselves to marry one another. If the parents had realised this, I do not doubt that Mr. Boange, out of respect for his daughter's feelings, would have ceased to dawdle over the arrangements for the betrothal ceremony; nor would Mr. Udalagama senior, mindful of his son's honour, have countenanced the suggestion that he should drop the matter "slowly" as he did. Perhaps the most reprehensible aspect of the defendant's conduct was that he kept both parents in ignorance of the extent to which he had personally committed himself and compromised the girl. These conservative gentlemen did not know that he was no longer in a position, either in law or in decency, to back out of the marriage "arranged" for him without committing a breach of his private obligations.

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The defendant did not inform the plaintiff after 20th April 1951 of the new " condition " that " time was of the essence of the contract ". As a matter of law, this uncommunicated stipulation did not bind her.

On the issue as to damages, the learned Judge considered that the amount to be awarded the plaintiff should not exceed Rs. 5,000 in the event of his decision on the other issues being set aside by this Court. I take the view that this amount is in no way excessive if one takes into account only the personal unhappiness that has been caused to her by the defendant's later conduct in repudiating his obligations (honourably undertaken in the first instance) without so much as an expression of regret for what he had done. At the trial, she was publicly cross-examined on the basis of his instructions that she was a liar and a " gold-digger ". To his knowledge, she deserved neither condemnation. I would allow the appeal and enter judgment for the plaintiff for Rs. 5,000 with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.

1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

T. S. JINASENA, Appellant, *and* THE MINNERIYA AGRICULTURAL PRODUCE CO-OPERATIVE MARKETING SOCIETY, LTD., Respondent.

S. C. 314—D. C. Colombo, 22,914

Interest—Mutual agreement necessary.

Plaintiff sued defendant for the recovery of a certain sum for services rendered to the defendant. He also claimed interest at 12 per cent. per annum on the strength of the following legend on his invoices : " Interest at 12 per cent. will be charged on all overdue accounts ".

Held, that interest was not recoverable in the absence of an agreement in that behalf. The intimation on the bill heads did not constitute an agreement to pay interest.

APPEAL from a judgment of the District Court, Colombo.

H. W Jayewardene, Q.C., with *Lyn Wirasekera* and *P. Ranasinghe*, for Plaintiff-Appellant.

N. E. Weerasooria, Q.C., with *B. H. Aluwihare* and *B. S. C. Ratwatte*, for Defendant-Respondent.

November 7, 1955. BASNAYAKE, A.C.J.—

The plaintiff-appellant (hereinafter referred to as the appellant) sued the defendant-respondent, the Minneriya Agricultural Produce Co-operative Marketing Society Limited (hereinafter referred to as the respondent), for the recovery of a sum of Rs. 4,888/25 with interest thereon

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at the rate of 12 per cent. per annum from 1st October, 1949, claimed by him for services rendered to the respondent in his capacity as an engineer. The respondent claimed a sum of Rs. 36,112 in reconvention and continuing damages at the rate of Rs. 50 a day from 1st July, 1950, but did not deny the claim of the appellant for the sum of Rs. 4,888/25.

After trial the learned District Judge found that the respondent had suffered damages in three sums of Rs. 3,000, Rs. 316 and Rs. 6,000 respectively and awarded the respondent a sum of Rs. 9,316, less a sum of Rs. 484/50 awarded to the appellant on his claim.

The learned Judge held that he had no territorial jurisdiction to go into the appellant's claim in respect of his quotations numbered 4014 and 4118 dated 23rd July, 1948, (P4A) and 1st March, 1949, (P5G) respctively and for that reason did not allow the claims in respect of those two quotations.

The learned Judge's conclusion that he had no territorial jurisdiction to go into those claims was founded entirely on the view that the contracts in respect of those quotations were made at Hinkurakgoda.

The originals of these documents which appear to have been used at the trial do not seem to have been filed of record and were not available to the learned Judge at the time he wrote the judgment. The absence of the conditions of the contract on the copies P4A & P5G which the learned Judge had before him forced him to this erroneous finding. The originals of both documents have since been produced before us and they contain the conditions of the contract printed on the reverse.

It is clear from the conditions that the contracts were concluded in Colombo and that the learned Judge had territorial jurisdiction to adjudicate on them. We therefore set aside the trial Judge's order disallowing the appellant's claim in respect of those quotations on the ground of lack of jurisdiction and allow him credit for the full amount of his claim of Rs. 4,888/25 which is admitted by the respondent. The appellant has also claimed interest at 12 per cent. per annum. This claim is based on the strength of the legend " Interest at 12 per cent. will be charged on all overdue accounts " on his invoices. Under our law interest is not recoverable in the absence of an express agreement in that behalf [1]. Intimation on the bill heads does not constitute an agreement to pay interest. We therefore disallow the claim for interest prior to the date of action. After the date of action the payment of interest is regulated by the Civil Procedure Code. The appellant is declared entitled to interest at 5 per cent. on the sum of Rs. 4,888/25 from date of action till the date of decree and further interest at the same rate on the aggregate sum adjudged from the date of decree to the date of payment.

In the result the respondent will get judgment in a sum of Rs. 9,316 less the sum of Rs 4,888/25 plus legal interest payable thereon in terms of this judgment. The order for half costs in favour of the defendant is set aside. There will be no costs of appeal.

PULLE, J.—I agree.

Judgment varied.

[1] *Areppin Ahamat v. T. D. Martines—Wendt's Reports 341.*
Annamaly Chetty v. Thornhill—3 C. L. W. 56, 36 N. L. R. 358.

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1955 *Present :* **Basnayake, A.C.J., and Weerasooriya, J.**

M. K. M. POTUHERA, Appellant, *and* D. B. UKKU MENIKA *et al.*, Respondents.

S. C. 269—D. C. Kurunegala, 6,193/M

Vendor and purchaser—Speculative purchase— Express warranty of title—Right of purchaser to claim damages.

Where a purchase of land was speculative and the purchaser knew that the title of the vendor might be defective—

Held, that the purchaser, when evicted, was not entitled to claim damages from the vendor even though the deed of sale contained an express warranty of title.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *D. S. Nethsinghe* and *P. Ranasinghe*, for Plaintiff-Appellant.

No appearance for Defendants-Respondents.

Cur. adv. vult.

December 5, 1955. BASNAYAKE, A.C.J.—

On deed No. 3088 of 6th December, 1942, attested by C. P. Senanayake, Notary Public (hereinafter referred to as P1), the plaintiff-appellant (hereinafter referred to as the appellant), purchased from the six defendants to this action (hereinafter referred to as the respondents) for a sum of one thousand rupees an undivided three-fourth share of all their rights in five different allotments forming one block of land of a total extent of about 50 acres or 5 pelas kurakkan sowing extent. The deed which is in Sinhalese contained the following warranty according to the translation produced by the appellant. The relevant clause in the original is also set out below :

" We the said vendors for ourselves, our heirs, executors, and administrators hereby further covenant to and agree with the said vendee, his heirs, executors, administrators and assigns to confirm this sale in all manner to warrant and defend this should any dispute arise against this and also to execute any deeds, assurances, etc., at the expense of the said vendee or his heirs, etc. if reasonably requested for the further confirmation of this sale in respect of the said Premises ".

" එම දේපළවත් ඉන් යම් කොටසක්වත් එහි ඵල ප්‍රයෝජනාදියක්වත් මෙම විකිණීමට විරුඩව අන්සතුවීමට හේතුවූ යම් කිසි ක්‍රියාවක් මින් පෙර නොකළ බවද මෙයින් එළිදරව් කරමින් මෙම විකිණීම සියලු ආකාරයෙන්ම සවිකර දෙන හැටියටද, මීට විරුඩව යම්කිසි වියවුලක් පැමිණියොත් එහිදී වග උත්තර කියා නිරවුල්කරදෙන හැටියටද, එකී දේපළ සම්බන්ධව මීට් අදලවූ මෙය වඩා ස්ථිර වීමට හේතුවූ යම්කිසි ඔප්පු තිරප්පු ආදියක් ඉහතකී ගැනුම්කාර මහත්මයා විසින් හෝ උන්නැහේගේ උරුමක්කාරාදීන් විසින් ඔවුන්ගේ වියදමින් සාදවා දෙනලෙස

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කරුණු සහිතව ඉල්ලා සිටියහොත් එබඳු ඔප්පු තිරප්පු ආදිය සාදවා දෙන හැටියටද, ඉහතකී විකුණුම්කාර අපි අප වෙනුවට සහ අපේ උරුමක්කාර පොල්මඃකාර අද්මිනිස්ත්‍රාසිකාරයන් වෙනුවටත් එකී ගැනුම්කාර මහත්මයා සහ උන්නැහේගේ උරුමක්කාර පොල්මඃකාර අද්මිනිස්ත්‍රාසිකාර බ්ලකාර ලැබුම්කාරයන් සමග මෙයින් වැඩිදුරටත් පොරොන්දුව බැඳුනෙමු ".

On 30th March 1943, the appellant instituted a partition action in the District Court of Kurunegala on the ground that the common and undivided possession of the land was attended with inconvenience and that it was desirable and expedient that a partition thereof be effected under the Partition Ordinance. He claimed 3/4 of the land and assigned 1/4 to the six defendants named by him as parties to the action. The appellant valued the land at Rs. 2,500 for the purpose of the action. The extent to which the appellant was conversant with the details of the title he claimed is shown by the following paragraphs of the plaint (P2) which set out the devolution of title to the land :

" 2. Herath Mudiyanselage Mudalihami Korale to an undivided half share and Herath Mudiyanselage Mutu Menike and Dingiri Menika to the remaining half share in equal shares were the original absolute owners and proprietors and in possession of all that allotments of land called (here follows a description of the land).

" 3. Being so seized and possessed of an undivided half share thereof the said Mudalihamy Korale died intestate leaving him surviving as his only heirs-at-law children namely (1) Dingiri Banda and (2) Ukku Menika who succeeded to his estate, which including the said share of the said premises was administered.

" 4. Being so seized and possessed of an undivided quarter share thereof the said Mutu Menika died intestate leaving her surviving as her only heirs-at-law her four children namely (1) Kiri Banda Vidane (2) Punchi Banda (3) Appuhami and (4) Ukku Banda who succeeded to her estate which including the said share of the said premises was not liable to be administered.

" 5. Being so seized and possessed of three undivided quarter share thereof the said Dingiri Banda and Ukku Menika (referred to in paragraph 3 hereof) and Kiri Banda Vidane, Punchi Banda, Appuhamy and Ukku Banda in and by Deed of sale No. 3088 dated 6th day of December, 1942, sold the same to I. T. M. Kiri Mudiyanse Potuhera alias K. M. Potuhera, the plaintiff abovenamed who thereupon became entitled thereto and to the possession.

" 6. Being so seized and possessed of an undivided quarter share thereof the said Dingiri Menika died intestate leaving her surviving as her heir-at-law her child Mutu Menika who died leaving her surviving as her heirs-at-law her children, namely (1) Kalu Banda, (2) Ranmenika, (3) Dingiri Banda, (4) Wimalagnana Thero, (5) Kiri Menika and (6) Dingiri Menika, the defendants abovenamed who succeeded to her estate which including the said share of the said premises was not liable to be administered.

" 7. All the plantations have been made by the defendants ".

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After interlocutory decree had been entered various claimants, about 38 in number, intervened and claimed the land for themselves to the exclusion of the appellant. After a trial in which the claims of the appellant, the defendants, and the intervenient-defendants were investigated, the appellant's action was dismissed on 8th December, 1949.

In the course of the proceedings of the partition action the appellant noticed the respondents to warrant and defend his title. They participated in the proceedings but did not succeed in establishing the title. The appellant did not appeal from the decree dismissing his claim in the partition action because he said he had no money. Neither did the respondents appeal. Upon the failure of the partition action, the appellant instituted the present action for breach of warranty against the respondents, claiming damages in a sum of Rs. 10,000 including the purchase price of Rs. 1,000. Their defence to the claim of damages was that the appellant purchased the land as a matter of speculation knowing that their title was defective, doubtful, and uncertain. They, however, admitted their liability to return the purchase price.

The appellant's position is that by questioning the respondents, his vendors, he satisfied himself that they had title to the land although they had no documents of title. These are his very words on this point :

> " Before I purchased this land I investigated the title, but I did not look for any deeds in the Land Registry. No documents were given to me by my vendors. I went to Katumuluwa and made inquiries from the vendors and satisfied myself that the vendors had title ".

The version of the respondents was that the appellant himself came and informed them that they were entitled to the lands in question and offered to buy them, assuring them that they were entitled to these lands by paternal inheritance, despite their professing ignorance of that fact.

The learned District Judge has found that the appellant's purchase was speculative and that he purchased the lands knowing that the title of the respondents was defective. He gave the appellant judgment in a sum of Rs. 1,000 being the amount of the purchase price ; but dismissed his claim for damages.

Learned Counsel for the appellant contended that the dismissal of the claim for damages is wrong. He submitted that the case of *Silva v. Silva* [1] does not hold that a speculative purchaser is not entitled to claim damages in a case where the vendors have given an express warranty as in this case. It is true that the judgments contain no reference to the nature of the deed in question and do not discuss the difference between an implied warranty and an express warranty. It is correct to say that ordinarily a vendor who fails to warrant and defend the purchaser's title is liable to refund the purchase price even if there is no express warranty of title in the deed of conveyance [2] ; but generally speaking damages do not become payable by the vendor to an evicted purchaser in the case of a

[1] *22 N. L. R. 377.*

[2] *Voet Bk. XXI Tit. II s. 32 & s. 31 ; Censura Forensis, Bk. IV, Part I, Ch. XIX, para. 14.*

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transaction made in good faith unless there is an express warranty in that behalf [1]. The general propositions I have stated apply to the sale of a thing such as a definite land or allotment and are subject to a number of exceptions which do not arise on the facts of this case.

This is a case of the sale of not so much of a thing as of some uncertain claim which the vendors had in the land. It is sale of some " doubtful and uncertain " right at the instance of the purchaser, who claimed to know the respondents ' rights thereto and which the vendors professed to be ignorant of. This class of uncertain and doubtful title is commonly known as village title and purchasers of such " title " know that they are purchasing something doubtful and uncertain for as a rule the documents that go to support it are unsatisfactory and of doubtful value. The plaint in the partition action bears out the claim of the respondents that it was the appellant who represented that they had a claim to the land by inheritance. That they honestly acted on such representation and executed the conveyance in favour of the appellant has been established. The learned Judge accepts the version of the respondents. In doing so he says—

> " The second defendant impressed me as an unsophisticated villager while the plaintiff obviously does not belong to the class of cultivators, though he calls himself a cultivator. "

Now both according to Voet [2] and Pothier [3] the vendor is not liable even to refund the purchase price in a case such as this, where he has only professed to sell an *incertum juris* (a doubtful right) acting in good faith, doubting indeed his own right, " but without the certain knowledge and consciousness that the thing was another's ". In such a case even an express warranty in the deed or instrument does not make the vendor liable in damages.

In the instant case there are two reasons why the appellant is not entitled to succeed. One is that the respondents only professed to sell an *incertum juris* acting in good faith doubting their own right but without the certain knowledge and consciousness that the thing was another's ; and the other is that it was the appellant who claimed to know the respondents' rights to what they sold. It may reasonably be inferred from his studied omission to ask for documents of title and his neglect to search the Land Registers that the defects which finally resulted in his eviction must have been known to the appellant. Those defects he did not make known to the vendors. In such a case he is not entitled to damages even when there is an express warranty.

The appeal is therefore dismissed.

WEERASOORIYA, J.—I agree.

Appeal dismissed.

[1] *Voet Bk. XXI Tit. II s. 31.* [2] *Voet Bk. XXI Tit. II s. 31.*
[3] *Pothier—Contract of Sale —s. 187 p. 116.*

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1955 *Present :* **Gratiaen, J., and H. N. G. Fernando, J.**

KALAWANE DHAMMADASSI THERO, Petitioner, *and* MAWELLA DHAMMAVISUDDHI THERO *et al.*, Respondents

Application for Restitutio in Integrum or in the alternative for Revision in S. C. 348 of 1952, D. C. Colombo 5,517

Appeal—Ex parte *hearing—Right of respondent to object to decree—Civil Procedure Code, ss. 28, 771.*

An appeal was heard *ex parte* in the absence of the respondent, and judgment was given against him. It was subsequently shown that the respondent's Proctor had, prior to the disposal of the appeal, informed the respondent that he had duly retained Counsel to represent him although, in fact, he had not done so. Further, during the pendency of the appeal, the Proctor had been suspended from the practice of his profession for a certain period.

Held, that there was " sufficient cause " within the meaning of section 771 of the Civil Procedure Code to re-hear the appeal.

APPLICATION to have a judgment and decree of the Supreme Court in certain civil proceedings vacated.

H. W. Jayewardene, Q.C., with *Daya Perera*, for the plaintiff-petitioner.

H. V. Perera, Q.C., with *H. A. Koattegoda*, for the defendant-respondents.

Cur. adv. vult.

June 7, 1955. GRATIAEN, J.—

This is an application to have a judgment and decree of this Court dated 19th July, 1954, in civil proceedings vacated. Arguments were addressed to us on behalf of both parties on the assumption that the facts set out in the petitioner's affidavit were substantially correct. I shall summarise these facts in so far as they are necessary for the purposes of our decision.

The petitioner had sued the respondents in the District Court of Colombo for a declaration that he was the lawful incumbent of Rajapushparama Vihara, situated at Galkissa. After a contested trial, judgment was entered in his favour as prayed for with costs on 19th September, 1951. The respondents then appealed to this Court and the appeal was heard on 12th and 13th July, 1954. The case for the respondents was fully argued by Counsel appearing on their behalf, but the petitioner himself was absent and was not represented by Counsel. Having reserved judgment, this Court made order on 19th July, 1954, allowing the appeal and dismissing the petitioner's action with costs in both Courts.

The petitioner has now explained the circumstances in which he was not represented at the hearing of the appeal. In the lower Court he

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had granted the partners of Messrs. Perera and Senaratne, Proctors, a joint proxy appointing them to respresent him at the trial and also in this Court. In October and November, 1952, he had, at Mr. Senaratne's request, paid sums aggregating Rs. 735 which were stated to be required as fees for a senior Counsel and a junior Counsel who had been retained by Mr. Senaratne to argue the petitioner's case on appeal. Mr. Senaratne later informed the petitioner that the advocates concerned had been duly briefed on his behalf, and the petitioner thereafter assumed that he would be represented at the argument when the appeal came up for hearing.

After the appeal had been disposed of, it was brought to the petitioner's notice that Counsel had not appeared for him at the argument because their fees had not been paid by Mr. Senaratne or Mr. Senaratne's firm. He also discovered for the first time that Mr. Senaratne had, in terms of an order of this Court, dated 27th October, 1953, been suspended from the practice of his profession for a period of three years on the ground of misconduct. In the result, the partners of Messrs. Perera and Senaratne had become incapable of acting jointly for the petitioner by virtue of the proxy previously granted to them.

Mr. Jayewardene's main argument was that failure to comply, even inadvertently, with the provisions of Section 28 of the Civil Procedure Code had the effect of rendering the judgment of this Court a nullity. The full implications of this Section cannot be determined without an examination of questions of much nicety, but for the purposes of this application it is sufficient, I think, to base our jurisdiction to order a re-hearing of the appeal on the provisions of Section 771 of the Code. The petitioner has satisfactorily explained that he was prevented by "sufficient cause" from appearing either personally or by Counsel at the hearing of the appeal. Moreover, the dispute as to the incumbency was certainly of sufficient gravity to make it desirable that the petitioner should not be denied an opportunity of supporting the judgment of the lower Court in his favour. I would accordingly vacate the judgment of this Court dated 19th July, 1954, and direct that the appeal be reheard before a Bench of which my brother and I (who heard the original appeal) are not members. In my opinion, the costs of this application should be costs in the cause.

There is another matter to which it is my duty to refer before I conclude. The serious allegations in the petitioner's affidavit concerning Mr. C. E. de S. Senaratne's conduct clearly calls for an investigation, and the question prominently arises whether he is a fit and proper person to be permitted to resume his practice in an honourable profession after his period of suspension comes to an end. I would therefore direct that copies of the petitioner's petition and affidavit dated 21st September, 1954, and of all supporting documents annexed thereto, be forwarded by the Registrar to the Attorney-General and to the Incorporated Law Society so as to enable them to take such action as they may consider appropriate.

H. N. G. FERNANDO, J.—I agree.

Appeal to be re-heard.

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1955 *Present* : **Pulle, J.**

RAJ RETTY, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 797—Appeal under the Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Application for citizenship—Evidence of applicant's residence in Ceylon—Assessment.

In an application for citizenship by registration under the Indian and Pakistani Residents (Citizenship) Act the evidence of a witness who testifies to the residence in Ceylon of the applicant and against whose integrity nothing can be urged should not be discounted on the ground that he is also an applicant for registration as a citizen.

APPEAL under the Indian and Pakistani Residents (Citizenship) Act.

G. Barr Kumarakulasinghe, for the appellant.

R. S. Wanasundera, Crown Counsel, for the respondent.

Cur. adv. vult.

August 22, 1955. PULLE, J.—

The appellant by his application dated the 10th December, 1949, applied to have himself, his wife and minor children registered as citizens of Ceylon. During the final stages of the inquiry which was conducted on the 12th November, 1953, he was required to prove that his wife was resident in Ceylon during the periods July, 1940, to August, 1942, and August, 1943, to August, 1945. The Deputy Commissioner held that he had failed to prove his wife's residence during these periods and refused his application. The appeal is from this order.

The appellant married in India on the 10th July, 1939, and his first three children were born there on the 29th June, 1941, 20th January, 1943, and 4th September, 1944, respectively. According to the appellant he returned to Ceylon with his wife shortly after marriage and afterwards he accompanied her to India for the first confinement. She left Ceylon for her second confinement with his uncle early in 1943 and for her third in July, 1944.

It would be convenient to deal first with the second period of alleged residence, namely, August, 1943 to August, 1945. Learned Crown Counsel did not seek to support the Deputy Commissioner's finding as regards this period. In my opinion he was right in making this concession. Presumably the Deputy Commissioner was satisfied with the evidence of the wife's residence during the year ending in August, 1943. A quarantine permit dated the 27th June, 1943, shows that in or about

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August of that year she had returned with the appellant from India. The account books produced by him showed that he had bought a sewing machine apparently for his wife on the 12th January, 1943. There are two items falling within the second period. One is dated the 21st May, 1944, in respect of the purchase of a feeding bottle and the other dated the 19th June, 1944, refers to the purchase of jewellery. This part of the case was disposed of by the Deputy Commissioner with the observation,

> " The other entries refer to jewels, sewing machine, feeding bottle, etc., and these may not refer to purchases made for the applicant's wife. "

In my opinion these items afford sufficient corroboration of the appellant's case that his wife was in Ceylon during the second period. It is inconceivable that he would have bought a feeding bottle for a child other than his own or jewellery for some one other than his wife, the evidence being that the appellant was the only child of his parents.

Crown Counsel, however, pressed on me that there was no reason to disturb the finding that the wife's residence during the first period had not been proved. This part of the case has given me considerable trouble. The appellant called two witnesses of whom one was the Rev. Father A. M. Arokiam the parish priest of Kadugannawa where the appellant had a property planted in tea named Mercantile Estate and where the main office of the appellant's family business was situated. The other witness was a trader named Bogaharalage Punchi Banda. Had these witnesses been believed the appellant's case would have been fully proved. The complaint on the appellant's behalf is that the evidence of these witnesses has been rejected on grounds which are demonstrably unsustainable. Father Arokiam was apparently asked by the Deputy Commissioner whether he was of Indian origin and whether he himself was an applicant for registration as a citizen to which questions he gave answers in the affirmative. The Deputy Commissioner in dealing with the evidence of Father Arokiam refers in his order to these admissions and I cannot agree with the submission for the respondent that he did not regard them as grounds for not acting on his evidence. I have already pointed out in the case of *M. Palaniyandi v. Commissioner for Registration of Indian and Pakistani Residents* [1] that a witness against whose integrity nothing can be urged should not lay himself open to have his evidence discounted on the ground that he is also an applicant for registration.

Another point made against the acceptance of the parish priest's evidence is set out in the order as follows :

> " He stated that the applicant took his wife to India for her first confinement in 1940 whereas the applicant gave the date as April, 1941. "

This criticism is, in my opinion, hardly justifiable because what the priest said in his evidence was,

[1] *(1955) 56 N. L. R. 374.*

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" The wife went to India for the first confinement in *about* 1940. " A greater degree of precision could hardly be expected of a witness giving evidence about thirteen years after the event.

A scrutiny of the evidence of Punchi Banda reveals that the Deputy Commissioner has either misunderstood relevant portions thereof or has misdirected himself. Punchi Banda used to visit Mercantile Estate to settle accounts for tea leaf supplied by him. He said,

> " The applicant always returned to Mercantile Estate and, after staying a few days here, the family moved to one or other of their estates. I cannot say to which estates they went. "

In his order, however, the Deputy Commissioner states,

> " This witness visited Mercantile Estate frequently, but the applicant stated that both he and his wife resided at other estates during a greater part of the periods in issue. The witness *admitted* he was not aware of their movements to the other estates. "

I see no ground for rejecting or doubting the evidence of the two witnesses called by the appellant. There are undoubtedly certain inconsistencies in the evidence of the appellant which are stressed in the order under appeal and stressed again at the argument in appeal. Yet making every allowance I am satisfied that the appellant has made out a *prima facie* case for registration. I may say that, as relevant to the issue of residence during the first period, I agree with the submission that the entry dated 21st July, 1940, in the appellant's books of account that medicine had been purchased for his wife is a strong piece of circumstantial evidence pointing to her return to Ceylon after the marriage and her stay in this country before the birth of the first child.

I hold that the appellant has made out a *prima facie* case for his application to be allowed and remit the record for further action on the basis of that finding.

The respondent will pay the appellant Rs. 105 as costs of appeal.

Appeal allowed.

1956 *Present :* **Sansoni, J.**

ALFRED APPUHAMY, Appellant, *and* D. G. A. DE SILVA (S. I. Police), Respondent

S. C. 1,337—M. C. Colombo, 19,507

Lorry—Carriage of goods in excess of maximum load—Weigh-bridge—Is evidence of its accuracy necessary ?—Motor Traffic Act, No. 14 of 1951, ss. 190, 216 (1) (a).

The accused was charged with having carried on a lorry goods in excess of the permitted maximum load, in breach of Section 190 read with Section 216

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(1) (*a*) of the Motor Traffic Act. The prosecution witnesses stated that an excess weight of 2 tons and 7 lbs. was ascertained by means of a weigh-bridge. No evidence was called for the defence.

Held, that it was open to the Court to hold that the load in the lorry was 2 tons and 7 lbs. in excess, even though the weigh-bridge had not been tested for over four weeks prior to the day when the lorry with its load was weighed on it.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Stanley de Zoysa, with *P. Ranasinghe*, for the accused appellant.

Daya Perera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 20, 1956. SANSONI, J.—

The accused, who was the driver of lorry No. IC 2540, was convicted on a charge of having carried 2 tons 0 cwts 0 qrs 7 lbs. of goods in excess of the weight which the lorry was licensed to carry, in breach of S. 190 read with S. 216 (1) (*a*) of the Motor Traffic Act No. 14 of 1951. The prosecution witnesses stated that the lorry in question was weighed with its load of vegetables at the Grandpass weigh-bridge, and the excess weight thus ascertained. An Engineer of Messrs. Avery & Co. gave evidence that the weigh-bridge in question was maintained by his firm and that it was last tested on 28th June 1955 ; the offence was detected on 2nd August 1955.

No evidence was called for the defence. The accused's Proctor submitted that the charge had not been established as the accuracy of the weigh-bridge at the time in question had not been proved. The learned Magistrate accepted the evidence of the Engineer who had spoken to having tested the machine. He also commented on the absence of any evidence for the defence and rejected a suggestion that the lorry carried only a small quantity of chillies.

In appeal it was urged that the accused should have been acquitted in view of the judgment of Soertsz, A.J., in *Soysa v. James Singho*[1], where the learned Judge said that it was desirable that a loadometer (which was the machine used in that case) should be tested soon after it had been used, to see that it was accurate at the crucial time. In *Siman v. Miskin*[2], Koch, J., expressed a similar opinion in regard to a stop watch which had been used to detect a case of exceeding the speed limit. If these decisions are binding on me I should have no alternative but to allow this appeal. Those decisions also have the support of the Divisional Court judgment in *Melhuish v. Morris*[3], which laid down that before a speedometer reading can be acted upon there must be evidence of the accuracy of the speedometer. Charles, J., in that case said :

[1] (*1935*) *38 N. L. R. 12.* [2] (*1936*) *38 N. L. R. 239.*
[3] (*1938*) *4 A. E. R. 98.*

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" the case rested upon the accuracy of the speedometer, which had not been tested . . . . it does not matter if five officers glued their eyes to the speedometer if evidence is not given as to its accuracy ".

Learned Crown Counsel drew my attention to the later judgment of the Divisional Court in the case of *Nicholas v. Penny* [1]. In that case the accused was charged with exceeding the speed limit of thirty miles per hour. The evidence against him was that of a Police Constable who followed the accused's car for a distance of 4/10ths of a mile at an even distance, and found that the speedometer in the Police car showed an even speed of forty miles per hour. Lord Goddard, C.J., considered the question whether it was necessary as a matter of law that the Court must have evidence that the speedometer was tested before the speedometer reading can be accepted. He refused to follow the decision in *Melhuish v. Morris* [3] and held that the evidence as to the speedometer reading was admissible and was prima facie evidence on which Justices can act. He said that in a particular case they might refuse to act on such evidence, owing to the cross-examination of the prosecution witnesses, or the evidence given on the other side, which might cause them to reject the prosecution case ; or again, the speedometer reading may show that the accused was driving at a speed which was just over the speed limit. Ultimately, however, it is a matter for Justices to say whether they are satisfied that the accused was travelling at a speed in excess of thirty miles per hour and they can be satisfied about it on the evidence which was given, apart from any evidence as to the accuracy of the speedometer.

Following this decision, I would hold that it was open to the learned Magistrate in this case to hold that the load in the lorry was 2 tons 0 cwts 0 qrs 7 lbs. in excess, even though the weigh-bridge had not been tested for over four weeks prior to the day in question. I therefore dismiss this appeal.

Appeal dismissed.

1955 *Present :* **Gratiaen, J., and Swan, J.**

WIMALA TUDOR, Appellant, *and* E. S. DASSANAYAKE, Respondent

S. C. (Inty.) 5 of 1955—D. C. Ratnapura, 488 Sp.

Costs—Application for review of taxation—Proper procedure—Civil Procedure Code, s. 214.

Where a party, who had been ordered to pay the costs of an inquiry and was dissatisfied with the taxation of costs, submitted a statement of objection to the Secretary of the Court who in turn submitted the document to the District

[1] *(1950) 2 K. B. 466.*

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Judge, recommending that the matter should be fixed for inquiry under section 214 of the Civil Procedure Code—

Held, that the procedure was substantially in conformity with the provisions of Section 214 of the Civil Procedure Code.

APPEAL from an order of the District Court, Ratnapura.

C. G. Weeramantry, for the claimant-appellant.

S. W. Jayasuriya, with *U. P. Weerasinghe*, for the judgment-creditor respondent.

Cur. adv. vult.

November 3, 1955. GRATIAEN, J.—

The respondent to this appeal caused certain immovable property valued at Rs. 8,000 to be seized in execution of a money decree for Rs. 947/40 against his judgment debtor. The appellant claimed that the property belonged to him and was therefore not liable to seizure. His claim was rejected by the Court and he was ordered to pay the costs of the inquiry. The present dispute relates to the taxation of the respondent's bill of costs.

The Secretary of the Court taxed the bill of costs at Rs. 844/- on 8th March 1954. On 31st March 1954, however, the appellant's Proctor objected to the taxation on the ground that the bill had been wrongly taxed by reference to the value of the property and not (as it admittedly should have been) to the amount of the decree sought to be executed. The Proctor accordingly asked that the Court should review the taxation under section 214 of the Code. This statement of objection was forwarded by the Secretary to the District Judge with the following minute endorsed on it :

"Notice may be issued on the judgment creditor for 6.5.54.

Sgd :.....
Secretary."

The matter came up for inquiry in due course. The learned Judge decided that the bill had been wrongly taxed under Class 5 of the second schedule Part 1 of the Civil Procedure Code, and upheld the objection that it should have been taxed under Class 3. Nevertheless, he refused to review the taxation because, in his opinion, the appellant had not adopted the correct procedure for having the matter referred to the Court under section 214.

It is correct to say that, when either party is dissatisfied with the Secretary's taxation, the Secretary himself, and not the litigant, is the proper person to refer the matter in dispute to the Court. *Mohamed v. Deen* [1]. The party is not, however, deprived of his right to claim a reference merely because he had not raised the objection in the first instance

[1] (*1927*) *8 Law Recorder 174.*

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before the bill was taxed by the Secretary. *Meenatchi v. Rengappa Pulle* [1]. It is sufficient if his objection is raised within a reasonable time after taxation. *Sapramadu v. Wijetunge* [2].

The respondent's complaint is that the appellant (instead of requiring the Secretary to refer the matter in dispute to the Court), had directly invoked the jurisdiction of the Court under section 214. In my opinion, the correct procedure was substantially followed. The appellant's statement of objection, containing a formal application for a review of taxation, was in fact handed to the Secretary who in turn submitted the document to the District Judge, recommending that the matter should be fixed for inquiry under section 214. In *Mohamed v. Deen* (supra) by way of contrast, the procedure was quite irregular because the Judge purported *ex mero motu* to revise an order of taxation.

I would allow the appeal and order that the Secretary of the District Court be directed to tax the bill of costs according to the rates specified in Class 3 of the schedule. The respondent must pay to the appellant Rs. 21/- as costs in respect of the argument in the Court below, and Rs. 31/50 as costs of this appeal.

SWAN, J.—I agree.

Appeal allowed.

[1] *(1912) 15 N. L. R. 119.* [2] *(1916) 3 C. W. R. 367.*

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[In the Privy Council]

1956 *Present :* **Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

S. K. SUBRAMANIAM, Appellant, *and* THE QUEEN, Respondent

Privy Council Appeal No. 20 of 1955

S. C. 4—M.C. Point Pedro, 16,525 (1st Northern Circuit, 1954)

Contempt of Court—Perjury—Exercise of summary powers of punishment—Principles applicable—Criminal Procedure Code, s. 440.

The summary power conferred by section 440 (1) of the Criminal Procedure Code is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury. It was never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witness in the case. If such an investigation is necessary it can and should be set on foot under section 440 (4).

APPEAL, by special leave, against an order of a Commissioner of Assize of the Supreme Court.

Phineas Quass, Q.C., with *R. K. Handoo* and *Biden Ashbrooke*, for the witness-appellant.

T. O. Kellock, for the Crown.

Cur. adv. vult.

April 10, 1956. [*Delivered by* Lord Oaksey]—

This is an appeal, by special leave, against the Order of a Commissioner of Assize of the Supreme Court of Ceylon, dated the 18th March, 1954, whereby the appellant was sentenced to one month's rigorous imprisonment for having given false evidence during the course of a trial for a murder on the 27th November, 1952, before the said Commissioner who, in sentencing the appellant, purported to exercise the summary powers vested in him under section 440 (1) of the Criminal Procedure Code of Ceylon.

The appellant has served the said sentence.

It is convenient to set out section 440 of the Criminal Procedure Code :—

Summary punishment for perjury in open Court.

"440. (1) If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of Section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness

2——J. N. B 5414—1,590 (6/56)

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as for a contempt of the Court to imprisonment either simple or rigorous for any period not exceeding three months or to fine such witness in any sum not exceeding two hundred rupees; or if such Court be an inferior Court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this Section is exercised by a Court other than the Supreme Court the Judge or Magistrate of such Court shall record the reasons for imposing such fine.

"(2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this Section shall not be liable to be punished again for the same offence.

"(3) Any person against whom any order is made by any Court other than the Supreme Court under Sub-section (1) of this Section may appeal to the Supreme Court and every such Appeal shall be subject to the provisions of this Code.

"(4) In lieu of exercising the power given by this Section the Court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided by Section 380.

"(5) Nothing in this Section contained shall be construed as derogating from or limiting the powers and jurisdiction of the Supreme Court or the Judges thereof."

The appellant was sentenced in the following circumstances :—

The accused man, one Veerakathey Tharuman *alias* Tharmalingam, was charged under section 296 of the Penal Code with the murder of one Kandasamy on the 27th November, 1952, at or near a road junction known as Nelliadi Junction.

The appellant was at that time the Village Headman of Karavetti North, a village which abutted on the north side of Nelliadi Junction which was the scene of the offence. The village of Karavetti West abutted on the south side of Nelliadi Junction.

The case for the prosecution appears to have been that the deceased was seriously assaulted and beaten by the accused and two others (who were not before the Court) on the north side of Nelliadi Junction soon after it had become dark (*i.e.* about 6.30–7 p.m.). His assailants left the injured man lying on the road where he was attacked but subsequently he was removed to the southern side of the Junction by two innocent persons who placed him under a tamarind tree. After the attack the attackers went away but the accused returned shortly after and finding the injured person under the tree attacked him again, this time with a knife. The injured man died as a result of the injuries he had thus received.

The case for the prosecution was supported principally by the evidence of two alleged eye-witnesses and by the evidence of police officers and others (the appellant among them) who had either assisted at the police investigation or otherwise had played some part therein.

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The appellant was called for the prosecution and testified that he was not an eye witness nor in possession of information which definitely identified any person with the crime. He was first informed of the offence at about 7.30 p.m. on the day in question and within 10 minutes or so of his receiving such information he went to Nelliadi Junction : On his arrival at the Junction he found the injured man alive but gravely wounded lying under a tree within the jurisdiction of the Karavetti West Headman in whose absence he (the appellant) assumed jurisdiction to deal with the emergency : He reported the offence to the police by telephone very shortly after—at about 7.45 p.m.—and until the police arrived at about 9 p.m. he carried out his duties as best he could : At about 8.15 p.m. he said he sent a written message to the Karavetti West Headman asking for his car for the removal of the injured person but the message was not accepted and was returned to him. He was unable to find the letter. The Karavetti West Headman did not arrive on the scene before about 9 p.m. : The appellant tried vainly to enlist the assistance of car owners for removing the injured person who died eventually at about 8.30 p.m. i.e. before the arrival of either the police or the Karavetti West Headman. Later the appellant telephoned to the hospital and arranged for the removal of the deceased.

Before the arrival of the police or the Karavetti West Headman he questioned, among others, one Kandappu a neighbouring boutique keeper and recorded his statement : The appellant stated that there was a general reluctance on the part of several persons who had been questioned to come forward with any information of th attack on the deceased : He denied that there was any truth in the suggestion that " we all of us got together and suppressed the fact as to who the assailant was. " The Karavetti West Headman was not called as a witness.

The Commissioner appears to have formed the opinion that evidence of the murder had been and was being suppressed and he therefore on his own initiative called a number of witnesses and cross examined the prosecution witnesses and the witnesses he had called not in connection with the alleged murder which he was trying but in connection with the alleged suppression of evidence of that murder. In the course of this cross examination he formed the opinion that the appellant and some of the police and other witnesses were committing perjury and proceeded to direct the acquittal of the prisoner although he stated that he had not the slightest doubt that the prisoner was guilty and that he had with the assistance of the police and of the appellant suppressed the evidence. At a later hearing the Commissioner after hearing counsel for the police and other witnesses and the appellant sentenced them to various terms of imprisonment.

In their Lordships' opinion the course taken by the learned Commissioner was misconceived. The summary power conferred by section 440 (1) is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury. It was in their Lordships' opinion never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case.

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If such an investigation is necessary it can and should be set on foot under section 440 (4). Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the Order of the Commissioner of Assize Supreme Court of Ceylon dated the 18th March, 1954, set aside. In all the circumstances of the case they think it right to make the unusual order that the appellant shall have his costs of the appeal and of the petition for special leave.

Appeal allowed.

1955 *Present :* **H. N. G. Fernando, J.**

THE ATTORNEY-GENERAL, Applicant, *and* (1) E. P. SAMARAKKODY (Member of Parliament for Dehiowita), (2) W. DAHANAYAKE (Member of Parliament for Galle), Respondents

S. C. 489—In the matter of an Application by the Attorney-General under Section 23 (1) of the Parliament (Powers and Privileges) Act, No. 21 of 1953

Parliament—Offence of breach of privilege—Disrespectful conduct in the precincts of the House—Immunity of Members—Meaning and scope of expression "Proceedings in Parliament"—Jurisdiction of Supreme Court—Suspension of sitting of House—Condition of time limit—Ceylon Constitution Order in Council, 1946, s. 17 (5)—Parliament (Powers and Privileges) Act, No. 21 of 1953, ss. 3, 4, 9, 22, 23, 25, 26.

The two respondents were members of the House of Representatives. At a sitting of the House another member, X, on being suspended from the service of the House, refused to leave the House when he was ordered by the Speaker to do so. The Speaker thereupon ordered the Sergeant at Arms to remove the member from the House, stated "I suspend the sitting of the House", and vacated the Chair. The mace remained on the Speaker's table. Thereafter, and before the Sergeant at Arms removed X with Police assistance obtained upon an order from the Speaker in Chambers, the 2nd respondent proposed that the 1st respondent do take the Chair, and another member seconded that motion. The Deputy Speaker and the Deputy Chairman of Committees were not in the Chamber when the motion was moved. As no objection was taken to the motion, the 1st respondent took the Chair. Thereafter X made a speech in the Chamber and continued to speak until the Sergeant at Arms entered with the Police and removed X from the Chamber. On the entry of the Sergeant at Arms with Police officers, the 1st respondent vacated the Chair.

The Attorney-General alleged *inter alia* in the present application made under section 23 of the Parliament (Powers and Privileges) Act that the 1st respondent was guilty of disrespectful conduct in the precincts of the House (an offence specified in paragraph 7 of Part B of the Schedule to the Act) and that the 2nd respondent was guilty of abetment of the said offence of disrespectful conduct (an offence specified in paragraph 10 of Part B).

Assuming (without deciding) that the sitting of the House was validly suspended by the Speaker and that there was no occasion for the operation of section 17 (5) of the Ceylon Constitution Order in Council, 1946, which provides that in the absence of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, at a sitting of the House, a member proposed and seconded in that behalf may preside at the sitting—

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Held, that the conduct of the two respondents, even if it was disrespectful, was not justiciable by the Supreme Court. It was conduct included within the scope of sections 3 and 4 of the Parliament (Powers and Privileges) Act and could not therefore be questioned or impeached in proceedings taken in the Supreme Court under section 23 of the Act. The jurisdiction to take cognisance of such conduct was exclusively vested in the House of Representatives.

Quaere, (i) whether the provisions of section 25 (2) of the Parliament (Powers and Privileges) Act preclude a respondent from challenging the validity of an application made under section 23 on the ground that the application includes charges not specified in the Report furnished by the Attorney-General under section 26.

(ii) whether, on every occasion of the suspension of a sitting of the House of Representatives, it is the duty of the Speaker to give notice of the time when the sitting will be resumed.

(iii) whether paragraph 7 of Part B of the Schedule to the Parliament (Powers and Privileges) Act covers only disrespectful conduct *in the precincts of the House*, and not such conduct in the House itself or in a Committee.

APPLICATION under section 23 (1) of the Parliament (Powers and Privileges) Act.

T. S. Fernando, Q.C., Acting Attorney-General, with *H. A. Wijemanne*, Acting Deputy Solicitor-General, *V. S. A. Pullenayegum*, Crown Counsel, and *I. F. B. Wikramanayake*, Crown Counsel, for the Crown.

Colvin R. de Silva, with *Walter Jayawardene*, and *T. W. Rajaratnam*, for the 1st respondent.

S. Nadesan, Q.C., with *Walter Jayawardene*, *J. Senathirajah* and *D. S. P. Dahanayake*, for the 2nd respondent.

At the commencement of the hearing, Counsel for the respondents submitted that they were objecting to charges (3) to (6) in the Application being entertained by the Court as these charges had not been included in the report of the Attorney-General to the Speaker under Section 26 (6) of the Parliament (Powers and Privileges) Act No. 21 of 1953.

The Attorney-General submitted that it was not competent for the Court to entertain the respondents' preliminary objection in view of the provisions of Section 25 (2) of the Parliament (Powers and Privileges) Act No. 21 of 1953.

The Court intimated that it would first hear the Attorney-General's submission.

T. S. Fernando, Q.C., Acting Attorney-General.—Section 25 (2) of the Parliament (Powers and Privileges) Act No. 21 of 1953 enacts that "the making of an Application under Section 23 by the Attorney-General in any case shall constitute *conclusive evidence* that the Application has been duly made in accordance with the preceding provisions of this Section." It is therefore not competent for the Court to go behind the Attorney-General's Application to determine whether the Application has been duly made. Similar provisions in various statutes

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have been consistently interpreted by the Courts in this manner, vide *The Queen v. Levi* [1] (Bankruptcy Act) ; *Oakes v. Turquand* [2] (Companies Act) ; *Ex parte Learoyd in re Foulds* [3] (Bankruptcy Act) ; *Ladies Dress Association Ltd. v. Pulbrook* [4] (Companies Act) ; *Kerr v. John Mottram* [5] (Companies Act) ; *Rex v. Agricultural Land Tribunal (South Eastern area) Ex parte Hooker* [6] (Agriculture Act).

Colvin R. de Silva, in reply, cited *In re National Debenture and Assets Corporation* [7] and *Attorney-General v. Mayor of Bournemouth* [8].

Colvin R. de Silva, showing cause on behalf of the 1st respondent, submitted that the conduct of the respondents was not disrespectful as they were acting in terms of Section 17 (5) of the Ceylon Constitution Order in Council which provided that in the absence of the Speaker, Deputy Speaker, and Deputy Chairman of Committees at a sitting, a member who is proposed and seconded in that behalf may preside at the sitting. The House had not been validly suspended as no time had been named by the Speaker—vide Standing Order 86.

The respondents were members of the House and Sections 3 and 4 of the Parliament (Powers and Privileges) Act, No. 21 of 1953, conferred immunity upon them in respect of their conduct in the House.

S. Nadesan, Q.C., for the 2nd respondent, adopted the arguments of Counsel for the 1st respondent and further submitted that if the 2nd respondent *bona fide* formed the view that there was no valid suspension, his subsequent conduct does not become justiciable merely because the suspension is subsequently held by the Court to be valid.

T. S. Fernando, Q.C., Acting Attorney-General, in reply.—The immunity conferred by Sections 3 and 4 of the Parliament (Powers and Privileges) Act, No. 21 of 1953, upon the members of the House was only in respect of " Proceedings in the House ".

> " What is done or said by an individual member becomes entitled to protection when it forms part of the proceedings of the House in its technical sense, i.e. the formal transaction of business with the Speaker in the Chair or in a properly constituted committee. " (May's Parliamentary Practice, 15th Edition, page 63).

In this case, the Speaker having suspended the sitting there could be no valid transaction of Parliamentary business. No immunity therefore attaches to the members in respect of things said or done during such suspension.

As to the meaning of the term " proceedings in Parliament " vide May's Parliamentary Practice, 15th Edition, pages 61 to 66, and *Rivlin v. Bilainkin* [9].

There was a valid suspension of the House although no time was specifically named. The purpose of naming a time is to give notice to the

[1] *(1865) L. J. M. C. 174*
[2] *(1867) 2 H. L. 325 at 354.*
[3] *(1878) 10 Ch. D. 3.*
[4] *(1900) 2 Q.B. 376.*
[5] *(1940) Ch. 657 at 660.*
[6] *(1952) 1 Q. B. 1 Divl. Ct.*
[7] *(1891) 2 Ch. 505.*
[8] *(1902) 2 Ch. 714.*
[9] *(1953) 1 Q. B. 485.*

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members as to when they should again re-assemble to continue the transaction of parliamentary business. In this case, having regard to the circumstances which immediately preceded the suspension, it would have been obvious to any reasonably intelligent member of the House that the Speaker intended to resume the transaction of parliamentary business when the member for Moratuwa who had been "named" by the Speaker had been removed from the House.

The inference is irresistible that the conduct of the respondents constituted a deliberate defiance of the authority of the Speaker.

Cur. adv. vult.

December 2, 1955. H. N. G. FERNANDO, J.—

In this case of first instance under the Parliament (Powers and Privileges) Act, No. 21 of 1953, the Attorney-General made an application for notices on two members of the House of Representatives calling on them to show cause why they should not be punished for offences of breach of privilege of Parliament. Being satisfied (in terms of the relevant section) on perusal of the application and of the evidence on affidavit furnished therewith that the members *appeared* to have committed the offences in question, I caused notices to show cause to be served on them returnable on October 14, 1955. My attention was thereafter drawn to certain defects in the form of the notices, and, although counsel for the respondents did not propose to rely on those defects, fresh notices were served on that day returnable on November 21, 1955, being also the day fixed for the inquiry.

I propose first to refer to the manner in which jurisdiction has been conferred on this Court to entertain proceedings for breaches of privilege of Parliament.

Section 22 (sub-sections (1) and (2)) of the Act declares each of the acts and omissions specified in both Parts of the Schedule to the Act to be a breach of the privileges of Parliament and to be an offence punishable by the Supreme Court under the provisions "hereinafter contained in that behalf". Sub-section (3) of the same section declares every breach of privilege specified in Part B of the Schedule to be an offence punishable by the appropriate House of Parliament. It will be seen therefore that the offences in Part A are punishable exclusively by the Supreme Court, while both this Court and the Houses have a concurrent jurisdiction over the offences specified in Part B. A comparison of Part A and Part B of the Schedule indicates that the latter includes (*a*) what may be called contempts of the authority of Parliament, such as the refusal to obey orders or resolutions under the Act, the refusal to produce documents or to give evidence and prevarication or other misconduct on the part of any witness, (*b*) assaults, insults or obstruction of members or officers of Parliament committed in any House or within its precincts, and (*c*) disturbances likely to interrupt proceedings of Parliament and disrespectful conduct within the precincts of either House. Part A on the other hand deals, generally speaking, with acts or omissions committed outside Parliament, such as assault, insult or obstruction

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of members coming to or going from either House, compulsion or inducement of members by force, threats or bribes, and the publication of false or perverted accounts of Parliamentary proceedings or of defamatory statements reflecting either on the proceedings or character of either House or on the conduct of members.

It would appear from this comparison that Parliament has thought fit to reserve for each House only the right to deal with misbehaviour in either Chamber or its precincts and conduct which interferes with the transaction of Parliamentary business. It must be noted also that even in these cases, the only punishment which either House may inflict is admonition or removal from the precincts of the House as well as suspension for one month in the case of a member (section 28). On the other hand the Supreme Court has power in the case of any offence to impose a sentence of imprisonment for not more than two years, or a fine not exceeding Rs. 5,000 or both imprisonment and fine.

The jurisdiction of the Supreme Court is created by section 22 of the Act, but is not exercisable except upon an application by the Attorney-General made in pursuance of an express resolution of the House concerned. The mode in which the Attorney-General is moved to make the appropriate application is prescribed in sections 26 and 25 of the Act. Section 26 (1) provides that the Speaker may refer to the Attorney-General for report any case of an alleged offence under Part II, the reference being made by the Speaker either upon a complaint made to him in Chambers by a member or upon a resolution of the House. Sub-section (2) of the same section provides for the recording of the statement of a member making a complaint and of other relevant statements which are transmitted to the Attorney-General at the time of the reference. Sub-section (6) requires the Attorney-General to report to the Speaker whether there is in his opinion sufficient evidence " to warrant the taking of further steps under this Act in respect of an alleged offence under this Part ".

Section 25 then provides that an application to the Court for the issue of a notice to show cause under section 23 may be made by the Attorney-General, only if he has furnished a report that there is sufficient evidence to warrant the further taking of steps under the Act and if the House after consideration of the report has by resolution required the Attorney-General to make the application. Section 23 provides for the making of the application to this Court by the Attorney-General, the issue of notice to show cause and the punishment in case no cause or no sufficient cause is shown.

It is convenient at this stage to summarize the facts which give rise to the present application.

(i) At the sitting of the House of Representatives on April 6, 1955, the Speaker " named " the member for Moratuwa, and in terms of Standing Order 82 the House thereupon passed a motion of the Leader that the member for Moratuwa be suspended from the service of the House.

(ii) On being thereafter ordered by the Speaker to leave the House the member for Moratuwa refused to comply with the order.

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(iii) The Speaker thereupon ordered the Serjeant at Arms to remove the member from the House, stated "I suspend the sitting of the House", and vacated the Chair. The mace remained on the Speaker's table.

(iv) Thereafter, and before the Serjeant at Arms removed the member for Moratuwa with Police assistance obtained upon an order from the Speaker in Chambers, the 2nd respondent, the member for Galle, proposed that the 1st respondent, the member for Dehiowita, do take the Chair, and the member for Kotte seconded that motion.

(v) The Deputy Speaker and the Deputy Chairman of Committees were not in the Chamber when the motion was moved.

(vi) There being no objection taken to the motion, the 1st respondent took the Chair.

(vii) Thereafter the member for Moratuwa made a speech in the Chamber and continued to speak until the Serjeant at Arms entered with the Police and removed that member from the Chamber.

(viii) On the entry of the Serjeant at Arms with Police officers, the 1st respondent vacated the Chair.

The Attorney-General alleges in his application that the 1st respondent is guilty of disrespectful conduct in the precincts of the House (an offence specified in paragraph 7 of Part B of the Schedule to the Act) and that the 2nd respondent is guilty of abetment of the said offence of disrespectful conduct (an offence specified in paragraph 10 of Part B). He also alleges that the 1st respondent is guilty of creating a disturbance in the Chamber while the House was sitting knowing or having reasonable grounds to believe that the proceedings of the said House were or were likely to be interrupted (an offence set out in paragraph 6 of Part B) and that the 2nd respondent was guilty of abetment of that offence; and lastly that the 1st respondent is guilty of the offence of joining in such a disturbance created by the member for Moratuwa (also an offence specified in paragraph 6 of Part B) and that the 2nd respondent was guilty of abetment of the latter offence.

The affidavits filed by the respondents contain averments that the report furnished by the Attorney-General under section 26 of the Act only stated that there was in the opinion of the Attorney-General sufficient evidence to warrant the taking of further steps in respect of the offence of disrespectful conduct specified in paragraph 7 of Part B of the Schedule and that there was no report from the Attorney-General in respect of any other offence nor any resolution passed by the House requiring him to make an application in respect of any other offence. Counsel for the 1st respondent has raised two preliminary objections based on these allegations of the respondents :—

(*a*) That the Attorney-General had no power to make an application to this Court in respect of any offence other than the offence referred to in his report, namely, disrespectful conduct in the

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precincts of the House ; and that therefore the Court had no jurisdiction to call upon the respondents to show cause in respect of the other alleged offences referred to in paragraphs (iii) to (vi) of the Attorney-General's application ; and

(*b*) That the application being invalid upon the ground already stated, the invalidity affects the entirety of the application and that the Court has therefore no jurisdiction to entertain even the charge of disrespectful conduct which was in fact specified in the report of the Attorney-General.

The Attorney-General has raised a counter objection to the right of the Court to entertain these objections as to the validity of his application. He relies on the following provision in section 25 (2) of the Act :—

> " The making of an application under section 23 by the Attorney-General in any case shall constitute conclusive evidence that the application has been duly made in accordance with the preceding provisions of this section ".

Upon the authority of several cases in which the expression " conclusive evidence " has been interpreted by the English Courts, the Attorney-General has argued that this Court is bound to assume that all the conditions antecedent to the making of a due application have been complied with, and that his Report to the House or the Resolution of the House cannot be utilised to displace that assumption.

At a later stage of the argument, counsel for the 1st respondent conceded that the application of the Attorney-General, in so far as it alleged the commission of the offences of disrespectful conduct and abetment thereof, was duly made, and that he could properly take objection only to the other charges, namely those numbered (iii) to (vi) in the application. All the charges being based on the same acts of the respondents, it appeared to me that the Court could not reach a finding against either of the respondents on charges (iii) to (vi) without also finding against them on those of disrespectful conduct, and that any additional finding on any of the last four charges would make no difference to the measure of punishment. The Attorney-General therefore agreed to my suggestion that the charges (iii) to (vi) be regarded as withdrawn. In these circumstances I am not called upon to give a ruling upon the first preliminary objection to the application which has been taken on behalf of the respondents. I need only make the observation that since the Attorney-General's Department will now be aware of the nature and scope of the objections which can be formulated against the inclusion in an application under section 23 of the Act of charges not specified in the Report under section 26, it is unlikely that in any future case a respondent to such an application will have occasion to raise such objections.

The second preliminary objection not being maintainable, the first two charges set out in the Attorney-General's application now require consideration.

The charge against the 1st respondent of disrespectful conduct within the precincts of the House is based on only one allegation of fact, namely

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that he took the Chair of the House on the occasion referred to in the application ; and the charge of abetment against the 2nd respondent is again based on one allegation of fact, namely that he moved the motion that the 1st respondent do take the Chair. The conduct of the respondents would not necessarily or even ordinarily be improper, for section 17 (5) of the Ceylon Constitution Order in Council, 1946, provides that in the absence of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees at a sitting of the House, a member proposed and seconded in that behalf may preside at the sitting. The argument of the Attorney-General was however that, the sitting of the House having been suspended by the Speaker, no business could be transacted in the House until the sitting was again resumed after the period of suspension. It was accordingly his argument that when a sitting is suspended there would be no occasion for the operation of section 17 (5) of the Constitution. But, argued counsel for the respondents :—

(*a*) the act of the Speaker on April 6, 1955, namely his statement " And I suspend the sitting of the House ", and his vacation of the Chair, did not in law constitute a suspension of the sitting ; and *alternatively*

(*b*) assuming that there was a valid suspension, the conduct of the two respondents, even if it constituted disrespectful conduct is not justiciable by this Court.

The first of the two arguments just mentioned is based on the omission of the Speaker to specify the period of the suspension of the sitting. Although the only provision in the Standing Orders of the House which refer to a suspension is Standing Order 86 :—

" *In case of grave disorder* arising in the House Mr. Speaker may, if he thinks it necessary to do so, adjourn the House without question put *or suspend the sitting for a time to be named by him* ",

the Clerk of the House has stated in an affidavit that " It is the practice of the House of Representatives for the Speaker to suspend sittings of the House as occasion demands without a resolution by the House " ; and it is conceded that according to the practice of the House sittings are occasionally suspended by the Speaker in circumstances other than those contemplated in Standing Order 86. But the Attorney-General does not contest the position that on every occasion of a suspension for whatever cause, it is customary for the Speaker to give notice to members of the time when the sitting will be resumed. It is apparent that such notice is necessary, for without it members would not know when they should return to the House for attendance at the resumed proceedings. I will assume for the purposes of this argument that the specification of a named time would not be the only means of giving notice, and that it would suffice for the Speaker to suspend the sitting for a named period or until the happening of a specified event.

It is apparently not unusual in the House of Commons for the House to be suspended without a time for the resumption being named. For

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instance on August 4th, 1919 there was a suspension the nature of which was made known to the House in the following remarks :—

> Sir Donald Maclean : " In view of the general desire of the House to view the River Pageant this afternoon, may I respectfully ask you, Sir, whether you have any suggestion to make to the House to meet that desire ?
>
> Mr. Speaker : The House will, no doubt, be desirous of doing what it can to salute the representatives of the Mercantile Marine as they pass. Probably it will be best if I quite informally suspend the sitting of the House for a reasonable interval. When I resume the Chair I shall have the bells rung, so that hon. Members may be aware of the fact ".

Again on 17th September, 1940, Mr. Speaker suspended a sitting in the following terms :—

> " I am informed that an air raid is now considered to be imminent and I will accordingly suspend the sitting ".

There follows a statement in Hansard that the House resumed after an interval of 22 minutes. Subsequently a special Standing Order was passed to the effect that the Speaker would suspend a sitting on being informed of the imminence of an air raid and that in that event the House would resume after the " danger past " signal was received.

The Attorney-General argues that in the context of the events of April 6th, 1955, the Speaker did (though not in so many words) give notice to the House that the sitting would be suspended until the member for Moratuwa had been removed from the Chamber and that every member should have been and was in fact aware that the suspension was being ordered with a view to resumption after the removal of the member for Moratuwa. If of course the Speaker had made the statement " I suspend the sitting until the member for Moratuwa is removed from the House " or even " I suspend the sitting in order that the member for Moratuwa be removed from the House ", there would have been a clear and adequate indication that the House would resume forthwith after the removal of the member for Moratuwa, and that indication would in my opinion have been substantial and effective (though not literal) compliance with the requirement that a time should be named. But it is argued for the respondents that the mere knowledge that the sitting was suspended consequent upon a disturbance created by the member for Moratuwa was not sufficient to fix members with the knowledge that proceedings would be resumed after the removal of the cause of the disturbance. It was argued also that the question whether there was a valid suspension is one of law and the omission of the Speaker to name a time rendered his purported suspension ineffective. There is I think something to be said for the view that if the Speaker, who is the representative of the House, failed duly to give effect to his intention to suspend members would be entitled to take advantage of his omission and to proceed with business despite his defective expression of intention. But in view of the opinion which I have formed on the second point relied upon by the respondents, namely that their conduct on this occasion is not justiciable by this Court, I can assume (without deciding) that the suspension was valid and effective.

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In order to consider the second point it is necessary to refer to sections 3 and 4 of the Parliament (Powers and Privileges) Act No. 21 of 1953 :—

Section 3 :—" There shall be freedom of speech, debate and proceedings in the House and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of the House ".

Section 4 :—" No member shall be liable to any civil or criminal proceedings, arrest, imprisonment, or damages by reason of anything which he may have said in the House or by reason of *any matter or thing which he may have brought before the House by petition, bill, resolution, motion or otherwise* ".

The argument for the respondents based on section 3 of the Act, which is an adaptation of Article 9 of the Bill of Rights, is that their conduct was part of the proceedings of the House and cannot therefore be impeached or questioned except by the House itself. It is interesting also to notice that section 4, more or less in amplification of section 3, protects a member from liability to civil or criminal proceedings " by reason of any matter or thing which he may have brought before the House by petition, bill, resolution, motion or otherwise ", and that section 9 requires the Courts to take judicial notice of the privileges of the House. The first question which arises is whether the immunity conferred by sections 3 and 4 for *proceedings* in the House are in any way qualified by Part II of the Act. It is true that section 22 appears on its face to confer on the Supreme Court jurisdiction over all offences specified in the Schedule and that section 23 contemplates the possibility that the Court can convict a *member* of an offence under the Act. But does this contemplation amount to an expression of intention by the Legislature that the Court will have power to convict a member even in a case where his conduct would otherwise be protected by the freedom of speech, debate and proceedings conferred in Part I ? I give without hesitation a negative answer to this question, and I am supported in that answer by the qualified concession made by the Attorney-General. There are many well-recognised modes by which the Legislature ordinarily expresses its intention that some right, benefit or immunity conferred by one provision of law must be regarded as taken away by another. It suffices to point out that no such recognised mode has been employed in the Powers and Privileges Act. Moreover, it must be borne in mind that when sections 22 and 23 read with the Schedule to the Act contemplate the possibility of a member being convicted by the Supreme Court, that is not a mere idle contemplation. Of the large number of acts which are declared by the Schedule to be offences, there are several which *if committed by a member* would not fall within the scope of the immunities conferred in Part I and this is specially true in regard to nearly all the offences specified in Part A which are declared to be punishable only by the Supreme Court. To hold therefore that some of the acts mentioned in the Schedule will, if committed by a member, not be justiciable by the Court is not to any appreciable extent to nullify the effect of sections 22 and 23. Those sections can be interpreted and applied perfectly consistently with the view that the freedom of speech, debate and proceedings

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was intended to be preserved intact. If therefore the conduct of the respondents of which complaint is made in the application falls within the scope of " speech, debate or proceedings in the House " within the meaning of section 3 of the Act, then clearly this Court has no jurisdiction to question that conduct.

It is urged on behalf of the respondents, on various grounds, that their acts namely the motion of the 2nd respondent that the 1st respondent do take the Chair and the act of the 1st respondent in taking the Chair after the motion was passed, are covered by the immunity conferred by these sections of the Act. May in his *Parliamentary Practice* (14th Ed pp 59 et seq) discusses Article 9 of the Bill of Rights under the topic of the " Right to exclusive cognisance of proceedings in Parliament " and refers to three principal matters involved in the statement of law contained in that Article—

(1) The right of each House to be the judge of the lawfulness of its own proceedings ;
(2) The right to punish its own members for their conduct in Parliament ;
(3) The precise meaning of the term " proceedings in Parliament ".

In regard to the first of these matters, May (at p. 60) makes the general observation that " the House is not responsible to any external authority for following the rules (of procedure) it lays down for itself, but may depart from them at its own discretion ". This right of the House holds good even where the procedure is laid down by statute, and for such purposes (i.e. in regard to procedure) the House can " practically change or supersede the law "— Coleridge C.J. in *Bradlaugh v. Gosset* [1]. In the same case Mr. Justice Stephen made the following observations :—

" Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out ? In my opinion we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings " (p. 278).

" It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned ; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly " (pp. 280–281).

" The House of Commons is not a Court of Justice ; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly and with the due regard to the laws in the making

[1] *12 Q. B. D. 273-274.*

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of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal " (p. 285).

Mr. Justice Stephen found much support for his views from statements of the judges who decided *Stockdale v. Hansard*, the case in which the Courts asserted in the strongest way their right to question the legality of a resolution of the House of Commons where such legality arises incidentally in an action between party and party.

I pass now to the meaning of the term " proceedings in Parliament ". The Attorney-General has relied on statements and citations in May to the effect that proceedings mean " the transaction of Parliamentary business ", or what a member may " say or do within the scope of his duties in the course of Parliamentary business " or " a part of a proceedings of the House in its technical sense i.e. the formal transaction of business with the Speaker in the Chair or in a properly constituted Committee ". Obviously Article 9 of the Bill of Rights was intended to include within its scope business of the nature referred to in these citations. But was that all which was intended to be included ? Was it not intended to include such acts as a giving of notice of a motion ? Standing Order 24 of the House of Representatives requires notices of motion to be given in writing and to be handed to the Clerk when the House is sitting, or to be sent to or left at the Clerk's office at any time. Is not then the handing or delivery to the Clerk of a written notice of motion a proceeding covered by the immunity ? Moreover, I take it that the Standing Orders contemplate the possibility that a member may not be able to write out his own motion and that he may therefore dictate his notices to a confidential stenographer or secretary. In my opinion such dictation, being an ordinary and even necessary mode by which busy men usually have documents prepared, would equally be covered by the immunity. To take a further example a member would not ordinarily give notice of some important motion in the House without first assuring himself that some other member will second the motion, and it would seem that a bona fide communication of the subject of his motion made to another member for this purpose will be protected as being a matter or thing brought before the House by motion—(Section 4 of the Act). May (at p. 65) refers to a statement made in this connection by the Select Committee on the Official Secrets Act that, " cases may easily be imagined of communications between one Member and another or between a Member and a Minister, so closely related to some matter pending in, or expected to be brought before the House, that, although they do not take place in the Chamber or a committee room, they form part of the business of the House, as, for example, where a Member sends to a Minister the draft of a question he is thinking of putting down, or shows it to another Member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed ".

I must refer now to the case of *Rivlin v. Bilainkin* [1] which was relied on by the Attorney-General. In an action for slander and libel the defendant in that case was restrained by an interim injunction from

[1] *(1953) 1 Q. B. D. 485.*

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repeating the alleged libels and slanders. While the injunction was in force, the defendant went to the House of Commons and handed to the messenger of the House five communications for delivery to named members of the House, which communications repeated the slanders. In accordance with the rules of the House of Commons, the messenger accepted one of the communications for delivery to a member of Parliament and the defendant posted the other four in the Post Office within the precincts of the House. The plaintiff in the case thereupon applied for an order committing the defendant to prison for breach of the injunction ordered by the Court. The argument for the defendant that the Court had no jurisdiction to make the order for committal since the publication occurred in the precincts of the House and was connected with an attempt to obtain Parliamentary redress for an alleged grievance was rejected by the Court. McNair J. relied particularly on the fact that the publication was not connected in any way with the proceedings in the House. I do not think that the ground of decision taken in a case where a stranger had made a communication to a member would be available against a member who makes a necessary communication regarding a proposed motion to another member or to his own secretary. I notice also that McNair J. formed his opinion upon a variety of reasons, and that one reason relied on by counsel in the case was that where a Court has once made an order affecting a private person and not affecting Parliament's own proceedings, the Court will not be deterred from enforcing its own order because of a claim of Parliamentary privilege. At best the case is only an authority for the proposition that if some person has already been prohibited by Court from making a particular statement, it is no answer for him to say that he made the statement to a member of Parliament.

The Standing Orders also contain provisions which contemplate that members do move motions which are out of order. For instance Standing Order 17 provides that where there is a motion (called a dilatory motion) for the adjournment of a debate, the Speaker, if he is of opinion that the motion is an abuse of the rules of the House, may nevertheless put the question thereupon from the Chair.

Again there is Standing Order 95 which declares that when a question for debate has been proposed, debated and disposed of, it should not be competent to any member, without the leave of Mr. Speaker, again to propose such question in the same session. Suppose for instance that a motion for the removal from office, of some office holder removable by vote of Parliament, on the ground that he is a bribe taker has been debated and negatived in a session. Suppose then that a member in the same session again seeks to introduce the same motion and hands a notice of motion to the Clerk, adding thereto an application for the leave of Mr. Speaker to propose that motion. Will the fact that the Speaker subsequently refuses to grant leave, render the motion one which is not protected by the immunity, or will it not instead be the position that since the motion is capable of being debated if the necessary leave is granted, it will be considered *ab initio* as being a motion, notice of which is given as part of the proceedings of Parliament ?

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I have referred to what appear in my opinion to be matters protected by Article 9 of the Bill of Rights, although they may not to a purist be thought to fall within the scope of the express words within the Article. It would have required both an extraordinary power of anticipation on the part of the framers of the Article, as well as an extraordinarily fine capacity of expression, for them to write that Article in terms which would have stated *beyond the possibility of argument* the true intended scope of the immunity. And I think that the citations already made from the case of *Bradlaugh v. Gosset* as to the right of the House to control its own proceedings and procedure make it sufficiently clear that the judge of an English Court would not examine the Article from the standpoint of a purist. The terms of section 9 of our Act, in my opinion, require a Judge to pose to himself not the question " is the act of a member outside the scope of the immunity ? ", but rather the question " is not the act of a member within the scope of the immunity ? ". In other words, sections 3 and 4 must receive a liberal construction wherever possible in favour of the plea of immunity.

The reason why I have referred to possible acts or conduct of members which in my opinion are covered by the immunity, even though they do not strictly form part of proceedings in the House with the Speaker in the Chair, is that it seems to me that the question whether any particular act or conduct forms part of " the proceedings " contemplated by sections 3 and 4 though one of law is nevertheless one of degree ; and I find those instances of assistance when I come to consider whether the conduct complained of in this case is not covered by the immunity.

Let me first take a genuine and unquestionable case of the application of section 17 (5) of the Constitution. May (at p. 237) refers to the practice of the House of Commons in the event of the absence of the Speaker : the Serjeant at Arms enters the House and places the mace on the table and the Clerk then informs the House of the absence of the Speaker and if necessary of the Chairman of Ways and Means ; the Chairman of Ways and Means or in his absence the Deputy Chairman then takes the Chair. Assuming that a similar practice is followed in our House of Representatives (although there is no evidence of it) a member would ordinarily propose another to the Chair under section 17 (5) only if the Clerk has first announced the absence of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees ; but I do not see how the failure of the Clerk to announce the absence of the three designated officers can invalidate a motion that some member take the Chair, if in fact those officers are not present. The motion would then be moved at a stage when the Chair is in fact unoccupied, and such a motion would surely be a proceeding in the House despite the fact that neither the Speaker nor any other member is in the Chair at the time the motion is moved. So that the presence of the Speaker or some other presiding member is not an essential pre-requisite to rendering the motion a part of the proceedings of the House. It would appear, therefore, that there can be a valid *proceeding in the House* even though no person is for the time being presiding. This can only be so, on the legal ground that, when the mace is placed on the table at the time appointed by Standing Orders for the commencement of a sitting, the

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business of the sitting can commence ; and if the Speaker be then absent, the first business is that some other member takes, or is voted to, the Chair under section 17 (5) of the Constitution.

Let me now take a case which, however improbable in practice, can legitimately be said to be possible in theory and to be comparable with the facts of the present case. Suppose that a Speaker out of sheer caprice or perversity or some more permanent mental defect suspends the sitting of the House without any reason, stated or apparent, for a period of four hours. Suppose that the business of the day includes the consideration of the 2nd and 3rd readings of a bill already passed by the other House, the enactment of which is urgently required in the public interest. Suppose that on such an occasion the Leader of the House, after the Speaker vacates the Chair, proposes that the Deputy Speaker should preside in order that the business of the day be transacted ; that the Deputy Speaker presides accordingly and that thereafter the Bill in question is debated and passed. If that Bill be presented for the Royal assent and assent be given, will it be open for any authority, judicial or otherwise, to declare the Bill to be invalid on the ground that the Chair was improperly taken by the Deputy Speaker ? In my opinion the principle referred to by May, that it is a *collective right* of the House to settle its own code of procedure and to depart from that code at its own discretion, will preclude any Court from questioning the validity of the Bill. The only appropriate means, if any, by which proceedings so taken with the Deputy Speaker in the Chair can be rendered invalid is by a successful motion in the House itself that the proceedings be expunged from the Journal and Minutes of the House.

It is important to note in this connection that there is no Standing Order which prevents a member from moving a motion like that moved in the present case, on the ground that the Speaker had suspended the sitting. It is the contention on both sides that despite the vacation of the Chair by the Speaker on April 6th, 1955, the House was still technically sitting, the mace remaining on the table. The admitted facts therefore render the circumstances of the occasion almost parallel to the circumstances of the two other occasions to which I have already referred, namely the announced absence of the Speaker at the commencement of a sitting or a causeless suspension.

The apparent object of the 2nd respondent in moving his motion was to secure if possible that the House should continue to sit and transact business despite the order of suspension. I cannot think of a motion which can be said to be more directly referable to a desire to carry out the duties and functions of membership than one moved for the purpose of proceeding with the business of a sitting sooner than the Speaker may have contemplated. It may be true in fact that the 2nd respondent had an additional motive in mind, namely that by proceeding to transact business the House would flout the Speaker's order of suspension. If there was present that additional motive, then perhaps he would, though acting in his capacity as a member, yet be guilty of disrespectful conduct, but if such had been the case, it would not be different from a case where a member while speaking in debate in actual proceedings in the House refers to the Speaker by a dirty name. Conduct of the latter kind,

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however disrespectful, would clearly not be justiciable by this Court, for the reason that it would be protected by the immunity conferred by sections 3 and 4 of the Act.

The view which I take of the matter does not have the consequence that a member can be disrespectful with impunity. I have already referred to the principle involved in Article 9 of the Bill of Rights that the House has the right to punish its own members for their conduct in Parliament. May (at p. 429) refers to cases where members of the British Parliament have been committed to the custody of the Serjeant or even sent to the Tower for the use of treasonable or seditious language, and to the power to punish a member for disrespect of the House itself. So far as the Houses in Ceylon are concerned, there are the powers of naming and suspension referred to in Standing Orders 82–87 as well as the powers of admonition, removal and suspension declared by sections 22, 27 and 28 of the Powers and Privileges Act.

The conclusion which I reach for these reasons is that assuming the suspension to have been valid, and assuming an intention on the part of the respondents to be disrespectful, their conduct, being conduct included within the scope of sections 3 and 4 of the Act, cannot be questioned or impeached in proceedings taken in this Court under section 23 of the Act. The jurisdiction to take cognisance of such conduct was exclusively vested in the House of Representatives. The respondents are accordingly discharged from the notices served on them.

There is one observation which I consider it necessary to make, even though it be *obiter*. It has been argued that, having regard to the phraseology employed in Part B of the Schedule to the Act, paragraph 7 in that Part will cover only disrespectful conduct *in the precincts of the House*, and not such conduct in the House itself or in a Committee. If, as one might reasonably expect, the intention of Parliament was to include disrespectful conduct on the part of members and strangers whether in the Chamber or the precincts, it may be advisable to supply by an amendment the omission of the draftsman to give unambiguous expression to that intention.

Application dismissed.

1954 *Present :* **Rose, C.J., and Gratiaen, J.**

G. P. KODIKARA, Appellant, *and* S. A. FERNANDO, Respondent

S. C. 431—D. C. Negombo, 15,730 L

Contract—Stipulation in favour of third party—Validity thereof—Roman-Dutch Law.

Under Roman-Dutch law a stranger to a contract is entitled to claim the benefit of a stipulation made in his favour. This rule is subject only to the qualification that until the benefit stipulated for has been accepted by him he can be deprived of it by agreement between the contracting parties without reference to him.

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APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

M. I. M. Haniffa, with *M. H. M. Naina Marikar*, for the defendant respondent.

Cur. adv. vult.

May 20, 1954. GRATIAEN, J.—

This action relates to a property which Lucia Fernando had donated to her grandson Joseph Fernando on 11th August 1945 subject to (1) a life-interest in herself and (2) a condition that the donee, "his heirs, executors, administrators *and assigns*" would sell the property to the plaintiff "or his heirs" for a consideration of Rs. 350 "at any time that he demands within a period of five years from the date hereof" (P2). Joseph Fernando accepted the gift and the condition attaching to it.

By a conveyance P3 dated 27th September 1945 Lucia and Joseph Fernando purported to sell the property to the defendant (who is Lucia's son) "to have and to hold the same *absolutely and for ever*". There can be no doubt that P3 operated effectively to transfer Lucia's life-interest as well as the right, title and interest which had previously passed to Joseph under P2. The question is whether or not the conveyance was subject to the original condition attaching to the grant in favour of Joseph and his "assigns".

On 24th April 1950 the plaintiff instituted this action against the defendant claiming that the defendant (as Joseph's successor-in-title) was under an obligation to sell the property to him for Rs. 350 in terms of the condition stipulated for his benefit in P2.

The defendant pleaded by way of defence that he was under no contractual obligation to sell the property to the plaintiff. As I understand the recorded submissions made on his behalf at the trial, it was argued that the stipulation in P2 was bad for want of mutuality, and that only Lucia (but not the plaintiff) had a remedy to enforce the contract against Joseph (but not against the defendant).

The rights and obligations of the parties under P2 and P3 were governed by the Roman-Dutch law, under which system a stranger to a contract is entitled to claim the benefit of a stipulation made in his favour provided that he accepts it within the prescribed period—*Mutual Life Insurance Co. of New York v. Hotz* [1]. This principle has been recognised by the Courts of this country —*Jinadasa v. Silva* [2] and *Marthelis Appuhamy v. Peiris* [3]. The rule enunciated in these cases is subject only to the qualification that, until the benefit stipulated for has been accepted by the third party, he can be deprived of it by agreement between the contracting parties without reference to him—*Van der Plank v. Otto* [4]. Watermeyer, C.J. states that the promisor can also be released unilaterally by the

[1] *(1911) S. A. A. D 556.*
[2] *(1932) 34 N. L. R. 344.*
[3] *(1946) 47 N. L. R. 78.*
[4] *(1912) S. A. A. D. at 353.*

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promisee from his contractual obligation " at any time before the third party's inchoate right has been perfected by acceptance communicated to the promisor "—*C. I. R. v. Estate Crewe* [1].

Let us apply these rules to the present case. It is not disputed that the plaintiff had, at some stage within the five-year period available to him, accepted the benefit of the stipulation in his favour contained in the deed of donation P2. The precise date of acceptance was, however, not investigated in the lower Court because it was not material to any of the issues framed at the trial. *Prima facie*, therefore, the plaintiff is entitled to enforce performance of the obligation as against the defendant who is the successor-in-title of Joseph Fernando.

I appreciate that the defendant had also pleaded in his answer that the contract had been " rescinded by the parties ". This defence, however, was not put in issue at the trial and, even if the terms of the conveyance could fairly be regarded as incorporating (by necessary implication) a rescission of the earlier contract, the defendant has neither pleaded nor proved that such rescission took place before the plaintiff had communicated to Joseph Fernando his acceptance of the benefit of the stipulation made in his favour in P2.

We have been invited to send the case back for a re-trial on this additional issue. In my opinion, however, the defendant should be refused this indulgence. The action was instituted over four years ago, and must be decided on the issues which the parties were content to raise at the original trial. It would be most unsatisfactory to permit them to lead oral evidence at this stage concerning events which took place in 1945 between the dates of execution of the conveyances P2 and P3. Besides, there is no reason for supposing that Lucia would have stipulated for a valuable benefit in the plaintiff's favour unless there had been some contemporaneous agreement between all the parties for the insertion of the relevant clause in P2.

The learned District Judge dismissed the plaintiff's action because the conveyance P3 in favour of the defendant did not specifically incorporate the earlier condition contained in P2. In my opinion, this omission was not fatal to the plaintiff's claim which was in truth based on the earlier contractual obligation undertaken by Joseph Fernando on his own behalf and on behalf of his " assigns ". The conveyance P2 was duly registered and must be assumed to have been brought to the defendant's notice at the time of his purchase. In the result, the only valid defence which might have been available to the defendant was that of "rescission *before acceptance* ", but there is no material on the record which enables us to hold in the defendant's favour on this point.

I would allow the appeal with costs in both Courts, and enter a decree in favour of the plaintiff as prayed for in paragraphs (*a*) and (*b*) to the prayer to the plaint.

Rose, C.J.—I agree.

Appeal allowed.

[1] *(1943) S. A. A. D. 656 at 674.*

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1955 *Present :* **Basnayake, A.C.J.**

S. G. DE SILVA (Revenue Inspector, Municipal Council of Kurunegala), Petitioner, *and* KURUNEGALA CO-OPERATIVE STORES, LTD., Respondent

S. C. 283—Application for Revision in M. C. Kurunegala, 6,974

Offensive trade or business—Requirement of licence—Meaning of " trade or business "—By-law—Municipal Councils Ordinance, No. 29 of 1947, ss. 148 (1), 267.

By a by-law made under sections 148 and 267 of the Municipal Council Ordinance, " storing grain, for purposes other than as forage, in quantity exceeding 5 cwt. " was one among a number of trades or businesses which were declared to be offensive trades or businesses for the carrying on of any of which it was necessary to obtain a licence.

Held, that unless the trade or business declared to be offensive was carried on for the sake of earning profits there would be no infraction of the by-law. Storage, therefore, of grain by a co-operative society as an incident of the trade of retailing rice could not fall within the ambit of the by-law.

APPLICATION to revise an order of the Magistrate's Court, Kurunegala.

N. E. Weerasooria, Q.C., with *L. Mututantri*, in support.

No appearance for Respondent.

Cur. adv. vult.

November 8, 1955. BASNAYAKE, A.C.J.—

This is an application by the Revenue Inspector of the Municipal Council of Kurunegala (hereinafter referred to as the applicant), praying that the order of acquittal of the accused respondent, the Kurunegala Co-operative Stores, Ltd. (hereinafter referred to as the respondent), be set aside, in the exercise of the powers of this Court under section 357 of the Criminal Procedure Code, and that a re-trial be ordered.

The applicant complained to the Magistrate's Court of Kurunegala that on the 22nd day of December, 1954, the respondent carried on the trade or business of storing grain for purposes other than as forage in quantity exceeding 20 cwt. without a licence from the Municipal Commissioner in breach of section 148 (1) of the Municipal Councils Ordinance No. 29 of 1947, and did thereby commit an offence punishable under section 148 (3) of that Ordinance.

Section 148 (1) referred to above provides as follows :—

" No place shall be used within any municipality for any of the following purposes, namely, for boiling offal or blood, or as a soap-house, oil-boiling-house, dyeing-house, tannery, brick, pottery or lime kiln, sago manufactory, gun-powder manufactory, manufactory of fireworks, or other manufactory or place of business from

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which either offensive or unwholesome smells arise, or for any purposes which are calculated to be dangerous to life, or as a yard or depot for hay, straw, wood, coal, cotton, bones, or inflammable oil, or for any other trade or business which the Council may, by means of by-laws, declare to be an offensive or dangerous trade or business for the purposes of this section, except under a licence from the Council, which is hereby empowered, at its discretion from time to time, to grant such licences, and to impose such terms therein as to the Council may appear expedient ".

By a by-law made under sections 148 and 267 of the Municipal Councils Ordinance a number of trades or businesses have been declared to be offensive trades or businesses. That by-law reads—

" The following trades or businesses are hereby declared to be offensive trades or businesses for the purposes of section 148 of the Municipal Councils Ordinance No. 29 of 1947 ".

A list of 57 trades or businesses declared to be offensive, another of 26 declared to be dangerous, and a third of 24 declared to be both dangerous and offensive are appended to the by-law. Of these the 52nd item within which the prosecution seeks to bring the respondent reads—

" Storing grain, for purposes other than as forage, in quantity exceeding 5 cwt. ".

The respondent successfully contended before the learned Magistrate that the by-law does not apply to it inasmuch as it is not carrying on the trade or business of storing grain. The evidence discloses that rice is brought to the respondent's store from the authorised wholesale dealer, the Co-operative Wholesale Union, for the purpose of retailing to the rice-ration book holders attached to it. A quantity of 56 bags of rice is brought each week in three or four instalments. Each instalment is distributed within a day or two of its receipt. On the date alleged in the complaint, there were 17½ bags of rice at the time the applicant visited the store.

The by-law declares the trade or business of storing grain to be an offensive trade or business. Where the expression trade is, as in this context, used in juxtaposition to the expression business, it must be understood to be used in the sense of buying and selling with a view to earn profits and not in its wider sense. The expression business in this context has a wider connotation than trade. It would embrace all activities carried on for the purpose of earning profits or gains and would include those caught up in the expression trade. Every trade is in a sense a business but every business is not a trade. Having regard to the list of items attached to the by-law the expression business may in this context be defined as any activity which occupies the time, attention, and labour of a person, whether corporate or not, for the purpose of obtaining profits or gains. Unless the trade or business declared to be offensive is carried on for the sake of earning profits there would be no

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infraction of the by-law. Now it is clear that the respondent does not carry on the activity of storing rice for the purpose of obtaining profits or gains by such storing. Its object is to sell the rice at a profit. For that purpose it is necessary that it should bring it to its store in reasonable quantities which would enable it to cater for the needs of its clientele without interrupting its service to them. The temporary storage of each instalment of rice brought to its store, for so long as it is necessary to retail it, is incidental to its trade of retailing rice and it cannot be rightly said that such storage constitutes the trade or business of the respondent. Storage of grain as an incident of the trade of retailing rice does not bring a person within the ambit of the by-law which forbids the carrying on of the trade or business of storing grain except with a licence.

In order to fall within the ambit of that by-law the main activity of a person should be the storing of grain and obtaining profits or gains by the activity of storing alone. It is clear that the respondent's main activity is not the storing of grain with a view to earning profit. It has therefore not committed any offence against the by-law. The applicant's prayer cannot be granted and is refused.

Application refused.

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[In the Privy Council]

1956 *Present:* **Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm, and Mr. L. M. D. de Silva**

THE TRUST CO., LTD., Appellant, *and* T. H. I. DE SILVA, Respondent

Privy Council Appeal No. 26 of 1955

S. C. 229—D. C. Colombo, 23,098

Master and servant—Negligent driving of motor car—Retention of control by person other than driver—Responsibility for damage.

A person in control of a motor vehicle—though not actually driving—is liable for the negligence of the driver over whom he has the right to exercise control.

P. was one of three "field officers" employed by the defendant insurance Company. The work of the field officers was to supervise and control the canvassers and to assist them to bring in business to the Company. They were paid a monthly salary and an overriding commission on business introduced through them. It was the duty of any canvasser or field officer bringing in a proposal for life insurance to forward with it a doctor's certificate with regard to the proponent. The doctor's fees were paid by the Company.

One day the plaintiff, who was a doctor, suffered personal injuries by reason of the negligent driving by H., a canvasser, of a motor car in which the plaintiff was a passenger on a journey undertaken from Colombo for the purpose of examining a number of proponents in Jaffna. On the journey there were present in the car four persons, viz., the plaintiff, H., P., and G. who was a paid driver. P., H., and G. took turns in driving the car. At the time of the accident H. was driving and P. was sitting in the back seat. The evidence disclosed that the car had been supplied to P. by the Company under a hire purchase agreement which recited that P. was employed by the Company as a field officer and that under the conditions of his appointment he was obliged to discharge certain obligations and that with a view to helping him discharge these obligations the Company had lent him the money to purchase a car in the name of the Company. It was also accepted by the trial Court that the plaintiff had stipulated with H. that transport should be supplied for the journey and that H. had agreed and arranged with P. for the use of his car.

Held, that P. was a servant of the Company and that in making the journey in the car which had been supplied to him for the purpose of carrying out his duties he was acting in the course of and for the purposes of his employment. Accordingly, although H. was at the wheel of the car at the moment of the accident, the fact that P. was at all times in control of the car and was exercising that control as a servant of the Company on its behalf rendered the Company liable to pay damages to the plaintiff.

APPEAL from a judgment of the Supreme Court reported in *55 N. L. R. 241.*

Neil Lawson, Q.C., with *R. K. Handoo*, for the defendant appellant.

2—J. N. B 55903—1,599 (6/56)

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Sir Frank Soskice, Q.C., with *Phineas Quass, Q.C.*, and *Srimevan Amerasinghe*, for the plaintiff respondent.

Cur. adv. vult.

March 19, 1956. [*Delivered by* LORD TUCKER]—

The respondent (hereinafter referred to as "the plaintiff") suffered personal injuries by reason of the negligent driving by one Holsingher of a motor car in which he was a passenger on a journey from Colombo to Jaffna on 27th April, 1950.

The question in the appeal is whether the appellant (hereinafter referred to as "the Company") is responsible for Holsingher's negligence.

The plaintiffs' claim failed at the trial in the District Court of Colombo on 8th March, 1951, but this judgment was reversed on appeal by the Supreme Court of Ceylon on 29th October, 1953, when judgment was directed to be entered in his favour for Rs. 50,000 with costs.

The Company transacts insurance business in Ceylon with its principal place of business and registered office in Colombo. Some of its business comes through canvassers who are paid commission on business introduced by them but receive no salary. Holsingher was one of these canvassers. The Company employ three "field officers" or "field organisers". Their duties are to supervise and control the canvassers and to assist them to bring in business. They are paid a salary of approximately Rs. 100 a month and an overriding commission on business introduced through them. They are answerable to the secretary of the Company who performs the duties generally carried out by a managing director. Any canvasser or field officer bringing in a proposal for life insurance must forward with it a doctor's certificate with regard to the proponent. It is left to the canvasser or field officer to select the doctor and make the necessary arrangements for medical examinations but the doctors' fees are paid by the Company. Doctors normally provide their own transport. A field officer cannot function efficiently without a car. One of these field officers was named Perera. He was supplied with a car by the Company under a hire purchase agreement dated 30th July, 1948, by which Perera agreed to pay at least Rs. 200 a month towards the full purchase price of Rs. 5,875 plus interest at 6 per cent. On payment in full the car was to become the property of Perera. The agreement recited that Perera was employed by the Company as one of its field officers and that under the conditions of his appointment he was obliged to discharge certain obligations and that with a view to helping him discharge these obligations the Company had lent him the money to purchase a car in the name of the Company.

There was a conflict of evidence at the trial as to the circumstances in which the plaintiff came to be travelling in the car at the time of the accident. Holsingher's evidence was to the effect that the plaintiff had borrowed the car for his own exclusive benefit in order to fulfil an undertaking to travel to Jaffna at his own cost and expense for the purpose

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of examining a number of proponents for Holsingher. It is implicit in the judgment of the District Judge that he rejected this story and accepted the plaintiff's version which was that he had stipulated that transport should be supplied for the journey from Colombo to Jaffna, a distance of 248 miles. Holsingher agreed and arranged with Perera for the use of his car. On the journey there were present in the car the plaintiff, Holsingher, Perera and a paid driver named Gunapala. Perera, Holsingher and Gunapala took turns in driving the car. At the time of the accident Holsingher was driving and Perera was sitting in the back seat.

The plaint was framed on the basis that Holsingher was an employee of the Company acting within the scope of his employment, but the case was argued on the alternative ground that Holsingher was under the control of Perera who was a servant of the Company acting on its behalf. The Judge dealt with the case on this basis without requiring any amendment of the pleading and no objection has been taken to this course at any stage of the proceedings. He held that Holsingher was not a servant of the Company nor was Perera when driving the car on this journey, and that if the accident had happened while he was driving the Company would not have been liable. Consequently no liability could attach to the Company while Holsingher was driving.

The Supreme Court reversed this judgment on the ground that Perera was a servant of the Company and that at no stage had he divested himself of his character as a servant authorised to act on behalf of the Company. That throughout the journey the car was through Perera's instrumentality being used on the Company's business, and that a contractual obligation binding on the Company had been entered into by Holsingher with the knowledge and approval of Perera to convey the plaintiff to Jaffna and that the car was being used as a means of transport which was clearly incidental to the execution of that which Perera was employed to do.

Their Lordships consider it is clear that Perera was a servant of the Company and that in making this journey in the car which had been supplied to him for the purpose of carrying out his duties he was acting in the course of and for the purposes of his employment. (See *Canadian Pacific Railway Company v. Lockhart*) [1]. Accordingly if the accident had happened while he was actually driving there can be no doubt that the Company would have been liable. Can it escape liability because Holsingher was at the wheel at the moment of accident ? Their Lordships are of opinion that this question must be answered in the negative. It is now well settled that the person in control of a carriage or motor vehicle—though not actually driving—is liable for the negligence of the driver over whom he has the right to exercise control. (See *Wheatley v. Patrick* [2], *Samson v. Aitchison*[3] and *Reichardt v. Shara* [4]). Perera was at all times in control of this car. He was exercising that control as a servant of the Company on its behalf. Any consequential liability attaching to him is a liability of the Company.

[1] [*1942*] *A.C. 591.*
[2] *2 M. & W. 650.*
[3] [*1912*] *A.C. 844.*
[4] *(1914) 31 T.L.R. 24.*

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Their Lordships do not consider it is necessary for the decision of this case to express any view on the question which was much canvassed at the Bar as to whether Perera had authority to delegate the driving of the car to Holsingher so as to create a direct relationship of master and servant or principal and agent between Holsingher and the Company, nor do they base their decision on the view that the Company was contractually bound to provide transport for the plaintiff on this journey.

For the reasons indicated above their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant Company must pay the respondent's costs of the appeal.

Appeal dismissed.

1955 *Present :* **Basnayake, A.C.J., and Gratiaen, J.**

H. E. TENNEKONE (Commissioner for the Registration of Indian and Pakistani Residents), Petitioner, *and* P. K. DURAISWAMY, Respondent

S. C. 150—In the matter of an Application for Conditional Leave to Appeal to the Privy Council in re an Application made under section 7 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949

Privy Council—Conditional leave to appeal—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, s. 15—Judgment of Supreme Court—Right of appeal therefrom—"Civil suit or action"—Appeals (Privy Council) Ordinance (Cap. 85), s. 3, Rule 1 (b) of Schedule.

A judgment given in an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act is a judgment in a "civil suit or action in the Supreme Court" within the meaning of section 3 of the Appeals (Privy Council) Ordinance.

APPLICATION for conditional leave to appeal to the Privy Council.

M. Tiruchelvam, Deputy Solicitor-General, with *V. Tennekoon*, Crown Counsel, for the Respondent-Petitioner.

Walter Jayawardena, with *S. P. Amerasingham*, for the Appellant-Respondent.

Cur. adv. vult.

December 20, 1955. BASNAYAKE, A.C.J.—

At the conclusion of the argument of this application for conditional leave to appeal to the Privy Council, we made order allowing the application and reserved our reasons to be delivered on a later date.

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It is common ground that the question involved in the appeal is one which, by reason of its great general or public importance, ought to be submitted to Her Majesty the Queen in Council for decision.

The only question in dispute was whether an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (hereinafter referred to as the Act) comes within the ambit of section 3 of the Appeals (Privy Council) Ordinance (hereinafter referred to as the Ordinance). That section reads :

> " From and after the commencement of this Ordinance the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council against the judgments and orders of such Court shall be subject to and regulated by—
>
> (*a*) the limitations and conditions prescribed by the Rules set out in the Schedule, or by such other Rules as may from time to time be made by His Majesty in Council ; and
>
> (*b*) such general Rules and Orders of Court as the Judges of the Supreme Court may from time to time make in exercise of any power conferred upon them by any enactment for the time being in force ".

Learned Counsel for the respondent opposed the application on the ground that the judgment from which the applicant sought to appeal was not a judgment in a " civil suit or action in the Supreme Court ". He relied on certain decisions of this Court in which applications for leave to appeal were refused. I shall presently refer to those decisions. But before I do so I think I should refer to the relevant statute law by which the right of appeal to the Privy Council has been granted and regulated since its grant.

The right of appeal to the Privy Council was granted by section 52 of the Charter of Justice of 1833 (hereinafter referred to as the Charter), the relevant portion of which reads as follows :—

> " And we do further grant, ordain, direct and appoint that it shall be lawful for any Person or Persons being a Party or Parties to any Civil Suit or Action depending in the said Supreme Court to appeal to Us, Our Heirs and Successors in Our or Their Privy Council 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 exercise of that right was at first regulated by the Charter itself and later, till their repeal by the Ordinance, by section 42 of the Courts Ordinance and section 779 of the Civil Procedure Code. Finally in 1909, when the Ordinance was enacted in order to bring about uniformity of practice in all the Colonies, the provisions of the Courts Ordinance and the Civil Procedure Code were repealed. The history of the legislation shows that the Ordinance was merely re-enacting the already existing legislation in a slightly different form and in a form capable of easy revision of the procedural aspects of it.

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An examination of the decisions of this Court as to the meaning and scope of the words " civil suit or action " in the Charter, the legislation that was repealed by the Ordinance, and the Ordinance itself, shows that the question that arises for decision is not entirely free from doubt. It also reveals that there are two conflicting lines of decisions. I shall first refer to the line of decisions on which Counsel for the respondent relies.

In the case of *Sockalingam Chetty v. Manikam* [1], this Court, following the decisions of *In re Ledward* [2], *In re Keppel Jones* [3], and *In re De Vos* [4], held that there was no right of appeal to the Privy Council from a judgment of the Supreme Court in insolvency proceedings. In *Soertsz v. Colombo Municipal Council* [5], it was held that there was no right of appeal to the Privy Council from a judgment of the Supreme Court on a case stated under section 92 of the Housing and Town Improvement Ordinance. That decision was followed in the case of *R. M. A. R. A. R. R. M. v. The Commissioner of Income Tax* [6], and *Settlement Officer v. Vander Poorten et al.* [7]. In the latter case it was held that no appeal lies as of right to the Privy Council from an order made by the Supreme Court dismissing an appeal from an order of the District Court made in the exercise of a special jurisdiction vested in it under the Waste Lands Ordinance.

I shall next refer to the line of decisions on which the petitioner relies. The first of that line of decisions is *Subramaniam Chetty v. Soysa* [8], where it was held that proceedings under section 282 (2) of the Civil Procedure Code to have a sale in execution set aside on the ground of a material irregularity in conducting it, was a civil suit or action for the purpose of the Ordinance. The next is the case of *In re Goonesinha* [9] where it was held that an application for a writ of certiorari, being an application for relief or remedy obtainable through the Court's power or authority, constitutes an action and comes within the ambit of the Ordinance. In the case of *Controller of Textiles v. Mohamed Miya* [10], a similar application for leave to appeal to the Privy Council was granted, but the question whether proceedings for a writ of certiorari come within the ambit of the expression " civil suit or action " does not appear to have been decided. But in the later case of *G. S. N. Kodakan Pillai v. P. B. Mudanayake* [11], another application for leave to appeal from an order granting a writ of certiorari, it was held that such proceedings came within the scope of the expression " action ". The last of this line of cases is *Attorney-General v. V. Ramaswami Iyengar* [12] where it was held by my brother Gratiaen that a judgment of this Court in an appeal under section 43 of the Estate Duty Ordinance is a judgment in a civil suit or action.

In this state of the decisions of this Court I formed the view, though not without hesitation, that the better course would be to grant the leave applied for. I was influenced largely by two considerations—one being that leave has been previously granted by this Court in the case of an

[1] *32 N. L. R. 65.*
[2] *3 Lorenz 234 (1859).*
[3] *(1877) Ram. 379.*
[4] *(1899) 2 Browne 331.*
[5] *32 N. L. R. 62.*
[6] *37 N. L. R. 447.*
[7] *43 N. L. R. 436.*
[8] *25 N. L. R. 344.*
[9] *44 N. L. R. 75.*
[10] *49 N. L. R. 105.*
[11] *54 N. L. R. 350.*
[12] *55 N. L. R. 572.*

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appeal under this very Act, in the case of *Badurdeen v. Commissioner for the Registration of Indian and Pakistani Residents* [1], without objection being taken either in this Court or in the Privy Council, and the other that the question that arises for decision is admittedly one which by reason of its great importance should be submitted to Her Majesty in Council for decision.

GRATIAEN, J.—

At the conclusion of the argument, we over-ruled the objection that the order of this Court dated 18th February 1955 under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (as amended in 1950) had not been made in " a civil suit or action ". It was conceded that the question involved in the appeal was " of great general or public importance ". Accordingly, we exercised our discretion in favour of the petitioner under Rule 1 (B), and granted conditional leave to appeal to Her Majesty in Council. I shall now set out my reasons for holding that the proceedings before this Court under the Act constituted a " civil suit or action " within the meaning of the Appeals (Privy Council) Ordinance.

The Deputy Commissioner had refused the respondent's application for the registration of himself, his wife and minor children as citizens of Ceylon under the Act. The respondent appealed to this Court against the Deputy Commissioner's order and the present petitioner (as Commissioner) was made a party to the appeal in accordance with established practice ; vide *Karuppanan's case* [2]. The appeal was in due course allowed by Sansoni J. and myself, and the present petitioner was directed to take appropriate action under section 14 (7) on the basis that a *prima facie* case for registration had been established. This is the order (reported in *56 N. L. R. 313*) against which the petitioner seeks leave to appeal to Her Majesty in Council.

In refusing the respondent's application for registration as a citizen of Ceylon, the Deputy Commissioner had performed a judicial function, but it may be conceded that the proceedings before him, as a statutory tribunal, did not at that stage constitute a " civil suit or action ". Nevertheless, a person aggrieved by a refusal of his application has a remedy by way of appeal to this Court, which is then empowered in an appropriate case to enter a mandatory decree directing the Commissioner (as respondent to the appeal) to take further steps under the Act on the basis that the aggrieved person (as appellant) is *prima facie* entitled to the benefit of registration as a citizen of this country. This decree fundamentally affects the civil status of the person concerned and, with great respect to my Lord the Acting Chief Justice, I had no hesitation in reaching the conclusion that the parties to the appeal were parties to " a civil suit or action in the Supreme Court " within the meaning of the Appeals (Privy Council) Ordinance.

In this context, the words "*civil* suit or action " stand primarily in contradistinction to " *criminal* " proceedings. In addition, they exclude judgments and orders made by the Supreme Court in the exercise of a

[1] *52 N. L. R. 354.* [2] *(1953) 54 N.L.R. 481 at 484.*

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statutory jurisdiction which is merely of a consultative or administrative character or in proceedings which can be equated to arbitration proceedings. The present application related to an order for a mandatory decree affecting civil rights and therefore falls within the ambit of the Ordinance. There is no earlier ruling of this Court which compels us to refuse the remedy of an appeal to Her Majesty in Council.

Application allowed.

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

R. A. PERERA *et al.*, Appellants, *and* BEATRICE PERERA, Respondent

S. C. 99–100—D. C. Colombo, 6,306L

Exceptio rei venditae et traditae—*Seizure of immovable property and registration of notice of it—Sale by judgment-debtor pending the seizure—Subsequent purchase by his nominee from execution purchaser—Validity and effect of such purchase—Civil Procedure Code, ss. 237 (1), 238.*

Where, during the pendency of a duly registered seizure of immovable property, the judgment-debtor sells the property by private alienation prior to the Fiscal's sale, the vendee is entitled to the benefit of the *exceptio rei venditae et traditae* if the judgment-debtor or his nominee buys the property subsequently from the person who purchases it at the Fiscal's sale. Although section 238 of the Civil Procedure Code declares *inter alia* that any sale during the pendency of the registration of a notice of seizure shall be " void " as against an execution purchaser and as against " all persons " deriving title under or through him, and although the words " all persons ", being words of the utmost generality, are *ex facie* wide enough to include the judgment-debtor himself, it does not necessarily follow that the superior title acquired by the judgment-debtor by virtue of section 238 can be vindicated in violation of his subsisting personal obligations independently undertaken by contract or imposed on him under the general law.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *T. B. Dissanayake* and *E. S. Amerasinghe*, for the defendants (appellants in S. C. 100 and respondents in S. C. 99).

H. W. Jayewardene, Q.C., with *V. Arulambalam* and *B. Senaratne*, for the plaintiff (respondent in S. C. 100 and appellant in S. C. 99).

Cur. adv. vult.

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February 10, 1956. GRATIAEN, J.—

This is a *rei vindicatio* action. The plaintiff's husband, Julius Perera, owned the property until 17th April 1950. He was in serious financial difficulties towards the end of 1949, and a hypothecary decree for the sale of the property had been entered against him in action 2447 M. B. of the District Court of Colombo. In addition, it was under seizure in execution proceedings in certain other cases. One such decree (to which I shall later refer) was entered in D. C. Colombo 9041/S in favour of S. M. D. Deen for Rs. 1,000 and interest payable on a promissory note.

In April 1950, Julius' uncle, Don Lewis Perera Appuhamy (hereafter referred to as "Lewis"), reluctantly agreed to assist him to settle his debts so as to prevent the property, which was then worth about Rs. 30,000, from being sold in execution. He received from Julius a document (D8) indicating that Rs. 16,000 was required to meet his liabilities. An agreement was arrived at, and was implemented on 17th April 1950, whereby Julius sold the property to Lewis for this amount subject to the vendor's right to re-purchase it for a like amount within 5 years. The conveyance P9 contains the following warranties and assurances :

> "And I the said vendor for myself and my heirs, executors, administrators and assigns do hereby covenant, promise and declare with and to the said vendor, his heirs, executors, administrators and assigns that the said premises hereby sold and conveyed are free from any encumbrance whatsoever and that I have not at any time heretofore made done or committed or been party or privy to any act, deed, matter or thing whatsoever whereby or by reason the said premises or any part thereof are, is, can, shall or may be impeached or encumbered in title, charge, estate or otherwise howsoever and that I and my aforewritten shall and will at all times hereafter warrant and defend the same or any part thereof unto him and his afore-written against any person or persons whomsoever and further also shall and will at all times hereafter at the request of the said vendee or his afore-written do and execute or cause to be done and executed all such further and other acts, deeds, matters, assurances and things whatsoever for the further and more perfectly assuring the said premises hereby sold and conveyed and every part thereof, unto him or his afore-written as by him or his afore-written may be reasonably required."

The agreed consideration was paid by a series of cheques made in favour of the judgment-creditors whose names were disclosed by Julius for the purpose. At the same time Lewis was placed in possession of the property as owner, the plaintiff himself acting as his rent-collector in respect of the tenements occupied by Julius' former tenants who attorned to Lewis. Lewis died on 10th September 1950 and his interests in the property passed to his daughter who is the 2nd defendant. The plaintiff and Julius at that time acknowledged the 2nd defendant as the new owner.

I accept the findings of fact recorded by the learned trial Judge as to the further events which led to the present litigation. When Julius persuaded Lewis in April 1950 "to save the property from forced sales", he had

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(perhaps through inadvertence) omitted to mention that the property was still under seizure for the recovery of the undisclosed judgment-debt in D. C. Colombo 9041/S and that a notice had been served on him under section 237 (1) of the Civil Procedure Code prohibiting him from transferring or charging the property in any way. Notice of this seizure had been duly registered on 14th October 1949 and re-registered under section 9 of the Registration of Documents Ordinance on 5th April 1950. Lewis was unaware of the seizure when he purchased the property under D9 or at any time thereafter. He assumed, without further investigation, that Julius was no longer in debt.

Registration of the seizure was kept alive by the judgment-creditor's proctor Mr. Rasanathan (certain aspects of whose conduct as a member of the legal profession need not be discussed for the purposes of this appeal) and the property was eventually purchased at a Fiscal's sale on 6th February 1951 for Rs. 250 by a man called Thiagarajah (Rasanathan's nominee). The conveyance in favour of Thiagarajah was executed on 28th May 1951, and a few days later Thiagarajah conveyed it for a consideration of Rs. 3,000 (borrowed under a contemporaneous mortgage) to the plaintiff. She then instituted this action against the 2nd defendant claiming a decree for the ejectment of the 2nd defendant from the property on the ground that she (the plaintiff) had acquired a superior title by right of purchase from Thiagarajah.

The action was instituted on the basis that the plaintiff had become the owner of the property in her own right, but the learned District Judge took the view that she was merely Julius' nominee. He ruled, however, that the title acquired under the conveyance P1 prevailed over that of the 2nd defendant by virtue of section 238 of the Civil Procedure Code which made the earlier sale to Lewis pending the registration of the notice of seizure " void as against the purchaser from the Fiscal selling under the writ of execution and as against all persons deriving title under or through the purchaser ". At the same time the 2nd defendant was declared entitled to compensation as a *bona fide* improver (and to a *jus retentionis*) on the ground that Rs. 12,304·79 out of the consideration paid by Lewis on the " void " sale had been utilised in freeing the property from mortgage.

The plaintiff and the 2nd defendant have both appealed from the judgment of the lower Court. The former complains that the order for compensation and a *jus retentionis* is insupportable. The latter contends that the plaintiff is not entitled in the circumstances of this case to a declaration of title or to a writ of ejectment against her. If the 2nd defendant's appeal succeeds, the correctness of the order for compensation need not be considered.

The main argument addressed to us on behalf of the 2nd defendant was that Julius had from the inception planned to defraud Lewis, and that the execution-purchaser Thiagarajah was also his nominee. I find myself unable to hold that the learned Judge was wrong in rejecting this argument on the evidence before him. It is far more likely that Proctor Rasanathan, having in the first instance procured the Fiscal's conveyance

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in the name of Thiagarajah for his own personal benefit, was later attracted by the idea of selling it to Julius at a profit (although at a figure substantially less than its true value at the relevant date).

The 2nd defendant over-stated her defence on this part of the case. She was however entitled in law to resist a decree for ejectment without proof of any express fraud on the part of Julius as alleged in the course of the argument before us. Having regard to the finding that the plaintiff was in truth a nominee of Julius, the obligations imposed on Julius as a vendor under the conveyance D9 dated 17th May 1950 precluded him from claiming either directly or indirectly the benefit of section 238 for the purpose of securing the eviction of his former purchaser's successor in title.

Section 238 declares *inter alia* that any sale during the pendency of the registration of a notice of seizure shall be "void" as against an execution purchaser and as against all persons deriving title under or through him. The intention is to "freeze" the judgment-debtor's title in the property under registered seizure so as to prevent him from placing it beyond the reach of a vigilant judgment-creditor. At the same time it protects a *bona fide* execution purchaser from the risk of the property having been alienated or encumbered during the interval between the registration and the judicial sale.

The draftsman could hardly have had in contemplation the possibility that a judgment-debtor would purchase his own property at the Fiscal's sale or even re-acquire title to it subsequently from the execution purchaser. Nevertheless, the words "all persons", being words of the utmost generality, are *ex facie* wide enough to include the judgment-debtor himself. But it does not necessarily follow that the superior title acquired by him by virtue of section 238 can be vindicated in violation of his subsisting personal obligations independently undertaken by contract or imposed on him under the general law.

For the purposes of the present contest as to title, Julius himself must be regarded as the person claiming (through a nominee) to avoid his own sale to Lewis under D9. The term "void" in section 238 must be read with some limitation. In a very similar context section 240 of the Indian Code declared any private alienation of property while under attachment to be "null *and void*". The Judicial Committee rejected the argument that the words "null and void" were to be taken in the widest possible sense as "null and void against all the world, including even the vendor", *Anund Lall Dass v. Shaw* [1]. In my opinion the subsequent acquisition by Julius of superior title by virtue of section 238 did not have the additional effect of automatically destroying the rights and obligations of Lewis and Julius *inter se* under the earlier contract of sale.

Apart from the express undertakings and assurances contained in the contract of sale, an obligation is imposed upon a vendor by the Roman Dutch Law "not only to guarantee to his purchaser the peaceful possession of the thing sold, but also to give an implied guarantee against every

[1] (1872) *17 Sutherland's W .R. 313.*

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form of molestation *on the part of the vendor himself* and of third parties." *Wessels on Contract* Vol. 2, sections 4593, 4603, and 4605. This is the foundation of the equitable doctrine *exceptio rei venditae et traditae* which was finally clarified by the Judicial Committee in *Gunatilleke v. Fernando* [1].

The registration of the prohibitory notice served on Julius had, at the time of the conveyance D9, merely reduced for the time being his powers of voluntary alienation, so that he had in truth only a defeasible title which he could pass to Lewis on 17th April 1950. Nevertheless, the *exceptio* became available to the 2nd defendant (as the heir of Lewis) as soon as Julius (through a nominee) re-acquired a title free from the earlier defect on 8th June, 1951.

"On the confirmation of the right of an alienor which had been defective at the time of the alienation, the original invalid title of his alienee becomes confirmed from the very moment that the first vendor acquired ownership." *Voet* 23 : 1 : 1. The law will not permit Julius to claim the benefit of section 238 in a situation where the proposed eviction of his vendee's successor in title would violate the obligation which the law had imposed on him by virtue of the earlier contract. "One acts dishonestly who tries to evict a thing sold by himself and to stultify his own act : equity dictating that a plaintiff should be all the more liable to be repelled by an equitable plea (*exceptio*) when he is himself liable to be sued on account of the eviction." *Voet* 23 : 1 : 2. The scope of the *exceptio* is not limited to cases where, at the time of the original sale, the vendor had no title at all that he could convey. It applies with equal force if the title conveyed had been defeasible though not void *ab initio* at the relevant date.

Section 238, construed in all its generality, certainly vested in Julius (as the real purchaser from Thiagarajah) a title superior to that which he had transferred to Lewis in disobedience of the forgotten prohibitory notice. Nevertheless, his obligations under the earlier contract of sale were not extinguished, so that the superior title which he later acquired served only to "confirm" the title of Lewis which had previously been defeasible. The *exceptio* precludes Julius from relying on his new title in order to evict his former purchaser whose continued possession he was under a special legal duty to protect. Mr. Berwick points out in a footnote to his translation of *Voet* 23 : 1 : 2 :—

> "In point of equity, the last person to be allowed successfully to recover a thing which he has himself sold to his own defendant, is the very person who would be liable in damages to the defendant for its eviction from the latter ; though law will allow him to sue, *equity* will allow the defendant to take and succeed upon this plea, if he prefers not to lose the thing rather than to have recourse to his right to damages."

The extent to which the *exceptio* can operate is indicated in *Wessels* (supra) sections 4600–4603. Let it be supposed that the vendee had purchased a title which was manifestly doubtful, and was in fact worthless. Let it also be supposed that in these circumstances the vendor had

[1] *(1921) 22 N. L. R. 385.*

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expressly stipulated that he would not hold himself responsible for his vendee's eviction by the true owner. Even then, he could not, by subsequently acquiring a better title, evict the vendee *on his own account.*

The learned Judge's decision (under issue 12) that the plaintiff is the nominee of Julius suffices by itself to preclude her from obtaining a decree for eviction which would not have been open to Julius himself. The remedy cannot be granted to defeat the rights of the very person whose possession Julius was bound to guarantee against "any form of molestation" at his own hands. In this view of the matter, it is unnecessary to decide whether, and to what extent, the express assurances and covenants contained in the conveyance P1 afford additional grounds for rejecting the plaintiff's claim. I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

GUNASEKARA, J.—I agree.

Appeal in S. C. 100 allowed.

Appeal in S. C. 90 dismissed.

1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

M. NANDARAMA, Appellant, *and* A. RATHANAPALA, Respondent

S. C. 85—D. C. Matara, 21,128

Buddhist Ecclesiastical Law—Viharadhipati—Renunciation of office.

A bhikkhu who is Viharadhipati of a temple is entitled to renounce his office of Viharadhipati.

Not only may a pupil who succeeds to the office of Viharadhipati by virtue of being the senior pupil of his tutor renounce his office, but also a junior pupil nominated by his tutor as his successor is free to renounce his right.

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the Plaintiff-Appellant.

N. E. Weerasooria, Q.C., with *A. F. Wijemanne*, for the Defendant-Respondent.

July 12, 1955. BASNAYAKE, A.C.J.—

This is an action by Malimboda Nandarama (hereinafter referred to as the appellant), the senior pupil of the late Godagama Jinaratana, against Akurugoda Rathanapala (hereinafter referred to as the respondent), the

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senior pupil of the late Murungasyaye Sumana, praying that he be declared the Viharadhipati of the temple known as Ogaspe Vihare (hereinafter referred to as Ogaspe) and that he be placed in possession thereof. The appellant claims that one Talgahagoda Dhammadara was the original Viharadhipati of Ogaspe, and Indurukawa Vihare (hereinafter referred to as Indurukawa). The former was the larger of the two and better endowed than the latter. Dhammadara had two pupils, Godagama Jinaratana, also known as Ehadugoda Jinaratana, and Murungasyaye Sumana. Of these two Sumana was the senior, having been ordained on the same day but before Jinaratana. Dhammadara died on 28th October, 1914, at Ogaspe. Shortly before his death he executed a deed No. 2432 of 2nd April, 1914, which for the purposes of this action is marked P1. In that instrument Dhammadara after reciting how he succeeded to the office of Viharadhiwasi of Ogaspe and Indurukawa and expressing his desire to nominate Jinaratana as his successor states—

> "I, the aforesaid Talgahagoda Dhammadara Therunnanse, do hereby appoint my own pupil Godagama Jinaratana Unnanse to be the Adikari after my demise of Ogaspe Vihare (here follows a description of the vihare and its grounds) and also of Indurukawa Vihare (here follows a description of the vihare and its grounds). Further that the aforesaid Godagama Jinaratana Therunnanse shall enjoy the income of the aforesaid premises in accordance with the rules and regulations laid down in the Vinaya and shall spend for the repairs, upkeep and improvements of the aforesaid Viharas ; should assist who is presently my pupil Murungasyaye Sumana Unnanse to prosecute his studies financially ; and also permit him to reside at Ogaspe Temple ".

Dhammadara died on 28th October, 1914. Immediately after his death disputes arose between Jinaratana and Sumana. Parties interested in the welfare of the temple appear to have brought about a settlement of those disputes. That settlement is recorded in the document D11 which is set out below :

> " The writing attaches to the list bearing the date 11th November, 1914 ".
>
> " On the 23rd January, 1915, at Ogaspe Vihare, the trustees of the said Vihare and D. C. Wiratunga Ralahamy, President of the District Committee, having met the dispute that existed between Murungasyaye Sumana Therunnanse and Ehadugoda Jinaratana Therunnanse was settled there :
>
> Murungasyaye Sumana Therunnanse shall reside and be in charge of Ogaspe Vihare.
>
> Ehadugoda Therunnanse shall reside and be in charge of Indurukawa Vihare.
>
> That the priests resident thereon shall have the right to make use of the produce and income of the said two Viharas in a reasonable manner.

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That Murungasyaye Sumana Therunnanse as chief shall in the knowing of the trustee in charge of the vihare protect the goods etc. mentioned in this list ".

In derogation of the settlement of 23rd January, 1915, and without making even a reference to it, Jinaratana by a deed dated 6th November, 1915, appointed Munamalpe Pemananda another pupil of Dhammadara to manage Indurukawa claiming that he did so because it was difficult to manage both Ogaspe and Indurukawa. After reciting the particulars in P1 and expressing Jinaratana's desire to appoint Pemananda as Viharadhiwasi of Indurukawa, the instrument proceeds as follows :

" I, the aforesaid Godagama Jinaratana Therunnanse because of the right devolved on me by the aforesaid deed No. 2432 and on behalf of the person who assigned that right and on behalf of myself who exercise it do hereby appoint the aforesaid Munamalpe Pemananda Therunnanse to carry on the management and administration subject to and in accordance with the conditions and in the manner laid down in the aforesaid document of the premises called and known as Indurukawa Viharastana and all fruit trees, image house, residing premises etc. appertaining thereto and to be the chief incumbent of the aforesaid Indurukawa Vihare (here follows a statement of the boundaries) ".

Thereafter, Jinaratana continued to live at Indurukawa and Sumana at Ogaspe. Sumana died in 1927 aged 50 and the respondent, his pupils succeeded to the management of Ogaspe. Some time after Sumana's death, Jinaratana who was living at Indurukawa came to reside at Ogaspe and continued to live there without any objection from the respondent till his death on 9th November, 1949, at the age of 71. It is alleged that Jinaratana left Indurukawa after the death of Sumana in order to escape ill-treatment by Pemananda, to whom he had in 1915, by the deed above referred to transferred the management of that temple.

The learned District Judge, after examining the evidence both oral and documentary, dismissed the appellant's action holding that from the time of the death of Dhammadara, Sumana had acted as Viharadhipati of Ogaspe and that Jinaratana, when he entered into the agreement D11, waived and abandoned whatever rights he got on P1 to Ogaspe and that since the death of Sumana the respondent has acted as the Viharadhipati of that Vihare.

The present appeal is from that decision. Learned Counsel for the appellant has argued with force that under our law according to the rule of *sissyanu sissya paramparawa* the senior pupil succeeds the tutor unless the tutor nominates another pupil to succeed him and that where there is a nomination by the tutor the co-pupils have no power to vary that nomination, even with the consent of the nominated pupil. While conceding that a pupil who succeeds to the office of Viharadhipati by virtue of being the senior pupil of his tutor may renounce his office, learned Counsel contended that a pupil nominated by his tutor as his successor was not free to renounce his right.

Learned Counsel also further contended that D11 is of no effect in law even though Jinaratana had consented to it and did not operate as a variation of the nomination made by Dhammadara.

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None of the authorities cited by Counsel support the proposition he was seeking to establish. There is nothing in the Vinaya or the decisions of this Court which forbids a bhikkhu from renouncing his right to the management of a vihare.

To hold that a bhikkhu is not free to renounce the office of Viharadhipati under any circumstances and that he is bound to hold that office whether he likes it or not would be going counter to the fundamental concepts of the Vinaya.

It would be appropriate in this connexion to refer to the words of Bertram C.J. in the case of *Saranankara Unnanse v. Indajoti Unnanse* [1] " But when we are dealing with ecclesiastical property, a region in which we are enforcing simply the ecclesiastical law based upon the original authoritative texts developed by religious customs, we ought not to recognize claims and transactions which are in their terms or in their nature inconsistent with the fundamental principles of those texts and those customs ". Under our law a person is free to renounce a right [2]

Upon Jinaratana's renunciation of his right to Ogaspe even if the document D11 did not mention Sumana as the Viharadhipati of that temple he would, by virtue of his being Dhammadara's senior pupil, have become the Viharadhipati as Jinaratana had no pupils at that time.

Jinaratana's renunciation of whatever rights he had to Ogaspe by virtue of P1 is valid not only according to ecclesiastical law but also according to the common law.

The view we have taken is in accord with the decision of this Court in the case of *Punnananda v. Welivitiye Soratha* [3].

We therefore hold that Jinaratana's surrender of whatever rights he obtained under the deed executed by his tutor Dhammadara was valid and effectual and that as Jinaratana had no pupil at the time, Sumana as the senior pupil of Dhammadara rightfully became Viharadhipati of Ogaspe and that the respondent as the pupil of Sumana was entitled to be Viharadhipati of that Vihare.

There were two other matters which were raised at the trial. They are—

(*a*) whether the decree in C. R. Matara No. 13,998, an action by Sumana against Don Thedias Wimalagunasekera, trustee of Ogaspe, and Jinaratana claiming the produce of certain lands and for maintenance, operated as *res judicata* between the appellant and the respondent, and,

(*b*) whether the appellant was barred by the Prescription Ordinance from maintaining this action.

In the matter referred to at (*a*) above, Wimalagunasekera filed answer that Jinaratana was the chief incumbent of the temple and was in possession of the property. The case was settled by consent. The material part of the decree reads—

" It is ordered and decreed of consent that the plaintiff be and he is hereby declared the chief incumbent of Ogaspe Vihare at Malimboda ".

[1] *20 N. L. R. 385 at 394.* [2] *Voet Bk. 1, Tit 4, s. 22.*

[3] *51 N. L. R. 372.*

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The learned District Judge held that the decree operated as "*res judicata*" between the appellant and the respondent.

On the question of prescription the learned District Judge held that the appellant's action was barred by prescription in view of the decision of this Court in the case of *Premaratne v. Indasara* [1]. As we have held that Sumana was the rightful Viharadhipati of Ogaspe the questions of *res judicata* and prescription need not be discussed for the purposes of this Judgment.

The appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.

1956 *Present :* **de Silva, J., and Sansoni, J.**

V. V. M. PACKIRMUHAIYADEEN *et al.*, Appellants,
and A. M. ASIAUMMA *et al.*, Respondents

S. C. 285—D. C. Batticaloa, 715/L

Donation—Minor as donee—Acceptance by donee's elder brother—Validity.

Where a donation executed by a father in favour of his minor son was accepted by the donee's elder brother on behalf of the minor donee—

Held, that there was no valid acceptance on behalf of the minor donee.

Fideicommissum—No acceptance by fideicommissaries—Validity.

Where a fideicommissary deed of gift makes a settlement in favour of a family as a class, acceptance by the immediate donee enures to the benefit of all the fideicommissaries. But if the fideicommissaries are particular members of a family (e.g., the brothers of the donee), their failure to accept the donation on their own behalf renders the deed invalid so far as they are concerned.

APPEAL from a judgment of the District Court, Batticaloa.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *E. B. Vannitamby*, for the defendants appellants.

S. Nadesan, Q.C., with *C. Shanmuganayagam*, for the plaintiffs respondents.

Cur. adv. vult.

May 18, 1956. SANSONI, J.—

This appeal raises two questions of law regarding the acceptance of a deed which admittedly contained a fideicommissum. The deed in question was executed by Abdul Careem Marikar Udayar in favour of his minor son Abdul Samadu. It dealt with thirteen lands and the relevant clauses read,

". . . . he will have the right to lease, mortgage, transfer, donate or dowry the said properties according to his wish, I or my heirs will have no right for any reason whatever to revoke this or claim right to the said properties.

[1] *40 N. L. R. 235.*

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"I further declare that should the said M. Mohamadu Abdul Samadu the grantee of this die issueless without executing any deed in respect of the said properties or any part or portion thereof the said properties should devolve on my children M. Mohamadu Abdul Majeed, M. Mohamadu Abdul Hameedu and M. Mohamadu Abdul Salam and their respective children in equal shares and that should any of them die issueless they should devolve on the survivors of them and the children".

Following these clauses there is a clause in the following terms,

"And as the said M. Mohamadu Abdul Samadu the grantee of this deed is a minor, I, Muhaiadeen Abdulkareem Marikar Udayar Mohamadu Abdul Majeedu of Kattankudyiruppu, his brother, do hereby accept this gladly on his behalf and set my signature hereto".

Abdul Majeedu who purported to accept the donation was presumably a major. There was no proof of acceptance by any of the three fideicommissaries, and it will be noted that the acceptance by one of them, Abdul Majeedu, was not on his own behalf but on behalf of the minor donee.

The donor and the donee both died in 1939. This action was brought by the only child of the fideicommissary Abdul Majeedu claiming to be entitled to 1/3 share of the lands in question. In order to succeed he had to prove both acceptance by the fiduciary and by the fideicommissaries. I take it to be settled law that acceptance by both these parties is necessary to render the gift valid so far as the fideicommissaries are concerned. See *Soysa v. Mohideen* [1], *Fernando v. Alwis* [2], *Carolis v. Alwis* [3]. The only opinions to the contrary are to be found in *Asiathumma v. Alimanchy* [4] and *Dharmalingam Chetty v. Yoosoof* [5], but I do not think those opinions can now be considered sound.

The two questions that now arise for decision are,

(1) Whether there was a valid acceptance on behalf of the fiduciary donee.

(2) Whether the failure of the fideicommissaries to accept the donation on their own behalf renders the deed invalid, so far as they are concerned.

To deal with the first question, it is clear that the major brother was neither the natural nor the legal guardian of his minor brother. There have been cases where acceptance by a major brother on behalf of his minor brother has been held to be sufficient. See *Lewishamy v. de Silva* [6], where Middleton, J. followed *Francisca v. Costa* [7], a case in which acceptance by the grandmother of a donee was considered sufficient. But the reason given in those two cases was that the father, who was the donor, permitted acceptance by those persons. I do not think that such a reason would be upheld today. Subsequent cases such as *Babaihamy v. Marcinahamy* [8] and *Bindua v. Untty* [9] have upheld the acceptance by such persons who are neither legal nor natural guardians only where possession of the property by the donees was subsequently proved. See

[1] *(1914) 17 N. L. R. at 280.*
[2] *(1935) 37 N. L. R. at 227.*
[3] *(1944) 45 N. L. R. 158.*
[4] *(1905) 1 A. C. R. 53.*
[5] *(1937) 17 C. L. Rec. 229.*
[6] *(1906) 3 Bal. 43.*
[7] *(1889) 8 S. S. C. 190.*
[8] *(1908) 11 N. L. R. 232.*
[9] *(1910) 13 N. L. R. 259.*

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Fernando v. Alwis [1]. The recent decision of the Privy Council in *Nagalingam v. Thanabalasingham* [2] makes it clear that acceptance on behalf of a minor by such a person as an uncle is not a valid acceptance even where the donor was the father and the donee was his minor son. Sir Lionel Leach in that case said " a maternal uncle is not a natural guardian ; in the strict sense he is not even the member of the same family. Without appointment by lawful authority Kanthar Sinnathamby (the uncle) could not act for Kandavanam (the minor donee) and it is not suggested that any such appointment existed ".

Now if there was any force in the argument that an elder brother or a grandmother or an uncle could accept a donation on behalf of a minor merely because the father, who was the donor, permitted such acceptance, the Privy Council would undoubtedly have held that there was a valid acceptance in that case. I am therefore of opinion that there was no valid acceptance on behalf of the minor donee in the present case. I might add that we are not dealing in this case with the question whether a father who is a donor can authorise another person by a special mandate to accept the gift. There is no evidence in the record on which such a plea could have been raised. It is therefore not necessary to consider such a case as had to be considered by Gratiaen, J. and Pulle, J. in *Mohaideen v. Maricair* [3].

With regard to the second question that arises for decision, there is a well-known exception to the rule that fideicommissaries must accept the gift in order to render it effective in their favour. That exception is to be found in Perezius ad Cod. (8.55.12) where that authority said that in the case of the settlement of property in a family the acceptance of the first donee enures to the benefit of, and is considered an acceptance by, all the beneficiaries. That exception was first applied by this Court in *Perera v. Marikar* [4] which, as Wijeyewardene, J. pointed out in *Wijetunge v. Rossie* [5] is a judgment of the Full Court and therefore binding on this Court. But the exception must be confined to fideicommissa in favour of the donee and his family, within which term would come a fideicommissum in favour of the donee's descendants. De Sampayo, A.J. referred to this question in *Soysa v. Mohideen* [6] and held that in such a case acceptance by the immediate donee was a sufficient acceptance on behalf of the descendants (where they are the beneficiaries), and acceptance by the immediate donee would also be sufficient where the property was to remain in the family. Lascelles, C.J. in the same case expressed himself in similar terms.

I should like to refer to some of the dicta of the judges in a recent decision of the Appellate Division of the Supreme Court of South Africa where this exception was considered—*Crookes v. Watson* [7]. Centlivres, C.J. said,

> " The reason given by Perezius for the exception which he mentions must not be read out of its context. He first states the general rule viz. ; that acceptance is necessary before a beneficiary is entitled to claim the benefit conferred on him and he then mentions a number of exceptions. In respect of the exception I am now dealing with he

[1] *(1935) 37 N. L R. 201.*
[2] *(1952) 54 N. L. R. 121.*
[3] *(1952) 54 N. L. R. 174.*
[4] *(1884) 6 S. C. C. 138.*
[5] *(1946) 47 N. L. R. 371.*
[6] *(1914) 17 N. L. R. 279.*
[7] *(1956) 1 S. A. L. R. (A. D.) 277.*

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says that it would be absurd for the making of an irrevocable fideicommissum that the acceptance of infants and people as yet unborn should be required. That statement is made after he has made it clear that the first beneficiary, who was a fiduciary, in the usual acceptation of that word (i.e. a fiduciary who has a beneficial interest) has accepted. 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. "

Again, Van den Heever, J. A. expressed the opinion that in this exception the family concerned is treated as " a persona in itself, acting through one of its members in accepting ". Steyn, J. A. said in regard to the Perezius rule, " that in the absence of a provision to the effect that the settled property is to remain in the settler's family, the rule does not apply ". I have cited these dicta because they emphasise the essential condition that the fideicommissum must be for the benefit of the family as a class, and not of individual members of a family.

When we look at the deed now under consideration in the light of these dicta, it becomes clear that the deed in no sense creates a fideicommissum in favour of the donee's family or of the donee's descendants. It is a deed which, like many a deed containing a fideicommissum, creates a fideicommissum in favour of three designated individuals who happen to be members of the same family as the donee. Such fideicommissaries must, according to the general rule, accept the gift if it is to be valid in their favour. In no sense can they claim the benefit of the Perezius exception which relates only to a fideicommissum in favour of a family as such and not particular members of a family, or in favour of the descendants of the donee and not particular descendants.

Mr. Nadesan for the respondents further submitted, if I understood him correctly, that a family fideicommissum or a " fideicommissum in favorem familiae " brings within its beneficiaries a very large group. Voet 36.1.27. says,

" A fideicommissum can also be left to the family ; and Justinian has laid down that in such a case under the term family are included not only parents and children and all relatives, but also the son-in-law and daughter-in-law to supply the place of those who have died, where the marriage has been dissolved by the death of son or daughter. But Sande points out at some length that by civil law adopted children alumni and freed men were included under the term familia when there is any question of some fideicommissum being left to the family and in that connection he puts the question whether women or their issue are included in the family. In section 12 he has collected the authorities who have laid down at greater length what is included under " family ", genus, stirps, linea, parentela, domus, cippus, and the like. Now there is also a bequest to the family when the testator forbids the alienation of a thing out of the family or directs that it should not go out of his line of descent or out of his ' blood ' ".

He sought to argue from this that since collaterals are also included in a family and the deed in question constitutes a fideicommissum in favour of the donee's brothers, acceptance by the donee is enough. I do not

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agree. Voet was dealing with a particular type of fideicommissum and he was explaining who would come under the term "family" in such a case. That does not mean that every time a fideicommissum is created in favour of particular individuals who are some of the members of a family as so defined, acceptance by the fiduciary donee renders acceptance by the particular fideicommissaries unnecessary.

The learned trial judge held that there had been a valid acceptance of the gift by the minor donee through his brother, and that such acceptance rendered acceptance by the fiduciaries unnecessary. For the reasons I have given I think that both findings were wrong and that this action should have been dismissed.

The appeal is therefore allowed with costs in both Courts.

DE SILVA, J.—I agree.

Appeal allowed.

1956 *Present :* **Basnayake, A.C.J., and Weerasooriya, J.**

RAN MENIKA, Appellant, *and* NANDOHAMY *et al.*, Respondents

S. C. 227—D. C. Kurunegala (Inty.) 4849/T

Kandyan Law—Illegitimate daughter married in diga*—Forfeiture of right to inherit father's acquired property—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 13, 15 (c).*

Section 15 (c) of the Kandyan Law Declaration and Amendment Ordinance does not enable a *diga* married illegitimate daughter to have a right of inheritance to her father's acquired property.

Where a Kandyan died intestate leaving legitimate children and also an illegitimate daughter who was married in *diga*—

Held, that the illegitimate daughter had no right of inheritance to her father's acquired property.

APPEAL from a judgment of the District Court, Kurunegala.

C. R. Guneratne, for 2nd respondent-appellant.

H. W. Jayewardene, Q.C., with *T. B. Dissanayake*, for petitioner respondent.

Cur. adv. vult.

February 16, 1956. BASNAYAKE, C.J.—

The only question that arises for determination on this appeal is whether a *diga* married illegitimate daughter forfeits her right to inherit her father's acquired property in consequence of her marriage in *diga*.

Shortly the facts are that one Sohondirala whose estate is being administered by the petitioner, his *binna* married daughter, left two children by his marriage, the petitioner and the first respondent, a daughter who married in *diga* in 1924. He also left an illegitimate daughter who married in *diga*, in 1921, the second respondent, (hereinafter referred to as the appellant).

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The learned District Judge has held that the first respondent and the appellant having married in *diga* have forfeited their rights to the inheritance and that the petitioner alone is entitled to the property left by Sohondirala.

Learned Counsel for the appellant while conceding the correctness of the learned District Judge's decision in regard to the first respondent, contends that the learned District Judge was wrong in law when he held that the illegitimate daughter who married in *diga* forfeited her rights. He contends that in Kandyan Law an illegitimate daughter does not by marrying in *diga* forfeit her rights to her father's acquired property.

He submits that, as Sohondirala died in 1950 after the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 (hereinafter referred to as Kandyan Law Ordinance) came into operation, he would be entitled to claim the benefit of section 15 (*c*) of that Ordinance, as the deceased intestate had registered himself as the father of the appellant when registering her birth. That section reads—

> "When a man shall die intestate after the commencement of this Ordinance leaving an illegitimate child or illegitimate children—
>
> (*a*) such child or children shall have no right of inheritance in respect of the paraveni property of the deceased ;
>
> (*b*) such child or children shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child or the descendant of a legitimate child of the deceased ;
>
> (*c*) any such child shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children, as the case may be—
>
> (i) if the deceased intestate had registered himself as the father of that child when registering the birth of that child ; or
>
> (ii) if the deceased intestate had in his lifetime been adjudged by any competent court to be the father of that child ".

If the appellant had remained unmarried or had contracted a marriage in *binna*, there would have been no question of her right to share in the succession to her father's acquired property. But having married in *diga* she cannot escape the consequences of such a marriage which are thus stated in Armour's Grammar of Kandyan Law (Perera's edition), p. 30—

> "A daughter will be incapacitated from inheriting landed property from her father by being given away in Deega marriage by her father—it being premised that she remained settled in Deega until her father's death, and that her father left other issue a son, or a daughter settled in the father's house in Beena ".

This statement of the law of forfeiture of the right to inherit the landed property of the father has been consistently affirmed by this Court. The appellant lost her right to share in the inheritance of her father's acquired property as an illegitimate child by being given in marriage in

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diga and remaining so settled until her putative father's death and is therefore not entitled to succeed in her claim. Section 15 of the Kandyan Law Ordinance does not have the effect of restoring the rights that were lost when she married in *diga*.

Learned Counsel has also argued that while section 13 of the Ordinance prescribes how children of two or more marriages shall inherit the property of their father it does not state the rule of inheritance governing a case where a man dies intestate leaving legitimate as well as illegitimate children.

He submitted that the rule in such a case, according to Kandyan Law, was that the legitimate children took one moiety and the illegitimate children the other. The rule of inheritance submitted by Counsel has the authority of the decisions [1] of this Court.

The question then is whether the appellant forfeited her rights to the inheritance by her marriage in *diga*. Learned Counsel submits that she did not. He relies on the rule of Kandyan Law that a *diga* marriage does not result in a forfeiture if the daughter were the only child of a man's first, or second, or third marriage.

He contends that the rule is capable of extension to illegitimate children ; but has cited no authority in support of the proposition. The rule on which Counsel relies has the authority of this Court [2] and of such writers as *Armour* and *Sawers* [3] but there is no authority or justification for the extension of that rule to children who are not children of a marriage.

It is not claimed that the appellant is a child by the deceased intestate's marriage and the rule of forfeiture will therefore prevail as the appellant cannot bring herself within its exception.

The appeal is accordingly dismissed with costs.

WEERASOORIYA, J.—

I have nothing to add to the judgment of My Lord the Chief Justice except in regard to the point urged by Mr. Guneratne on the basis of the rule of Kandyan Law that on a man dying intestate and leaving legitimate as well as illegitimate children, his acquired property is divided into two moieties of which one would be shared by the illegitimate children. It seems to me that section 15 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, has brought about a substantial change of the law in this respect. Paragraph (c) of that section provides that the illegitimate child or children referred to therein shall be entitled to succeed to the acquired property of the deceased *equally* with his legitimate child or children. In a case to which that Ordinance applies, the position therefore would be that there is no separate moiety which devolves on the illegitimate child or children, and there is, accordingly, no room for the application of the principle relied on by Mr. Guneratne that in the absence of any other representative in the illegitimate line

[1] *In re Sundara, deceased (1907) 10 N. L. R. 129; Appuhami v. Lapaya (1905) 8 N. L. R. 328.*

[2] *Punchi Menika v. Tennekoongedere (1843) Morgan 350—D. C. Col., Kandy, 20898, (1851) Austin 122.*

[3] *Armour 63, 71, 73, Sawers 3.*

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to inherit that moiety it would fall to an illegitimate daughter who has contracted a *diga* marriage, even though she may otherwise have forfeited her right of inheritance to her father's acquired property.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

1956 *Present :* **Sansoni, J.**

THAIBO, Appellant, *and* ABRAHAMS (S. I. Police), Respondent

S. C. 1,233—M. C. Matara, 40,773

Betting on Horse Racing Ordinance (Cap. 36)—Prosecution thereunder—Quantum of evidence—Sections 3 (3), 15, 17 (b).

In a prosecution for unlawful betting on a horse race, the presumption which is said to arise from the fact that the accused, when he was searched, was found to be in possession of betting slips can be relied on only if the conditions prescribed by Sections 15 and 17 (*b*) of the Betting on Horse Racing Ordinance were fulfilled.

APPEAL from a judgment of the Magistrate's Court, Matara.

C. S. Barr Kumarakulasinghe, for the accused appellant.

L. H. de Alwis, Crown Counsel, for the Attorney-General.

February 28, 1956. SANSONI, J.—

The only matter which has to be considered on this appeal is whether the prosecution has proved that the accused committed the offence of unlawful betting on a horse race, in breach of Section 3 (3) of the Betting on Horse Racing Ordinance (Cap. 36).

No evidence was led as to any betting having actually taken place. The prosecution relied on the presumption which was said to arise from the fact that the accused was arrested by Sub-Inspector Abrahams as he was walking along the road, and on being searched was found to be in possession of 25 betting slips. The presumption that the accused committed the offence could only have arisen if the conditions prescribed by Sections 15 and 17 (*b*) of the Ordinance were fulfilled. If the Sub-Inspector had recorded his grounds of suspicion that betting was being carried on in a particular place and the accused was found in that particular place, the position would have been different. But no particular place was mentioned in the record made by the Sub-Inspector nor was the accused even seen coming out of any particular place. The presumption therefore did not arise. The prosecution therefore failed entirely to prove that the accused committed any offence.

The appeal must be allowed and the accused acquitted.

Appeal allowed.

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1956 *Present :* **Basnayake, A.C.J., and Pulle, J.**

DE SILVA, Appellant, *and* ILANGAKOON, Respondent

S. C. 147—D. C. Kurunegala, 7,355/M

Action against public officer—Notice of action—Procedure—Malice alleged in plaint—Is notice necessary then ?—Civil Procedure Code, s. 461.

In an action against a public officer in respect of an act purporting to be done by him in his official capacity, the requirements of section 461 of the Civil Procedure Code should be strictly observed and the notice which should be given to the defendant should be in the form prescribed in the Schedule to the Code. A letter of demand written to the defendant by the plaintiff's Proctor does not satisfy the requirements of section 461.

Where malice was alleged against the defendant in an action for defamation instituted against a public officer in respect of a statement purporting to be made by him in his official capacity—

Held, that the allegation of malice in the plaint did not exempt the plaintiff from his duty to give the defendant due notice of the action in conformity with the requirements of section 461 of the Civil Procedure Code.

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *E. A. G. de Silva* and *D. R. P. Goonetilleke*, for Defendant-Appellant.

N. E. Weerasooria, Q.C., with *G. T. Samarawickrema*, for Plaintiff-Respondents.

Cur. adv. vult.

May 2, 1956. BASNAYAKE, C.J.—

The defendant-appellant (hereinafter referred to as the appellant) is the Headmaster of a Government School. He has been sued by the plaintiff-respondent, a minor, by his next friend, his father (hereinafter referred to as the respondent), in damages alleged to have been suffered by him in consequence of a defamatory statement made by the appellant in the School Leaving Certificate granted to the respondent. The alleged defamatory statement was made in a document which the appellant had to complete in his capacity as Principal of the School and hand over to the legal guardian of the respondent when the pupil left the School, and is as follows : " Conduct extemely bad."

The learned trial judge held against the appellant and entered judgment for the respondent in a sum of Rs. 5,000 with costs in that class.

The appellant submits that the respondent is not in law entitled to maintain the action as he has failed to comply with the terms of section 461 of the Civil Procedure Code. That section provides that no action

2—J. N. B 56056—1,590 (7/56)

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shall be instituted against a public officer in respect of any act purporting to be done by him in his official capacity, until the expiration of one month next after notice in writing has been delivered to such officer stating the cause of action and the name and place of abode of the person intending to institute the action and the relief which he claims. It also requires that the plaint in such an action must contain a statement that such notice has been delivered.

Learned counsel for the appellant contends that the requirements of that section are imperative.

Learned counsel for the respondent contends that the notice required by section 461 has been given and refers us to a letter by Perera & Perera, the respondent's Proctors, which is to the following effect :—

27th January 1951

L. B. J. de Silva Esq.,
Principal, Govt. School,
Uhumiya.

Dear Sir,

We have been instructed by our Mr. I. M. P. B. Ilangakoon, Village Headman, Uhumiya, Palata, as Guardian of his minor son Ilangakoon to demand of you the immediate payment of the sum of Rs. 15,000 being damages occasioned by your false and malicious endorsement in the leaving certificate of the said Banda Ilangakoon dated 12th January 1951. Should you fail to comply with this demand on or before the 6th February 1951 we have further instructions to sue you at law to recover the said damages.

Sgd. Perera & Perera.

The Schedule to the Civil Procedure Code prescribes the form of notice of action. That form provides that it should be addressed to the public officer concerned and it reads thus :—

" Take notice that I, ... A. B. . . . of . . . am about to institute an action against you in your official capacity as . . . . for . . . . (state the cause of action and the relief claimed) . . . .

Sgd. . . . . "

Now in the instant case the document which the respondent claims is a notice of action is not in the prescribed form, nor does it purport to be a notice of action. It is a demand of payment by the Proctors for the respondent with an indication that they have instructions to sue the appellant at law to recover the damages if they are not paid. That the respondent never intended the letter which his Proctors wrote to the appellant demanding the payment of damages to be a notice of action under section 461 of the Civil Procedure Code is apparent from the fact

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that in his plaint he did not plead as required by section 461 that the notice required by that section had been given to the appellant. When the appellant in his amended answer took the objection that the action cannot be maintained as the respondent had failed to give the prescribed notice, the respondent filed replication denying that any notice under section 461 of the Civil Procedure Code was necessary in the circumstances of this case.

The notice under section 461 of the Civil Procedure Code is a condition precedent to the institution of an action against a public officer in respect of any act purporting to be done by him in his official capacity. The requirements of that section should be strictly observed and the notice should be in the form prescribed in the Schedule to the Code. The notice should indicate to the recipient that the communication is meant to be a notice under that section and inform him of all the particulars that are required to be stated in such notice. The letter which the respondent's counsel now claims is a notice of action does not satisfy the requirements of section 461. Procedural provisions such as these are imperative and failure to observe them is fatal to an action.

In the case of *Thampoe v. Murukasu* [1] it has been held that the failure to observe the requirements of section 461 absolutely debars a Court from entertaining a suit instituted without compliance of those provisions.

Learned counsel for the respondent also argued that in this case no notice was necessary as there was an allegation of malice and *mala fides* in the plaint. He submitted that there is a long line of decisions of this Court which lays down that where malice is pleaded in an action against a public officer notice under section 461 need not be given. He relies particularly on the case of *Appu Singho v. Don Aron* [2] and *Abaran Appu v. Banda* [3]. In the former case it was held that it would be intolerable if the privileges conferred by the Civil Procedure Code on public officers acting in their official capacity were to be extended to public servants who act wrongly and for the gratification of private malice. In the latter case it was also held that a public officer who does an act maliciously in the pretended exercise of his authority cannot be said to be purporting to act as a public officer and is therefore not entitled to notice of action.

I am unable to find in the language of section 461 anything which requires a person bringing an action against a public officer to ascertain beforehand whether the act which he purported to do in his official capacity was *mala fide* or *bona fide*. All that the section attempts to do is to debar a person from instituting an action against a public officer "in respect of an act purporting to be done by him in his official capacity" until the expiration of one month next after notice as prescribed in the section has been given. If the action is in respect of an act purporting to be done by a public officer in his official capacity, then the prohibition in section 461 applies. The word "purporting" has been defined in the case of *Appu Singho v. Don Aron* (*supra*) as equivalent to "in pursuance of", and in the case of *Abaran Appu v. Banda* (*supra*) as meaning "pretended to be done" or "intended to be done".

[1] *1 C. L. R. 107.*

[2] *9 N. L. R. 138.*

[3] *16 N. L. R. 144.*

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When construing a provision such as section 461, in the first instance, the expressions used therein should be given their ordinary meaning. The word " purport " means ordinarily " profess " or " claim " or " mean " or " imply ". Where as in this case a public officer clearly in the exercise of his function as the Principal of a School has given a certificate to a pupil in accordance with the requirements of Government regulations, there is no doubt that the act is one that he purports to do in his official capacity. There is no other capacity in which he can give such a certificate. Clearly therefore the mental process whether it be malicious or otherwise which induced him to write the words " Extremely bad " against the cage " Conduct " is immaterial.

The appellant is therefore entitled to succeed on this preliminary point which learned counsel has placed at the forefront of his appeal.

It is sufficient to refer to only two of the Indian cases cited at the argument, namely, the case of *Albert West Meads v. The King* [1] and *Gill & another v. The King* [2]. In the former case it was held that a public servant can only be said to act or to purport to act in the discharge of his official duties if his act is such as would lie within the scope of his official duty. It was stated by Lord Morton of Henryton that the test is whether the public servant if challenged can reasonably claim that what he does he does in virtue of his office. In the course of his judgment in the latter case Lord Simmonds in interpreting the words " an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty " in section 197 (1) of the Indian Criminal Procedure Code stated :—

> " Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act ; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

In the instant case there is no doubt that what the appellant did he did by virtue of his office.

The appeal is allowed with costs.

PULLE, J.—I agree.

Appeal allowed.

[1] *(1948) A. I. R. Privy Council 156.* [2] *(1948) A. I. R Privy Council 128.*

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1956 *Present :* **T. S. Fernando, J.**

M. P. P. GUNAWARDENA, Appellant, *and* REGISTRAR OF MOTOR VEHICLES, Respondent

S. C. 1,688—M. C. Colombo, 21,622

Lorry—Transfer of ownership—New owner's liability for possession without revenue licence—Motor Traffic Act, No. 14 of 1951, ss. 12 (3), 14 (3), 25 (1) (2) (9), 28 (3), 32, 216 (1), 226.

When a lorry is transferred by its registered owner to another person, the benefit of the licence already issued to the transferor cannot be claimed for the transferee. Under section 25 (9) of the Motor Traffic Act the new owner can avoid a prosecution for possessing the lorry without a revenue licence, in contravention of section 25 (1) of the Motor Traffic Act, only (*a*) if he has applied for a new licence, but has not yet had a decision made on such application, or (*b*) if he has given notice of non-user. Whatever benefit he can derive from section 32 of the Act is taken away by the provisions of section 25 (9).

APPEAL from a judgment of the Magistrate's Court, Colombo.

C. D. S. Siriwardena, for the accused appellant.

Daya Perera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 29, 1956. T. S. FERNANDO, J.—

Complaint was made to the Magistrate's Court of Colombo on 26th October 1955 by the Registrar of Motor Vehicles that the appellant did on 1st December 1953 possess a lorry bearing registered number CN 1037 for which a licence was not in force on the said 1st December 1953, thereby contravening section 25 (1) of the Motor Traffic Act, No. 14 of 1951, an offence punishable under section 226 read with section 216 (1) of the same Act.

It is admitted that on the date alleged in the charge, viz., 1st December 1953, the appellant was the registered owner of lorry bearing number CN 1037. By reason of the presumption created by section 25 (2) of the Act the appellant can therefore be said to have possessed the lorry on the day in question. Prior to the registration of the appellant one Nilaweera had been the registered owner of this lorry up to 1st December 1953, on which date he transferred its ownership to the appellant. Nilaweera had paid the licence fee in respect of this lorry up to and including the year 1953. It is admitted by the prosecution that the appellant has paid the licence fee for the years 1954 and 1955, and it is not denied by the appellant that he has failed to pay any fee in respect of the year 1953 although the lorry was admittedly in his possession during the period 1st to 31st December 1953.

Counsel appearing for the appellant contends that, as the transferor has already paid the licence fee for the year 1953, the transferee is not in law obliged to pay any further duty in respect of the lorry in view of the provisions of section 32 of the Act which enacts that a revenue

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licence issued continues in force till the 31st of December following the date of issue. The benefit of the licence issued to Nilaweera for 1953 is thus claimed for the appellant until 31st December 1953, and it is further contended by counsel that such benefit cannot be said to be lost unless otherwise expressly provided in Part III of the Act.

It is important to bear in mind that under the scheme for licensing of lorries contemplated in the Motor Traffic Act no lorry licence can be issued except for a lorry the registered owner of which is the holder of a permit granted under Part V of the Act which regulates the issue of goods carriage permits. This requirement is not only made clear by the provisions of section 28 (3) of the Act, but sections 12 (3) and 14 (3) which prohibit a new owner of a registered lorry from using such lorry unless a new revenue licence is issued in respect of such lorry only serve to strengthen such requirement. If therefore the new owner wishes to use the lorry he must make application for a new licence for such lorry. Inasmuch, however, as possession of the lorry without a revenue licence is, irrespective of the user of the lorry, itself a contravention of the provisions of the Act, the registered owner of a lorry can avoid a prosecution for such contravention only (*a*) if he has applied for a new licence, but has not yet had a decision made on such application, or (*b*) if he has given notice of non-user. This is the position to which the new owner appears inexorably to be driven by the provisions of section 25 (9) of the Act which enacts that

> " On any change of possession of a lorry, the possession of the lorry by the new owner shall be deemed not to be a contravention of sub-section (1), if, but only if, he has applied for a new revenue licence in accordance with the provisions of section 41 and the application has not been finally determined, or he has given notice of a period of non-user under section 37. "

If the new owner has not done either of the two things specified in the sub-section quoted above, it seems to be a clear inference that he cannot be heard to say that he has not contravened sub-section (1).

In the case before me it is admitted that the appellant (the new owner) had not on the date alleged in the charge either applied for a new licence or given notice of non-user. In these circumstances I am of opinion that whatever benefit the appellant could have derived from section 32 of the Act has been taken away by the unambiguous language of section 25 (9), and the learned Magistrate had no alternative to entering a verdict of guilty in the case.

That a new owner of a lorry should be compelled in law to pay the licence fee for a full year, irrespective of the length of the period of his possession of the lorry during the tax year, can work undue hardship on some new owners as it certainly has done in the case of this appellant. The removal of such hardship is however a matter for the legislature and not for a court of law which can but interpret the law as enacted by the legislature.

For the reasons set out above this appeal is dismissed.

Appeal dismissed.

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1954 *Present :* **Gunasekara, J., and H. N. G. Fernando, A.J.**

S. MURUGESOE *et al.*, Appellants, *and* V. CHELLIAH *et al.*, Respondents

S. C. 534—D. C. Point Pedro, 3,035

Charitable trust—Construction of deed—Purchase of property for a Hindu temple—Legal position of the purchaser—Co-trustees—Survival of trust on death of a co-trustee—Trusts Ordinance (Cap. 72), ss. 5, 6, 78, 84, 107.

Where a transfer of immovable property contained a recital that the consideration was paid by the transferee " for " a specified Hindu temple—

Held, that the transferee must be taken to have purchased the property with funds provided by, or held by him for, the religious charity represented by the temple. The transferee, therefore, held the property as trustee, and, on his death, the land devolved on his heirs subject to the same trust.

Held further, that section 78 of the Trusts Ordinance is applicable to charitable trusts. On the death, therefore, of a co-trustee, the trust property passes to the other co-trustees and not to the heirs of the deceased trustee.

FERNANDO, A. J.—The words " for the Temple " were not merely precatory but were sufficient to create a trust.

APPEAL from a judgment of the District Court, Point Pedro.

H. V. Perera, Q.C., with *H. Wanigatunga*, for the 1st defendant appellant.

H. W. Tambiah, with *H. L. de Silva*, for the 2nd defendant appellant.

N. E. Weerasooria, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiffs-respondent.

Cur. adv. vult.

September 14, 1954. GUNASEKARA, J.—

This is an appeal by the 1st and 2nd defendants in an action before the District Court of Point Pedro from a decree declaring the two plaintiffs entitled to a 1/16th share each of a piece of land, 3 roods 14·5 perches in extent, which had been conveyed by the Crown to one Vyramuttu Kandavanam on the 8th October, 1910. The question that arises on the appeal is whether Kandavanam purchased it for himself, as alleged by the plaintiffs, or in trust for a religious charity, as alleged by the defendants.

Kandavanam died in 1914. The district judge holds that thereupon a ½ share of this property devolved on Kandavanam's widow and the other half on his two brothers (the 3rd defendant and one Velupillai) and two sisters. Velupillai died in 1920, and the learned judge holds that the ⅛th share which Velupillai had inherited devolved on his sons, the two plaintiffs. (An issue as to their legitimacy was decided in their favour and this finding was not canvassed in appeal.) The case for the 1st and

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2nd defendants is that upon Kandavanam's death the property passed to his brothers subject to the trust alleged by these defendants, and upon Velupillai's death the 3rd defendant became the sole trustee and by two deeds executed on the 26th August, 1940, conveyed a portion of the property to the 1st defendant and the rest to the 2nd defendant subject to the same trust.

The crown grant of 1910 recites that the consideration for the grant is a sum of Rs. 27 " paid by Vyramuttu Kandavanam of Polikandy for Polikandy Kandasamy Temple ", and the appellants rely on this recital to show that Kandavanam bought the property in trust for the temple. The learned district judge takes the view that it is insufficient to indicate either the beneficiaries or the purpose of the trust.

The learned judge points out that " it is not possible to declare lands are the property of the temple as we do not recognise the personality of religious foundations ". But the personification of the temple in the statement that the price paid for the land was paid on behalf of the temple does not purport to treat it as a juristic person : the figure of speech is employed merely as a means of indicating the religious charity represented by the temple. As Mr. Perera pointed out in the course of his argument, it is one that the legislature itself has found it convenient to use for a similar purpose : see the Buddhist Temporalities Ordinance (Cap. 222) which speaks, for instance, of property belonging to a temple (sections 4, 26, 28, 29, 30, 32), tenants of a temple (section 14), property appropriated to the use of a temple (section 20), offerings made for the use of a temple (*ibid.*), contracts made " in favour of any temple or of any person on its behalf " (section 22), " persons who owe any money to any temple or to any person on its behalf " (*ibid.*), moneys received by a trustee " for or on behalf of a temple " (section 25). In each of these expressions the temple is personified without the attribution to it of a juristic personality, but with the implication of the existence of a trust for the benefit of those persons for whose benefit the place of worship has been established. When the property in question was conveyed to Kandavanam for a consideration that he purported to pay on behalf of the Polikandy Kandasamy Temple, he must be taken to have purchased it with funds provided by, or held by him for, the religious charity represented by the temple. Therefore the beneficiaries of the trust attaching to the ownership of the property are the persons for whose benefit the temple was founded and the purpose is that for which it was founded.

It was contended by Mr. Weerasooria that there is no evidence that the Polikandy Kandasamy Temple is a charitable trust. Learned counsel for the appellants drew our attention to some evidence, to the effect that the temple had a manager and that " high festivals " were celebrated there, as evidence which showed that the temple was (or represented) a charitable trust. This evidence may well have been regarded as being too slender for the purpose if the parties had been at issue on the point. But the proceedings at the trial appear to indicate that it was assumed that the Polikandy Kandasamy Temple (which was apparently a well-known institution) represented a charitable trust. The answers of the 1st and 2nd defendants averred that they held the land in question " for and on

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behalf of the Polikandy Kandasamy Temple, which is a charitable trust"; but, while issues were framed as to whether it was "the absolute property of Vyramuttu Kandavanam or the property of the Polikandy Kandasamy Temple", and as to whether the plaintiffs could maintain the action if it was held that the land "belongs to the Kandasamy temple", there was no issue as to whether the temple represented a charitable trust. It appears also to have been assumed in the argument of counsel for the plaintiffs at the trial that the temple represents a charitable trust. I do not think that the question whether it does can be canvassed at this stage.

The land in question, having been held by Kandavanam subject to a trust, devolved on his heirs subject to the same trust. It is immaterial whether his heirs were his two brothers only or his brothers and sisters, for, in any event, by reason of the provisions of section 78 of the Trusts Ordinance (Cap. 72), upon the death of Velupillai the trust property passed to his co-trustee or co-trustees and not to the plaintiffs. There appears to be no substance in a contention that was advanced on behalf of the plaintiffs at the trial that section 78 does not apply to charitable trusts.

I agree with my brother, whose judgment I have had the advantage of reading, as to the order that should be made.

H. N. G. Fernando, A.J.—

The two plaintiffs in this case, who claim to be the sons of one Vyramuttu Velupillai, sought a declaration of title to a half-share of a certain land situated at Polikandy, basing their action upon the following averments :—

(*a*) the land in question was conveyed by a Crown Grant (P1 of 1910) to one Vyramuttu Kandavanam ;

(*b*) Kandavanam died intestate in 1914, leaving a widow, but no children, so that upon his death a half-share of the land became her property, and the remaining half-share devolved on Kandavanam's two brothers, namely the plaintiff's father Velupillai and the 3rd defendant Kathiritamby ;

(*c*) the latter half-share was included in the inventory filed for the purposes of the administration of Kandavanam's estate and was subsequently conveyed (P3 of 1915) by the Administrator (3rd defendant) jointly to himself and Velupillai ;

(*d*) on Velupillai's death intestate his share devolved on his two sons (the plaintiffs), to the exclusion of his daughters who had been separately dowered. (It will be seen that even on this footing the two plaintiffs are jointly entitled only to a $\frac{1}{4}$ share which was all that devolved on their father Velupillai).

The learned District Judge has found the plaintiffs to be entitled each to a 1/16th share, presumably upon the basis that they have not established their claim to exclude the right of their sisters to shares in Velupillai's property.

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The only question which has been raised at the argument in appeal is one of law, namely whether the land conveyed to Kandavanam by P1 was held by him subject to a trust. This contention was put forward on behalf of the 1st and 2nd defendants, but was rejected by the learned Judge.

The consideration for the Crown Grant P1 (as stated therein) was twenty-seven rupees "paid by Vyramuttu Kandavanam of Polikandy for Polikandy Kandasamy Temple", but, apart from this recital, there was no evidence of the constitution of a trust or of the terms or conditions of the alleged trust. The only other relevant evidence as to Kandavanam's intention was that of one Chelliahpillai (now deceased) who had given evidence in earlier proceedings in this action which were subsequently set aside on appeal to this Court. He had been the Manager of the Polikandy Kandasamy Temple and stated that Kandavanam had purchased the land "to develop it so as to make use of the income for defraying the expenses for reading of *puranas* at the Temple". This object was apparently not carried out during Kandavanam's lifetime and for a considerable period thereafter for the reason that the land was not planted and produced no income until quite recently.

It is relevant at this stage to refer to the title which the 1st and 2nd defendants have claimed. Their case is that the transfer P3 of 1915 by Kathiritamby to himself and Velupillai of a half-share of the land was invalid in so far as it purported to convey the share free of the trust, and that, upon Kandavanam's death in 1914 the land vested in his heirs, i.e., his four brothers and sisters, subjct to the trust upon which it had been previously held by Kandavanam, and that in 1940, Kathiritamby was the sole surviving trustee. In that year, Kathiritamby executed transfers of the land (in divided portions) to the 1st and 2nd defendants respectively, stating that he was unable to develop the land and render it productive and expressing his confidence that it would be developed by the transferees. The latter have both given evidence to the effect that they are possessing the land, not on their own account, but on behalf of the Temple, and the learned Judge has accepted their evidence that the coconut plantations now on the land were made by them. The 3rd defendant filed one answer fully acknowledging the existence of the trust, but subsequently filed answer admitting the plaintiff's averments while yet asking for a dismissal of their action ; he took no further part in the case.

The question whether a trust was created by P1 has to be determined by reference to S. 5 & 6 of the Trusts Ordinance read together with S. 107. The document in this case being a Crown Grant in favour of Kandavanam and not an instrument executed by Kandavanam does not strictly fulfil the requirements of S. 5, but this defect can be remedied under the provisions of S. 107 which render evidence of the formal constitution of the trust unnecessary in a case where property is alleged to be the subject of a charitable trust. The recital in P1 that consideration was paid "for the Polikandy Kandasamy Temple" was obviously one inserted into the Crown Grant at the direction or request of Kandavanam himself, and if their inclusion can be held to constitute a declaration of a charitable trust there would be every reason to have recourse to the provisions of S. 107.

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S. 6 of the Trusts Ordinance is no more than a statutory reproduction of the principles of English Law as to the requisites necessary for the creation of a trust : indeed the language is much the same as that employed in the English text books, (*Underhill, Law of Trusts and Trustees, 9th Edition, p. 17*).

Postponing for the present a consideration of the question whether P1 indicates with reasonable certainty an intention on Kandavanam's part to create a trust, but assuming that there was such an intention, the other requirements of S. 6 are undoubtedly satisfied. If the intention was to create a trust in favour of the Temple, there has been a sufficient indication of the purpose, i.e., that the property was to be applied for the benefit of the Temple. *Underhill* (at pp. 22 & 23) refers to numerous English cases where it has been held that directions to a legatee to apply the property for " religious purposes ", " charitable purposes ", or " religious and charitable purposes " constitute a sufficient indication of the purpose of the trust. The fact that no particular ceremonies, festivals or heads of expenditure are indicated in P1 is not material and the purpose must be construed to cover all purposes properly connected with the Temple.

There is also a sufficient indication of the beneficiaries, since it is clear that any trust for the benefit of a temple is in reality for the benefit of the worshippers in that temple who will, if necessary, be entitled to avail themselves of the remedies provided for beneficiaries in Chapter 10 of the Trusts Ordinance. As for the last requirement in S. 6, it is unnecessary to cite authority for the proposition that the person in whose name property is bought may himself be trustee.

There remains then the question of Kandavanam's intention to create the trust. It is necessary first to distinguish an intention to create a trust from mere expressions of desire or hope and precatory words. The more modern view upon language of the latter description is stated by *Underhill* (p. 27) as follows :—" If a gift in terms absolute is accompanied by a desire, wish, recommendation, hope, or expression of confidence that the donee will use it in a certain way, no trust to that effect will attach to it, unless, on the will as a whole, the court comes to the conclusion that a trust was intended ". For instance where a gift of property contained the words " and it is my desire that she allows to A. G. an annuity of £25 during her life ", it was held that the property was not subject to a trust, *Re Diggels* [1] ; and again where a testatrix gave legacies to two nieces adding " I wish them to bequeath the same equally between the families of O and P ", it was held that there was no trust in favour of the families. *Re Hamilton* [2]. In the case of *Arumugam Pillai v. Velupillai Periyatamby* [3] the deed in question transferred a land " by way of donation " and on account of " natural affection " for the donee, who was entitled by its terms to " take the rents and profits of the land ". There was a condition also that the donee should perform a certain " poojah " as also a certain festival in the Temple standing on the land, but Wijeyewardene J. was unable to find any evidence as to whether or not the performance of the stated ceremonies would involve expenditure, nor was the donee enjoined to utilise any part of the income for the purpose of those ceremonies.

[1] *(1888) 39 Ch. Div. 253.* [2] *(1895) 2 Ch. Div. 370.*
[3] *(1945) 46 N. L. R. 241.*

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He held that the conditions were insufficient to create a trust, being presumably more in the nature of a pious desire on the part of the donors, than an expression of an intention to impose an obligation annexed to ownership.

Upon a consideration of the full implication of the recital in P1, it cannot I think be said that the language constitutes a mere expression of desire. The words such as " for the Polikandy Kandasamy Temple " would rarely if ever be inserted in a Crown Grant except with some specific object, and they are in my opinion capable only of one of two constructions, *either* that the money was money actually belonging to the Temple in the sense that it formed part of the Temple funds, *or* that it was money that Kandavanam decided to gift to the Temple. Accordingly the money at the moment of its delivery to the Government as consideration for the grant was actually Temple money or money held in trust by Kandavanam for the benefit of the Temple. In the one case then, the transfer by a Crown Grant to Kandavanam was for a consideration paid or provided on behalf of the Temple, and Kandavanam would in terms of S. 84 of the Trusts Ordinance have held the property for the benefit of the Temple ; in the latter case Kandavanam's declaration that he was paying his money " for the Temple " was a sufficient indication of his intention to create a trust over the money in his hands and over the property into which the money was converted. It has to be borne in mind in construing P1 that " a much greater latitude of expression is allowed in gifts to charity than in gifts to individuals, and that a gift to charity will never fail for uncertainty " (*Lewin on Trusts, 15th Edition p. 425*).

The learned District Judge appears to have experienced some difficulty in the face of decisions of this Court to the effect that a Temple is not a juristic person and is therefore incapable of holding property. But any difficulty arising thereby is completely resolved by the Law of Trusts. In the case of *Karthigasu Ambalavaner v. Subramaniar Kathiravelu* [1], Bertram C.J. said " When a person who is the owner of property purports to transfer it to a Temple, the effect of his so doing is to constitute himself a trustee of the Temple. The document of dedication is in fact a declaration of trust and the *dominium* remains with the dedicator and passes on his death to his heirs subject to the trust ". For the reasons stated above, I am of opinion that Kandavanam held the land purchased on P1 subject to a trust for the benefit of the worshippers at the Polikandy Kandasamy Temple. Since no provision was made either by P1 or by any subsequent instrument, executed by Kandavanam for the devolution of the trusteeship, the property would devolve on Kandavanam's heirs who would continue to hold it subject to the same trust. On the evidence in this case, these heirs were either Kandavanam's two brothers (Velupillai and Kathiritamby), or those brothers together with their two sisters. But in any event, by 1940 Kathiritamby was by virtue of S. 78 of the Trusts Ordinance the sole surviving trustee. In the absence of express provision in that behalf, Velupillai's heirs had no right to the property, whether as trustees or otherwise, and accordingly the plaintiffs had therefore no right now to maintain this action.

[1] *(1924) 27 N. L. R. 15 at p. 21.*

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In this connection Mr. Weerasooria argued that S. 78 has no application in the case of a charitable trust, because matters relating to charitable trusts fall, he said, to be decided solely by the provisions of Chapter 10 of the Trusts Ordinance, and cannot be determined by reference to those provisions of the Ordinance applicable to trusts *simpliciter*. I see no substance in this argument. Its consequence if upheld would be that all matters relating to powers, duties and disabilities of trustees, successions to trusteeships, extinction of trusts, rights of beneficiaries, etc., which are in cases of ordinary trusts dealt with by sections 11–98 of the Ordinance, can in the case of charitable trusts be determined only by means of special recourse to a District Court. The correct view, I think, is that all the provisions of the Ordinance other than Chapter 10, apply generally in relation to all trusts, and that Chapter 10 merely contains special additional provisions applicable to charitable trusts only.

Mr. Weerasooria also contended that the provisions of S. 107 are not available in this case on the ground that in the absence of evidence that the Temple in question was open to worship by the public, a trust in its favour is not *a charitable trust* within the meaning of S. 99 of the Ordinance. The only evidence on record is that " the high festival is celebrated in May or June ", and " the ' Kanthasiddy festival ' in November ", and in addition there is an office of Manager of this Temple. These two items of evidence permit of the inference that the Temple is open for worship, at least by a section of the Hindu public in that area. Moreover, there was no evidence to the effect that the Temple is situated on land which belonged to Kandavanam or his heirs, and Counsel for the respondents at the trial made no suggestion that the Temple was not one open to public worship. I think therefore that the allegation by the defendants that the trust in question was a charitable trust is sound, and that accordingly resort may properly be had to the provisions of S. 107 to hold that a trust exists despite the absence of evidence of its formal constitution.

The appeal must be allowed and the plaintiff's action dismissed. The plaintiffs must pay the costs in the original Court to the three defendants, and the costs of appeal to the 1st and 2nd defendants.

Appeal allowed.

1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

DHAMMAVISUDDHI THERO *et al.*, Appellants, *and*
DHAMMADASSI THERO, Respondent

S. C. 348—D. C. Colombo, 5,517/L

Buddhist Ecclesiastical Law—Dedication of temple—Viharadhipati—Appointmen need not be in writing—Bhikkhu—Residence in temple—Right to claim incumbency thereby.

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When a Buddhist temple is built for the first time by laymen and offered to the Sangha, there is no requirement of law or custom that the viharadhipati should be appointed by a written document.

Where a bhikkhu who is a viharadhipati of more than one temple places bhikkhus in whom he has confidence, not necessarily his pupils, in charge of the different temples of which he is viharadhipati, while adopting for his usual residence only one of them, the performance of their duties by the bhikkhus so appointed does not have the effect of making them viharadhipatis of the respective temples. There being no particular duties, spiritual or temporal, which a viharadhipati need perform for the purpose of keeping alive his rights, such rights cannot be said to be lost because another bhikkhu who is actually residing in the temple manages its affairs and prevents the temple from falling into decay.

A bhikkhu residing at a Sanghika temple who, by virtue of his residence therein, asserts in a Court of Law the right of the temple to its property does not thereby acquire a right to be its viharadhipati.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *H. A. Kottegoda*, for Defendants-Appellants.

H. W. Jayewardene, Q.C., with *Daya Perera*, for Plaintiff-Respondent.

Cur. adv. vult.

October 28, 1955. BASNAYAKE, A.C.J.—

This appeal has had an unusual course. It was first argued before a Bench consisting of my brothers Gratiaen and Fernando. At that hearing on 12th and 13th July, 1954, the plaintiff-respondent, Kalawane Dhammadassi Thero (hereinafter referred to as the respondent), was unrepresented. After the arguments of Counsel for the defendants-appellants, Mawella Dhammavisuddhi Thero and Tissamaharama Gunaruchi (hereinafter referred to as the first appellant and the second appellant respectively and collectively as the appellants), the Court made order allowing the appeal and dismissing the respondent's action with costs in both Courts ; but reserving the reasons to be delivered on a later date. Thereafter on 19th July, 1954, the reasons were delivered [1].

On 2nd June, 1955, an application for *Restitutio in Integrum* made by the respondent to this Court was entertained by the very Judges that heard the appeal.

It would appear that the respondent had as his Proctors a firm carrying on business under the name of " Perera and Senaratne " to whom he gave a joint proxy appointing them to represent him at the trial and also in the appeal. In October and November, 1952, at Mr. Senaratne's request, he paid sums aggregating to Rs. 735 to Mr. Senaratne as fees for senior and junior Counsel. The respondent was later informed by Mr. Senaratne that the advocates concerned had been duly briefed, and he assumed that he would be represented at the hearing.

[1] *56 N. L. R. 284.*

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After the appeal had been disposed of, the respondent became aware that Counsel had not appeared for him at the argument as their fees had not been paid by Mr. Senaratne. He also discovered that Mr. Senaratne had, in terms of an order of the Supreme Court dated 23rd October 1953, been suspended from the practice of his profession for a period of three years on the ground of misconduct.

The Court was satisfied that, in the circumstances, the proper course to take was to order a re-hearing under section 771 of the Civil Procedure Code and accordingly on 7th June 1955 vacated the judgment of the Court dated 19th July 1954, and directed that the appeal be re-heard before another Bench. It was also ordered that the costs of the application for *Restitutio in Integrum* be costs in the cause.

The appeal has accordingly come up for hearing before us. The main question that arises for decision is whether the late Kodagoda Upasena Thero (hereinafter referred to as Upasena), a member of the Ramanna Nikaya who later became its head, was, at all material times, viharadhipati of the temple known as Raja Pushparama Vihare also known as Malwatte Temple at Mount Lavinia (hereinafter referred to as the Temple).

In my opinion, the evidence clearly establishes that Upasena was the viharadhipati of the Temple from its inception till his death in 1939, and that the respondent, as his pupil, has succeeded to that office and is entitled to hold it. The absence of a deed gifting the Temple to Upasena does not matter, as it has been established by other evidence, that, in fact, he was viharadhipati.

Before stating the reasons which have led to the above decision, it would be useful to state briefly the relevant facts. According to the evidence of the respondent, who was at the date of the trial 77 years and is now past 81, the Temple in dispute was built by a group of Buddhist laymen, chief of whom was Margiris Fernando. They built a shrine room, a preaching hall, a dining hall, and an avasa. Upasena, who lived at a temple in Walpola in Panadura, was invited by Margiris Fernando and other dayakayas to perform religious ceremonies at this Temple. On those occasions, the respondent was in the habit of accompanying his teacher, Upasena.

The date on which the Temple came into existence does not transpire but it was not till 1904 that it was offered to the Sangha. In that year at a formal ceremony, the Temple was offered to the Sangha under the presidency of Matara Gnaninda Sabha, the most senior of the bhikkhus present.

The evidence indicates that even before the Temple was made Sanghika Upasena was regarded as the viharadhipati. After the Sanghika ceremony he appears to have continued in that office, a fact which appears to have been recognised by both the Sangha and the laity not only on the day of the ceremony but ever afterwards till Upasena's death.

When a temple is built for the first time by devout laymen and offered to the Sangha, there is no requirement of law or custom that the viharadhipati should be appointed by a written document. In the instant case,

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it would appear that the laymen concerned, inspired by their religious zeal, built a temple with all the buildings that are associated with a Buddhist place of worship and invited Upasena to assume charge of it.

As Upasena was already viharadhipati of a temple at Walpola in Panadura, where he conducted a pirivena, he entrusted the care of the Temple to the respondent and Matara Ananda (hereinafter referred to as Ananda). The latter, though not a pupil of Upasena by robing, was a pupil in the sense that he obtained instructions from him at the pirivena at Walpola. He lived in the Temple till 1934 when he died; but the respondent appears to have lived for the most part in a temple at Kandy.

It is not uncommon in this country for a bhikkhu to be viharadhipati of more than one temple, as in this instance. Such a viharadhipati usually places bhikkhus in whom he has confidence, not necessarily his pupils, in charge of the different temples of which he is viharadhipati while adopting for his usual residence only one of them. Such a charge was Ananda's. It has not the effect of making him viharadhipati.

It was not till 1939 when Upasena died, that the respondent became entitled to the office of viharadhipati as pupil of Upasena both by succession and nomination. The fact that Ananda and after him Dhammaruchi always resided in this Temple gave neither of them any right to be viharadhipati. The residence of a bhikkhu for whatever length of time in a Sanghika temple gives him no right to be viharadhipati, for every bhikkhu is entitled, as a member of the Sangha, to reside and participate in the religious activities of a temple subject to the consent express or implied of the viharadhipati. The right to an incumbency cannot be acquired by residence merely because the rightful incumbent does not visit the temple often enough or resides elsewhere for the most part. There being no particular duties, spiritual or temporal, which a viharadhipati need perform for the purpose of keeping alive his rights, it cannot be said to be lost because another bhikkhu who is actually residing in the temple manages its affairs and prevents the temple from falling into decay. Those are obligations which any bhikkhu resident in a vihare may properly perform for the sake of preserving the property of the Sangha. It will be contrary to the Vinaya to hold that the performance of such duties gives to the performer rights in the temple and is prejudicial to the rights of the lawful viharadhipati.

It is clear from the documents produced by the respondent that Ananda resided at the Temple only as Upasena's agent. In his letters to Upasena, Ananda unreservedly recognised Upasena as the adhipati of the Temple. The relevant portions of some of the documents produced at the trial are reproduced below :—

In the first of these documents written on 18th March, 1905, and marked P1, Ananda says :

"This Galkissa property is not one that should be abandoned. Even according to the shaping of things it is imperative that the place should be accrued (preserved) with every possible effort. Agonis here also went away displeased with the Upasakamma. If there is any

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income of the place all that is in the custody of Upasakamma. We got not a cent of benefit from the Upasakamma. The dayakayas having dedicated the place to the Sangha stay at home. *Your reverend self having obtained rights over it stay at the temple. How can things get on here.* Here Upasakamma is having her own way. It is not proper that every body should stand aloof leaving power in the hands of a woman who does neither search or inquire into anything. *It is imperative that you should get the dayakas together and make arrangements for the convenience of priests who stay here.* It is absolutely necessary that the place should be looked after since enemies are preparing to attack us. Since it is a completed temple and built for us. This must be seriously considered. It is inadvisable to rely on the dayakayas ".

තැපැල් සලකුණ 1905 මාර්තු මස 18 වනි දින.

වලපොල සඩමෝදය පිරිවෙනාධිපති
ආචාර්‍ය උපසේන ස්වාමීන් වහන්සේ
වෙතට ලැබෙන පිණිස, පානදුර
තැපැල්.

මාර්තු 18 වෙනි දිනදීය.

ගෞරව නමස්කාර පෙරටුව සැල කරමි. අවසර. ගල්කිස්සේ මෙම ස්ථානය අත් හැරිය යුත් ස්ථානයක් නොවෙයි. වැඩ වේගන යන අන්දමටත්, පුළුවන් වීර්‍යයකින් ස්ථානයේ රැක ගැනුම යුතුමයි. මෙහි හිටිය අගෝනිසුත් උපාසකම්මා සමග නොසතුටකින් යන්ට ගියේය. ස්ථානේ උපදින යමක් ඇතුවා නම් ඒ සියල්ලත් උපාසකම්මා භාරේය. උපාසකම්මාගෙන් සතේක උපකාර අපට නොපෙනේ. ස්ථානේ සංඝ ගත කර දයකයෝ ගෙදරවල්වල සිටිති. ස්වාමීන් වහන්සේ එහි බලය ලැබ පන්සලේ වැඩ සිටී. ඉතින් මෙහි කෙසේ වැඩ වේද, මෙහි උපාසකම්මාගේ බුඩියයි. කිසිම සෙවීමක් බැල්මක් නැති ගෑනියෙකුට බලය දී කවුරුත් පැත්තට වී සිටීම යුතු නොවේ. එම නිසා ස්වාමීන් වහන්සේ දයකයන් රැස්කර මෙහි නවතින සංඝයාගේ සැප පහසු පිණිස කටයුතු සලස්වා ක්‍රියා කිරීම යුතුමය. හතුරෝ අපට කොටන්ට එන නිසාත් ස්ථානය හැදිච්ච ස්ථානයක් නිසාත් අපේ වෙනුවෙන් හැදිච්ච ස්ථානයක් නිසාත් රැක ගැනීම ඕනෑ මය. මෙය තද වසයෙන් කල්පනා කට යුතුයි. දයකයෝ ගැන බලා සිටිය යුතු නොවේ.

මේවගට,

ශිෂ්‍ය ආනන්ද.

In the second, marked P2 and dated 23rd March, 1905, he says :—

" It is difficult for me to call up that body as requested. If you think it would be better to write to those and come on an appointed date we are available at any time . . . . Your coming here can be put off till after Dhammadassi Unnanse arrives. Punalankara Unnanse is also here. May you note that the time is insufficient to inform them as directed ".

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නැපැල් සලකුණ 1905 මාර්තු මස
24 වෙනි දින.

වලපොල සඞ්ඝෝදය පිරිවෙනාධිපති
ආචාර්‍ය්‍ය කෝදගොඩ උපසේන සවාමීන්
වහන්සේ වෙතට ඔප්පු කරන පිණිසයි,
පාණදුර තැපැල්.

23 වෙනි දිනදීය.

ගෞරව නමස්කාර පෙරටුව සැල කරමි. අවසර කියා තිබුන අන්දමට ඒ පිරිස රැස් කිරීම මට අමාරුයි. සවාමීන් වහන්සේට හැකිනම් ඒ දෙදෙනාට ලියුන් යවා පැමිණෙන දිනක් නියම කර ගෙන පැමිනෙනවා හොඳයි. අනික් පිරිස කොයි වේලේත් පුළුවනි. .....සවාමීන් වහන්සේගේ මෙහි වැඩි ධම්මදස්සී උන්නාන්සේ ආවාම පුළුවනි. පඤ්ඤ ලංකා උන්නාන්සේත් මෙහි වැඩ සිටී. නියම කර තිබෙන අන්දමට ඒ අයට දැන්වීමට කල් මදි බව දැන වදළ මැනව.

මේවගට,

ශිෂ්‍ය ආනන්ද.

In the third, marked P3, sent from Kandy where he had gone for treatment for his eye, after referring to his eye trouble and his difficulty of getting on at the Galkissa, he says :

" How am I to get on at Galkissa if even a single dayaka pays no attention. I have not even the railway fare to come. Dhammadassi Unnanse came to Udawatte yesterday ".

නැපැල් සලකුණ 1906 අප්‍රෙල්
11 වෙනි දින.

වලපොල සඞ්ඝෝදය පිරිවෙනාධිපති
ආචාර්‍ය්‍ය කෝදගොඩ උපසේන සවාමීන්
වහන්සේ වෙතටය, පානදුර තැපැල්.

10 වෙනි දින.

ගල්කිස්සේ කිසිම දයකයෙක් නොසලකනවානම් වැඩ කරගන්නේ කොහොමද. මට ඒමට රේල් ගාස්තුවත් නැත. ධම්මදස්සී උන්නාන්සේ උඩවත්තට ඊයේ ආවාය.

ශිෂ්‍ය, ආනන්ද.

In the fourth, marked P4 and dated 23rd May, 1907, he says :

" As directed I informed the dayakas that you will be coming for the Bana on Monday by the 3 o'clock train. They are very much pleased. Again I beg that you should come by that train without fail ".

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තැපැල් සලකුණ 1907 මැයි මස
24 වෙනි දින

වලපොල සඩමෝදය පිරිවෙනාධිපති
ගෞරවනීය ආචාර්‍ය උපසේන ස්වාමීන්
වහන්සේට ලැබේවා,
පානදුර තැපැල්.

මැයි මස 23 වෙනි දිනදීය.

ගෞරව නමස්කාරයෙන් සැලකරමි. අවසර. ස්වාමීන්වහන්සේගෙන් අවසර ලැබුන අන්දමට සඳුදා 3 නේ රේල්ලෙන් ධර්මදෙසනාවට මෙහි වැඩමවන බව දයකයින්ට දැන්වීමි. ඒ අය ඉතාමත් ප්‍රිති උනෝය. ස්වාමීන්වහන්සේ එකී රේලුවෙන් නොවරදවාම වැඩමවන ලෙසට නැවතත් සැලකරමි.

මේවගට, ශිෂ්‍ය

ආනන්ද වන මමය.

In the fifth, marked P5 and dated 26th March, 1908, he says :

" Worshipfully submitted. By your leave. Sugunapala Unnanse is said to be going shortly as incumbent of Udukawa. *When he goes I shall be alone here. Some priest must be sent here. Please note that if a priest is not sent I cannot stay alone. Again I beg that a priest should be sent.* Please remember to send here two priests of some consequence for the forthcoming vas season.

තැපැල් සලකුණ 1908 මාර්තු මස
30 වෙනි දින.

වලපොල සඩමෝදය පිරිවෙනාධිපති
අපාචාර්‍ය ගෞරවනීය උපසේන ස්වාමීන්
වහන්සේ වෙත ඔප්පු වේවා,
පාණදුර තැපැල්.

මාර්තු මස 26 වෙනි දින ගල්කිස්සේදීය.

නමස්කාර පෙරටුව සැලකරන වගනම්. අවසර. සුගුනපාල උන්නාන්සේ උඩුකාවේ අධිපති කමට මේ ලඟදී යනවාළු. ඒ උන්නාන්සේ ගියාම මෙහි මම පමණයි. කවුරු හරි උන්නාන්සේ නමක් මෙහි එවන්ට ඕනෑය. එසේ තනිවුවහොත් මට පමනක් මෙහි සිටින්ට බැරි බව දැන වදාල මැනවි. උන්නාන්සේ නමක් එවන්ට ඕනෑ බව නැවතත් දැන වදරණසේක්වා. මේ ලබන වස් කාලේ මෙහි වසට එක විධියක සන්ඝයාවහන්සේලා දෙනමක් එවන්ට කල්පනාවට ගත මැනවි.

මේ, ශිෂ්‍ය

ආනන්ද.

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About 1909, there appears to have been some litigation affecting the Temple. In that connexion Ananda wrote as follows on 10th June, 1909, to Kodagoda Upasena :—

" Proctor Munasinghe of Kollupitiya has sent a message requesting you to come up without delay and he has asked me also to come. What am I for without you. You must come pretty soon (to-day or tomorrow). No news about the case as yet. That the victory is for the temple is all that is learnt. The teacher priest also visited us here recently ".

නැපැල් සලකුණ ජුනි 10 වෙනි දින, 1909.

වලපොල සඞ්ඝෝදය පිරිවෙනාධිපති
අපාවායී උපසේන සඞ්ඝාමීන්වහන්සේ
වෙත ලැබේවා
පානදුර නැපැල්.

ජුනි මස 10 වෙනි දින ගල්කිස්සේදිය.

ඉගෞරව නමස්කාර පෙරටුව සැලකරමි. අවසර. කොල්ලුපිටියේ මුනසිංහ ඔපරකදෝරු මහතා සඞ්ඝාමීන්වහන්සේට වැඩමවන්න කියා පණිවිඩයක් එවා තිබේ. ප්‍රමාද නැතුව යන්ට කියාය. මටත් යන්ට කියා තිබේ. සඞ්ඝාමීන් වහන්සේ නැතුව මම කුමටද ? සඞ්ඝාමීන්වහන්සේ අදින් හෙටින්ම මෙහි වැඩමවන්න ඕනෑය. නඩුව ගැන විස්තරයක් තවම දැනගන්ට නොලැබුනේය. සන්සලට ජය බව පමණක් ආසාවෙන් අසන්ට ලැබුනේය. ආචාරීන්වහන්සේත් මේ ලහදී මෙහි වැඩමවා ගියේය.

මේවගට, ශිෂ්‍ය

ආනන්ද.

After the case had been concluded he wrote on September 2, 1910, as follows :—

" The judgment of the case relating to this temple was delivered yesterday. The essence of the judgment is that land should go to the relations. The remaining cash should go to the temple. The trustees are attempting to get the money into their hands because we are lying low. If that happens there will be no benefit to the temple. Their trusteeship is also not a permanent one. *I think it would be advisable if you would come here even on a Sunday, call up the dayakayas and apply for the money through even a petition.* Haramanis Appu's idea is ' let anything happen that may '. Davith Singho Gurunanse's idea is the same. Both of them are ill-disposed towards you and me. Gure is always on the side of Haramanis. All that Gure wants is to put the money into the hands of Haramanis. It is hard to rule in that way. It must be noted, that Gure's former qualities are now absent. Haramanis' present idea is to deposit the money in Court, show accounts and go to his village. *You must come here even on a Sunday, call up Ralahamy and other dayakayas. Yes and decide on a satisfactory course of action* ".

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තැපැල් සලකුණ 1910 සැප්තැම්බර් මස
2 වෙනි දින.

වලපොල සඩමේ්දය පිරිවෙනාධිපති
ගෞරවනීය අපාචාය්‍යියන් වන උපසේන
සාමීන්වහන්සේ වෙතට ලැබේවා.
පානදුර තැපැල්.

සැප්තැම්බර් මස 2 වෙනි දින ගල්කිස්සේදීය.

ගෞරව නමස්කාරයෙන් සැලකරමි. අවසර. මේ සථානේ පිළිබඳ නඩුවේ තීන්දුව ඊයේ දෙනලදී. එහි නියම තීන්දුව ඉඩන් ඇතීන්ට වීමයි. ඉතිරි මුදල පන්සලට නියම වීමයි. දැනට අපි කරබාගෙන සිටීමෙන් මුදල බාරකාරයො අතට ලබාගන්න උත්සාහ කරති. එසේ උනිනම් සථානෙට ප්‍රයෝජනයක් නැතිව යයි. ඒ භාරකාරයින්ගේ භාරකාරකමත් ස්ථිර එකක් නොවෙයි. ඉරිදා දවසකවත් සාමීන්වහන්සේ මෙහි පැමිණිලා දයකයෝ මෙහි ගෙන්නලා පෙත් සමකින්වත් ඒ මුදල ඉල්ලා සිටිනවා නම් හොඳෙයි කියා මම සිතමි. හරමානිස් අප්පුගේ කල්පනාව ඒ මුදල ඕනෑ එකක් වී ගියාවේ කියයි. දවිත් සිංඤෝ ගුරාගේ අදහසත් එලෙසමයි. ඔය දෙදෙනාම සාමීන්වහන්සේත් මාත් සමග නොම නාපය. ගුරේනම් හරමානිස් පැත්තටමයි. මුදල හරුමානිසේ අතර ලබා දුන් නොත් ගුරේට ඕනෑ එපමණයි. ඒ අන්දමේ මට වැඩ කරන්ට අමාරුයි. ගුරේගේ පෙර ගති දැනට නැති බව සැලකිය යුතුයි. දැනට හරුමානිස්ගේ කල්පනාව මුදල උසාවියේ බැඳලා ගහන් පෙන්නලා ගමට යාමයි. සාමීන්වහන්සේ ඉරිදා දිනකවත් මෙහි පැමිනිලා රාලහාමි ආදී දයකයෝ ගෙන්නා සැහෙන අන්දමක් කථා කොට කෙරීමයි.

මේවගට, ශිෂ්‍ය
ආනන්ද.

It is not necessary to quote the contents of the post card P10 of 11th July, 1912, in which Ananda described the disputes between the dayakayas and the trustees. In the post card of 15th September, 1921, P11, he wrote—

"For my illness I took several decoctions and am taking a medicine prepared at great expense. By this I have lost the previous improvements I have had. Present illness in my body are slight cough, upset phlegm, want of sleep through loss of appetite and exhaustion. It is not advisable to wait. The vedaralas are also of the opinion that I am getting worse. *As it is inconvenient to get things done here, let me have your permission to go to a suitable place and get treatment. Of the two priests now here one is leaving to his own place. The other goes to Maliyakanda at 6 a.m. and returns at 6 p.m. If you want this place send somebody to stay*".

තැපැල් සලකුණ 1921 සැප්තැම්බර් මස
16 වෙනි දින.

වලපොල සඩමේ්දය පිරිවෙනාධිපති
අපාචාය්‍ය උපසේන සාමිපාදෝත්ත
මයාණන්වහන්සේ වෙත පිළිගැන්වීමටයි,
පානදුර තැපැල්.

වෂී 1921 සැප්තැම්බ්‍ර මස 15 වෙනි දින ගල්කිස්සේදීය.

ගෞරව නමස්කාර පෙරටුව ලියා සැලකරමි. අවසර. මට සැදී තිබෙන රෝගය ගැන කසාය වඩි කීපයක් බී විශාල ගණනක් වියදම් කර බෙතක් සාදවා වළඳිමි. එයින් පෙර තිබුණ ගුණගතිය දැනට දෙන්නේය. දැනට මගේ ශරීරය

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හුල පවතින ලෙඩෙනම්, හීන් කැස්ස, සෙම් කෝපය, වැළඳීම රුචි නැතිකම, නින්ද නොයාම, ක්ලාන්ත ගතිය යන මෙවාය. දැනට මේ ගැන බලා සිටීම නුවනට හුරු නොවේ. වෙදවරුන්ගේ මතත් අමාරු තැනට පැමිණීගන යන බවයි. මෙහි සිට ලෙඩෙට කිටයුතු කරගැනීම අපහසු බැවින් සුදුසු පලාතකට පැමිණ ප්‍රතිකාර කරවා ගැනීමට අවසර දුන මැනව. දැනට මෙහි සිටින දෙනම අතරෙන් එක නමක් විසිවෙනිදා සඩකීය පලාතට යනවාය. අනික් නම උදේ 6 ට මාලිගාවත්තට ගියාම සවස 6 ට එනවාය. සථානය උවමනා නම් මෙහි නැවතීමට කෙනෙක් එවනු මැනවි.

මීට, ආනන්ද.

The fact that Upasena, though not actually resident in the Temple, was the viharadhipati and that Ananda was a mere *locum tenens* placed in charge of the place by him, gains support from a letter sent by 22 dayakayas of the Temple to Upasena in September, 1935, in which they say—

> " Malwatte Rajapushparama vihare of Galkissa which was dedicated to the Maha Sangha of the Ramanna Sect by Upasakas and Upasikas of the neighbouring villages with Muhandiram M. Margiris Fernando as chief *and the incumbency whereof was conferred on your Honoured Self on the day of the dedication and managed since the demise of the late Reverend Ananda by Hakmana Gunananda Thero Principal of Sri Sunanda Pirivena of Beliatta is left without any improvement.*
>
> We therefore hereby write to you, honoured Nayaka Thero, to sympathise with us and restore the Arama into an improved state so that we neighbours could hear bana and do meritorious acts ".

පානදුරේ වලපළ ශ්‍රී සඩමෝදය පිරිවෙනාධිපති ගරුතර රාමඤඤ නිකායේ අධිකරණ නායක සවාමිපාදයන් වහන්සේ වෙත වැඳ නමස්කාරයෙන් ලියා සැළ කරන වගනම්,

ගරු නායක සවාමිපාදයන් වහන්ස,

ඇම්. මාග්‍රිස් ප්‍රනාන්දු මුහන්දිරම් මහත්මයා ප්‍රධාන අසල් ගම් වැසි උපාසක උපාසිකා දින් විසින් රාමඤඤ නිකායික මහා සංඝයා වහන්සේ වෙත පූජාකරන ලද්දවූද, සංඝික කොට පූජාකළ දිනයේදීම පූජා ලැබූ සංඝයා විසින් ගරුනායක සවාමීන් වහන්සේ වෙත ආරාමයෙහි අධිපතිකම පවරණ ලද්දවූද ආනන්ද සථවිර යන් වහන්සේගේ අභාවයෙන් පසු බෙලිඅත්තේ සිරි සුනන්ද පරිවෙනාධිපති හක්මණ ගුණානන්ද සථවිරයන්වහන්සේගේ පාළනයෙන් පවත්නාවුද ගල්කිස්සේ මල්වත්තේ රාජපුෂ්පාරාම විහාරසථානය මේ කාලයෙහි කිසිත් දියුණුවක් නැතුව පවත්නා බැවින් ගරු කටයුතු නායක සවාමීන් වහන්සේ අප කෙරෙහි අනුකම්පා කිරීමෙන් යථෝක්ත සථානයට පැමිණ අසල්වාසි අපට පින්දහම් කර ගැනීමට, බණ දහම් ඇසීමට ආරාමය දියුණු තත්වයකට පත් කර දෙනමෙන් මෙයින් ආරාධනා කර සිටිමිහ.

1935. 9. 8. වෙනි දින
ගල්කිස්සේදීය.

මේවගට ආරාමයේ දියුණුව පතන දායක
පිරිස වෙනුවෙන්.

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The appellants' case is that Ananda was the first viharadhipati of the Temple, that it was offered to him in 1904, and that on the death of Ananda in December 1934, Talgaspitiya Dhammaruchi (hereinafter referred to as Dhammaruchi), his pupil, succeeded him. Dhammaruchi, having been viharadhipati till 29th June 1948, disrobed on that day. Before disrobing, he appointed the first appellant to be the guardian of his pupil, the second appellant, who was a samanera and a minor.

The appellants rely almost entirely on a petition 1D1, presented by Dhammaruchi, in March, 1935, in a partition action filed by Ananda praying that he be substituted in place of the plaintiff, Ananda, who had died intestate while the action was pending.

That document lends no support to his claim. There is no evidence that Ananda claimed the land to be partitioned *qua* viharadhipati of the Temple, nor does anything said or done by Ananda support the claim that he was viharadhipati.

In those proceedings Ananda is described as " Rev. Matara Ananda Thero of Mount Lavinia " and not as viharadhipati of the Temple. After investigating the petition of Dhammaruchi for substitution, the District Judge held (1D7) that Ananda's interests in the land sought to be partitioned accrued to the Temple by virtue of section 23 of the Buddhist Temporalities Ordinance, as Ananda had lived in the Temple for a long time. The learned District Judge construed the words " the Temple to which such bhikkhu belonged ", in that section, as meaning the Temple in which the bhikkhu was robed or ordained, or the Temple which the priest had made his own as it were by residing for a long time.

Applying the latter test he concluded as follows :—

> " The priest, Matara Ananda belonged, in one sense, to the Rajapushparamaya as even according to Manana Dhewa he had been dwelling there for more than 15 years ".

The District Judge did say—

> " The only priest who seems to be residing in the Temple is the priest Dhammaruchi who claims to be the pupil of Matara Ananda and to be the incumbent of that Temple ".

But those words cannot have the effect of making Dhammaruchi the viharadhipati having regard to the circumstances in which they were used. In the partition action, the question of who was the rightful viharadhipati was not in issue, as the action was instituted by Ananda in his individual capacity in respect of his private interests in the land and not *qua* viharadhipati.

It is common ground that Dhammaruchi was a pupil of Ananda and that he was in the Temple at the time of Ananda's death. Dhammaruchi, as Ananda's pupil, cannot have greater rights than Ananda himself who was never viharadhipati of the Temple. The fact that the District Judge allowed Dhammaruchi's application to represent the Temple to which

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Ananda's interests in the partition action had accrued by virtue of section 23 of the Buddhist Temporalities Ordinance cannot have the effect of conferring on him the viharadhipatiship of the Temple.

A bhikkhu residing at a Sanghika temple who, by virtue of his residence therein, asserts the right of the temple to its property, does not thereby acquire a right to be its viharadhipati.

It would be contrary to Buddhist Ecclesiastical Law by which all bhikkhus are governed to recognise such a right.

The Secular Courts when dealing with problems affecting the Sangha should view them against the background of the Vinaya and should be cautious in applying to the Sangha the rules that govern relations and transactions between laymen. This approach to problems of Buddhist Ecclesiastical Law was laid down by Sir Anton Bertram over a quarter of a century ago, and bears repetition [1]. He said :

> " But when we are dealing with ecclesiastical property, a region in which we are enforcing simply the ecclesiastical law based upon the original authoritative texts developed by religious customs, we ought not to recognize claims and transactions which are in their terms or in their nature inconsistent with the fundamental principles of those texts and those customs ".

For the above reasons, we dismiss the appeal with costs in both Courts. For the purpose of dispelling any doubts, we repeat that the respondent would, in terms of the order in the proceedings for *Restitutio in Integrum*, be entitled to the costs of those proceedings as well.

PULLE, J.—

I agree.

Appeal dismissed.

[1] *Saranankara Unnanse v. Indajoti Unnanse, 20 N. L. R. 385.*

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1955 *Present :* **Gratiaen, J., and Swan, J.**

THE ATTORNEY-GENERAL, Appellant, *and*
S. SABARATNAM, Respondent

S. C. 108—D. C. Colombo, 24,847/M

Quia timet *action—Remedy of declaratory decree—Jurisdiction of Court to grant it—Liability of Crown.*

A party who has a concrete dispute with another may obtain in anticipation a declaration by Court that his opponent does not have a good cause of action against him. The jurisdiction of Court to grant a declaratory decree is, of course, discretionary, and would not be exercised for the purpose of making premature pronouncements as to future contingent rights of litigants.

The Crown enjoys no special immunity from declaratory decrees in cases where they would be appropriate in actions between private litigants.

The plaintiff, when he was a Public Works Department overseer, had been called upon by the Director of Public Works to refund a certain sum of money which was alleged to have been over-paid to him. Plaintiff denied that there had been any over-payment, but the Director persisted in his claim for a refund. Even after he retired from the Public Service, the Government refused to withdraw its claim for a refund and, the plaintiff alleged, was withholding payment of arrears of salary and pension due to him. He instituted the present action asking for a formal declaration in his favour that, *inter alia*, he was not liable to refund any sum of money.

Held, that the action was maintainable.

APPEAL from a judgment of the District Court, Colombo.

V. Tennekoon, Crown Counsel, with *E. R. de Fonseka*, Crown Counsel, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *R. Manikkavasagar*, for the plaintiff respondent.

Cur. adv. vult.

November 28, 1955. GRATIAEN, J.—

This is an appeal by the Attorney-General on behalf of the Crown against a declaratory decree to the effect that " the allegation made by the Government that a sum of Rs. 10,003/57 had been over-paid to the plaintiff on his bill No. 37 for work done in January 1948 was wrongly made, and that the plaintiff is not liable to refund any monies received on account of the said bill No. 37. "

The form of the decree under appeal is certainly unusual, but it was entered in circumstances which rarely occur in the proceedings between the Crown and a subject or even in private litigation. The facts as

2——J. N. B 56174—1,552 (7/56)
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found by the learned trial Judge upon the issues which were framed at the trial are no longer in dispute. Shortly stated they are as follows :

The plaintiff had been a Public Works Department overseer stationed at all material times in Point Pedro. The Department was then engaged in the construction of " the Mahadeva causeway ", but found some difficulty in inducing private contractors to enter into sub-contracts undertaking part of the work. Accordingly, the plaintiff and two other P. W. D. overseers were persuaded, in addition to their normal duties, to carry out certain items of works on sub-contract. In due course, the plaintiff submitted for payment through the usual channels his Bill No. 37 setting out particulars of his claim that Rs. 15,892/17 was due to him for work done and materials supplied up to January 1948. This bill was duly settled, but on 25th May 1949 the (then) Director of Public Works wrote to him alleging that there had been an overpayment of Rs. 10,067/77 and calling upon him to refund this sum within three weeks. The letter also alleged that there had been a further over-payment the precise extent of which was still under official investigation, and that a claim for a refund under that head would also be sent to him.

Correspondence then passed in the course of which the plaintiff denied that there had been any over-payment, but the Director persisted in his claim for a refund which was later restricted, however, to Rs. 10,003/37.

In 1950 the plaintiff fell ill, and retired from the Public Service on 30th September on medical grounds. The Government had even at that point of time refused to withdraw its claim for a refund. In due course, the plaintiff instituted this action on 25th June 1951 setting out the facts relating to the dispute, and asking for a declaration in his favour that, *inter alia*, he was not liable to refund any part of the sum paid to him three years previously on Bill No. 37. Part of his complaint against the Crown was that " insisting on the correctness of its demand for a refund the Government was wrongly withholding the plaintiff's (retiring) pension. "

The Attorney-General, on behalf of the Crown, filed an answer (and later an amended answer) repeating the allegation that there had been an over-payment as previously suggested, and disputing, in a negative form, the averment that the plaintiff was not liable to refund Rs. 10,003/37 to the Government. In addition the Attorney-General pleaded, as a matter of law, that the plaintiff was not entitled to a bare declaratory decree as to his non-liability to the Crown.

Nineteen issues were framed for adjudication at the trial ; of these, 18 related to the principal dispute as to whether the plaintiff had in fact been overpaid on Bill No. 37. The other issue introduced the legal objection that the plaint disclosed no cause of action.

The learned trial Judge, after a careful assessment of the oral and documentary evidence, held that the plaintiff was not liable to refund any part of the money received by him in settlement of Bill No. 37. He also decided that, in the particular circumstances of this case, the plaintiff was entitled, (" for what it was worth ") to a formal declaratory decree as to his non-liability.

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The Crown has at long last accepted the findings of fact in favour of the plaintiff on the dispute which commenced on 25th May 1949. In the result, the plaintiff must at least receive considerable comfort from the decision of an independent tribunal that, at the time of his retirement after over 26 years of public service, there was no foundation for the accusation that he had " got away " with public funds.

The only ground of appeal raised before us on behalf of the Crown was that the plaintiff could not claim a formal decree absolving him from the imputation of liability to refund monies to the Government. I am glad to say that I find myself unable, as a matter of law, to uphold this objection. The Courts in Ceylon are not completely powerless in situations of this kind, and are vested with a discretion to enter a decree of a declaratory nature although prevented from granting more substantial relief to the successful litigant.

It is perfectly true that the jurisdiction conferred on our Courts by the Civil Procedure Code to grant declaratory decrees is not quite so wide as that enjoyed in England and South Africa. We have no express procedure, for instance, for the settlement of disputes in anticipation by way of " originating summons " as to the interpretation of a statute, a testamentary disposition, or a written contract. Nevertheless, there are many instances in which our Courts have properly assumed jurisdiction to make binding declarations which would serve some tangible purpose concerning the rights and liabilities of litigants in respect of " concrete, genuine disputes " as opposed to " controversies of a purely academic nature ". The jurisdiction is, of course, discretionary, and would not be exercised for the purpose of making premature pronouncements as to future contingent rights of litigants (particularly if all the persons likely to be affected are not before the Court). For recent rulings on this subject, see *Hewavitharne's case* [1], *Naganathar's case* [2] and *Selvam's case* [3].

The Crown enjoys no special immunity from declaratory decrees in cases where they would be appropriate in actions between private litigants. " The King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him. " *Pawlett v. The Attorney-General* [4]. It is important to realise that any decree against the Crown for the payment of money to a private individual is itself declaratory in effect though not in form. The Crown is immune from all ordinary modes of enforcing judgments, but in the ultimate result, the obligations arising under the decree are invariably honoured.

In England, the Crown Proceedings Act of 1947 now makes special procedural provision for the remedy of declaratory decrees against the Attorney-General as representing the Crown. But even before that date, the Attorney-General had long since been regarded as amenable in that capacity to such proceedings.

[1] *(1951) 53 N. L. R. 169.*
[2] *(1953) 55 N. L. R. 319.*
[3] *(1954) 55 N. L. R. 426.*
[4] *(1667) Hard 465 at 469 ; 145 E. R. 550.*

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In *Dyson v. A.G.*[1], Cozens-Hardy M. R. explained that the Court has a discretion, having regard to all the circumstances of a particular case, to decide whether or not a declaratory judgment should be granted to enable a party to a concrete dispute, who expects to be made defendant, to obtain in anticipation a declaration that his opponent has no good cause of action against him. In some cases, of course, the Court may well say "wait until you are attacked, and then raise your defence." In others, it may properly decide that justice requires the person aggrieved to be protected from the imputation of liability. See also *Dyson's case* [2] and *Re Clay: Clay v. Booth* [3] where the Court refused a declaratory decree in the particular case, but Eve J. indicated (page 79) that the position would have been different if a "specific right had been asserted" and a claim unambiguously formulated.

In the present action, the plaintiff has asked for and obtained, after adjudication, a decree that the "specific right" persistently asserted against him by the Crown since April 1949 does not exist, and that the claim "formulated" against him has no foundation. In all the circumstances of this case, I am satisfied that the learned Judge has properly exercised his discretion in favour of the plaintiff. It is no small matter for a retired public officer, with a record of long and honourable service under the Crown, to have over his head the constant threat of litigation for the recovery of a substantial sum of money which he does not in fact owe the Government. With the passage of time, there is always a real danger that the best evidence of his non-liability might cease to be available if and when the threatened litigation does materialise. I can think of no case in which the protection of a declaratory decree would be more appropriate. It is based on the *quia timet* remedy.

The institution of the plaintiff's action was virtually an invitation to the Crown either to withdraw the earlier allegation or alternatively to counterclaim the sum of Rs. 10,003/17. The decision to decline both invitations would have been quite inexplicable in the case of a private litigant claiming to be the genuine creditor of his adversary. Mr. Tennekoon, who argued the appeal before us with admirable fairness and moderation, told us that, in the absence of instructions on the point, he was not in a position to explain why the Crown in this case persisted in asserting at the trial that money was due which it did not seek (even after the lapse of so many years) to recover through the usual machinery of the Courts. In these circumstances, the Crown can hardly complain that the plaintiff suspects, and has unequivocally insinuated, that the executive prefers to resort to an indirect (and less commendable) method of recovery by withholding his arrears of salary and his retiring pension until the alleged debt is liquidated. The unchallenged and uncontradicted evidence of the plaintiff on this point was to the following effect :

> "The defendant did not accept my explanation and persisted in asking for the money, and then stopped my salary and my security money and my pension. I appealed to them even to pay me an alimentary allowance, but that was also refused . . . . I had waited

[1] *(1911) 1 K. B. 410 at 417.* [2] *(1912) 1 Ch. D. 158.*
[3] *(1919) 1 Ch. 66.*

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for years before I came into Court. My pension has been stopped for two years and one month, and I had to come into Court for a declaration that they were not entitled to a refund in this matter."

This evidence was given over three years ago, and it is not denied that the pension "earned" by this public officer who retired in September 1950 is still being withheld for reasons which have never been divulged. It is therefore very desirable that the plaintiff should receive the formal confirmation of a judicial decree declaring that he is not in fact a debtor of the Crown. This is the only form of assistance that he can receive from a Court of justice which is powerless to compel the payment of salaries to public servants or of pensions to retired public officers.

The plaintiff has complained that his arrears of salary have not been paid. The Courts cannot assist him; "his only claim is on the bounty of the Crown" and "his only remedy lies in an appeal of an official or political kind . . . by petition, by memorial or by remonstrance." see *High Commissioner for India v. Lall* [1], where the Judicial Committee entered a decree declaring that the plaintiff was still a member of the Indian Civil Service, but declined to enter a judgment in his favour for arrears of salary upon that basis. Equally, the Courts cannot compel the Crown to pay the present plaintiff any pension which he may have "earned". The Minutes on Pensions serves as a reminder that "public servants have no absolute right to any pension or allowance under these rules." *Gunawardene v. The Attorney-General* [2]. Accordingly, he is "entitled only to expect" a pension, but "this expectation, though it might be relied on with full certainty, is none the less not a legal right", *Considine v. Mc Inerney* [3]. But Courts of justice have always assumed, so far without disillusionment, that their declaratory decrees against the Crown will be respected. For this additional reason, I would affirm the judgment under appeal in the confident belief that it may thereby assist the plaintiff to obtain through the proper channels extra-legal relief against suspected departmental victimisation. It has now been clearly established that he is not a debtor of the Crown. It is therefore quite unthinkable that the learned Judge's verdict on the facts, which have not been challenged by the Attorney-General, would be insolently ignored for the purposes of any future administrative decision connected with the payment of salary or pension which the plaintiff is "entitled to expect". I would dismiss the appeal with costs.

SWAN, J.—I agree.

Appeal dismissed.

[1] (*1948*) *A. I. R. P. C. 121.*

[2] (*1948*) *49 N. L. R. 359.*

[3] (*1916*) *2 A. C. 162 at 170.*

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1954 *Present :* **Pulle, J., and Swan, J.**

H. KIDA SILVA, Appellant, *and* H. BUILIS SILVA *et al.*, Respondents

S. C. 160—D. C. Colombo, 6,216

Fideicommissum—Designation of fideicommissaries—Use of word " or "—Does not always bear substitutionary meaning.

A father gifted a ½ share of a land to his son B. S. subject to a fideicommissum in favour of B.S's children. On the same day he executed three other deeds gifting a ⅙th share of the land respectively to each of his three daughters ; each deed was subject to the following conditions :

" I the said donor do hereby reserve to myself the right of enjoying the rent, issues and profits of all the premises described in the schedule hereunto during my life ; and also subject to the conditions that the said donee shall not sell, mortgage or otherwise alienate the said premises but after her death the same should evolve on B. S. *or her* lawful heirs. " (B. S. was the aforementioned son of the donor.)

Held, that none of the deeds in favour of the daughters created a fideicommissum inasmuch as the fideicommissaries were not sufficiently clearly designated. The word " or " could not, in the context in which it was used, be given the usual meaning " whom failing ".

APPEAL from a judgment of the District Court, Colombo.

S. W. Walpita, with *J. R. M. Perera*, for the plaintiff appellant.

No appearance for the defendants respondents.

Cur. adv. vult.

May 10, 1954. PULLE, J.—

The plaintiff who is the appellant sought to partition the land depicted in Plan No. 90 of 20th August, 1951. There were three defendants of whom the first was her brother Hathimuni Builis Silva, to whom she allotted a ½ share and the second and third her sisters to each of whom she allotted a 1/6th share. The plaintiff claimed the balance 1/6th. The 2nd defendant Hathimuni Gardin Silva died pending the action. The principal question for determination is whether upon her death her share passed by intestate succession to the plaintiff and the 1st and 3rd defendants or whether by reason of the provisions contained in a deed of gift No. 872 marked P4 from her father dated the 29th July, 1938, her share passed exclusively to the 1st defendant. The donor, Hathimuni Martin Silva, the father of the plaintiff and the defendants, executed on the 29th July, 1938, three other deeds No. 871 marked 1D 1, No. 873 marked P5 and No. 874 marked P6. By deed No. 871 Martin Silva donated a half share to the 1st defendant subject to a fideicommissum in favour of the 1st defendant's children. Deeds Nos. 872, 873 and 874 were in identical terms by which Martin Silva gifted a 1/6th share respectively

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to each of his daughters. The case for the 1st defendant is that these deeds also created fideicommissa in his own favour and the learned District Judge has so held.

The donor made the gifts to his daughters subject to the following conditions :

> " I the said donor do hereby reserve to myself the right of enjoying the rent, issues and profits of all the premises described in the schedule hereunto during my life ; and also subject to the conditions that the said donee shall not sell, mortgage or otherwise alienate the said premises but after her death the same should devolve on Hathimuni Builis Silva *or her* lawful heirs. "

Now the submission on behalf of the plaintiff both here and below is that if the donor intended to create a fideicommissum he did not succeed in giving effect to his intention because there is not in the deed a sufficiently clear designation of the fideicommissaries. On a literal reading of the deed it would seem that upon the death of the donee either the 1st defendant succeeded to the whole of the property donated or he succeeded jointly with the plaintiff and the 3rd defendant. Could one say with reasonable certainty from the beginning in whom the property would vest upon the death of the donee ? Before answering this question I shall analyse the reasons which appear to have weighed with the learned Judge in holding that there was a sufficient designation of the ultimate beneficiaries.

There can be no doubt, as the Judge says, that fideicommissaries can be indicated in the alternative or successively or as a class by the use of the word " heirs ". The basic point of the decision is expressed by him as follows :

> " The recipients were to be Builis Silva in the first instance and failing him the intestate heirs of the donees. There is in my opinion a clear designation of the fideicommissaries in the substitutional sense indicated by the use of the word ' or '. "

For this proposition he relies on a footnote at p. 269 of Professor T. Nadarajah's work on the Roman-Dutch Law of Fideicommissa where it is stated,

> " Although the meaning of the word ' or ' must in each case be a question of fact, the South African courts have followed the view of the English courts that, generally, where there is a bequest to ' A ' or ' B ', the ' or ' is used in a substitutional sense. "

The learned author refers to *In re Estate of Albertyn*,[1] and *Peduru Fernando v. Mary Fernando*[2]. In the former case the court had to construe a paragraph of the will which reads in effect as follows :

> " 3. To my nephew C the interest on a capital of £5,000 and after his death the interest on said capital shall devolve on his child J. *or* such other lawful issue by subsequent marriage him surviving in equal shares who shall likewise only be entitled to the interest on the capital in equal shares. "

[1] *1929 C. P. D. 244, 253—255.*

[2] *46 N. L. R. 44.*

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At the time the will was made C had only one child by his first marriage, namely J, and his wife was then dead. C married a second time and had two children. One of the questions which had to be decided was whether, in the event of C's death, J and the two children of C would succeed jointly to £5,000; or whether J alone would succeed, if J survived his father C. The decision was that upon C's death J, if alive, would be vested absolutely with £5,000. It was further held that if J predeceased C, the two children would succeed in equal shares. In the course of his judgment Van Zyl, J., after citing the case of *Bowman v. Bowman* [1], said,

"It seems to me that it will be in accordance with the ordinary and natural use of the English language if 'or' in paragraph 3 is taken to be equivalent to 'whom failing'." He went on to add,

"I am further strengthened in my view that a decision should be given in favour of the sixth defendant as against the other children of the fifth defendant by two circumstances. Firstly, the sixth defendant was the only child the fifth defendant had when the testator made his will, and it seems to me neither unnatural nor unreasonable to assume that to the mind of the testator, when he made his will, the sixth defendant was more important than any possible further children who might be born to the fifth defendant who was not even married at the time. And secondly, the words "who shall likewise only be entitled to the interest on the capital in equal shares does not seem to me to be consistent with a reading of paragraph 3 which would bring in the sixth defendant on equal terms with the other surviving children. Those words clearly refer to the other children only and show that the testator in drawing up paragraph 3, was not contemplating an alternative in which the sixth defendant should share with the other children." The fifth defendant referred to was C and the sixth defendant J.

I have cited *in extenso* from the judgment of Van Zyl, J., to show that the word "or" in the context of P4, P5 or P6 cannot automatically be given the meaning "whom failing". By the deed 1D 1 the 1st defendant received a ½ share subject to a fideicommissum in favour of his children. If the 1st defendant's contention is accepted then it was not the intention of the donor that the balance half share given to his sisters should, when it devolves on him, be burdened with a fideicommissum in favour of his children. In other words he would have a free disposing power over it. I do not see any particular reason, from the bare circumstance that all the sisters were childless, for thinking that the donor must have intended that each sister's share should devolve only on the brother. Speculation as to intention is an unsafe guide, one way or the other, especially in interpreting a contractual instrument. Ultimately one has to fall back on the language used in the instrument and gather the intention from that language with the help of such extraneous evidence as the law permits.

The learned Judge says that the passage which I have quoted from P4 shows clearly the donor's intention to create a fideicommissum. He is, perhaps, right in the sense that a prohibition against sale, mortgage or

[1] *1899 A. C. 518.*

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alienation is often found in clauses creating a fideicommissum, but it is no less essential that what was in the mind of the donor must be expressed with that degree of clarity which the law demands. There are many cases in England relating to charitable trusts in which the most praiseworthy intentions of testators to benefit the public have been defeated because of faulty draftsmanship. One of the best known is *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson and others* [1] in which the House of Lords held that a direction to the executors to apply the residue of a large estate " for such charitable institutions or other charitable or benevolent object or objects " as they should select was void for uncertainty. In the present case the donor did probably intend to make a fideicommissary gift but he used language which left it in doubt whether upon the death of the alleged fiduciary the property was to pass to A alone or jointly to A, B and C. The result is that neither of the deeds P4, P5 and P6 could be held to have created a fideicommissum. In reaching this conclusion I have borne in mind that while generally in a will by which a bequest is made to a person or a class " or " his or their heirs, issue, children or descendants, the word " or " is substitutionary—Vide *Stroud*, 1953 edition, p. 2007—the use of the word " or " is not conclusive that the gift is substitutional. *Williams on Executors 1930 ed. p. 782.*

I would set aside the decree under appeal and direct that a decree be entered giving effect to this judgment. The 1st defendant will pay the plaintiff the costs of appeal. The other costs will be pro rata.

SWAN, J.—I agree.

Decree set aside.

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

WIJESINGHE, Appellant, *and* WIJESINGHE, Respondent

S. C. 390—D. C. Colombo, 2,027

Husband and wife—Judicial separation—Cruelty—Proof—Right of plaintiff to choose between separation and divorce.

Cruelty, as a ground for a decree of judicial separation, need not be physical ; moral cruelty will suffice. To entitle a wife to a decree on this ground it is sufficient for her to show that her husband has been guilty of conduct which has impaired her health and made it intolerable for her to continue to live with him.

Decree for judicial separation may be entered although the party seeking it is entitled on the evidence to ask for the greater relief of a divorce.

[1] *(1944) 60 Times Law Reports 492.*

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APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *Eric Labrooy* and *G. D. C. Weerasinghe*, for the defendant appellant.

J. N. Fernandopulle, with *E. B. Vannitamby*, for the plaintiff respondent.

Cur adv. vult.

July 23, 1954. SANSONI, J.—

This is an appeal by a husband against a judgment which granted his wife a decree of judicial separation and dismissed his claim in reconvention for a divorce. The grounds upon which the plaintiff-respondent based her claim were that for some time past the defendant-appellant had treated her with harshness and cruelty which made her life intolerable and caused her to fear that continuing to live with him might endanger her life. The defendant-appellant in his answer pleaded that his wife, at the instigation of her mother and brothers, without any cause whatsoever, left his house on 10th December, 1948, as she had done previously on 18th May, 1947. He further pleaded that in spite of a reconciliation effected after that earlier departure from his home she occupied a separate room and refused to talk to him or to attend to his needs, and was thus guilty of cruelty. He claimed a divorce on the ground of malicious desertion and cruelty.

The parties were married in 1931 when the wife was 16 and the husband 30 years old. The eldest child, a girl, was born in 1932 ; a boy was born in 1933 and another girl in 1940. Not long after the marriage the wife took employment as a subpostmistress on a salary of Rs. 125. Out of this sum her husband admittedly took Rs. 35 to cover part of the house rent on the ground that their house had to be bigger than would otherwise have been necessary ; she also had to pay her brother Rs. 25 for assisting her. The learned Judge has accepted the wife's evidence that her husband took her entire salary from her every month.

In 1943, when the wife's mother and brothers were also living with this couple, a brother named Bennet got married and there arose some disagreement over that. The wife says it was because her husband disapproved of Bennet getting engaged against his wishes ; the husband says that what he disapproved of was their extravagant plans for the wedding reception. He admits, however, that he was displeased with his wife because she did not comply with his wishes. The next incident was the purchase of a car by Bennet and the husband. Bennet apparently wanted his share of the purchase money back, and the husband got annoyed with the wife when she suggested to him that he should comply with Bennet's request.

In 1945, their eldest daughter attained puberty and there was an argument as to the observance of certain ceremonies in that connection. In the course of a quarrel the husband admittedly assaulted the wife in the presence of the wife's mother. After this incident the husband asked

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his mother-in-law to leave his house, which she did. She never again lived with her daughter and son-in-law. The wife complains that after this her husband became indifferent to her ; he failed to provide her with sufficient money for running the house ; she also had to render an account to him of all monies she had received from him. It was at this time that she says her health began to be affected by this treatment.

Early in 1947 the car was stolen when the husband was in Kandy. The wife sent him a telegram informing him of the theft, but when he returned home he found fault with her for having gone to her brothers before she went to the Police. According to the wife she was always being blamed by her husband for the loss of the car, and he totally neglected her and failed to maintain her. She also says he asked her to leave the house. I might here draw attention to the husband's admission that he did ask her to leave the house, though he has not specified at what stage of their dissensions he made the request. At any rate the wife says that she could not bear to live with her husband any longer and she accordingly left the house on 17th May, 1947, when he was away at Galle. She informed the Police that she was leaving on account of ill-treatment and that she was going to live with her brother. She also left behind a letter to her husband in which she complained, " I am compelled to take this action after years of agony with you. I bore up your mean and callous treatment for the great love I have for my children ". She asks him not to expect her to return to him unless he was prepared to completely reform himself.

In September 1947, through the good offices of a Mr. Seneviratne the parties were reconciled, but not before the husband laid down certain conditions which he wanted his wife to observe. The husband said in evidence :—" The condition of reconciliation was that she should not go out of the house without permission, and not talk to her mother and brother without permission ". Apparently the wife was persuaded by Mr. Seneviratne to agree to these conditions. It seems to me a shocking thing that a husband should require his wife to observe rules such as these which were calculated to make her a prisoner. He also admits that he listened to outsiders who told him that his wife was not complying with these conditions, and also questioned the children to ascertain whether their mother was breaking his commands. Their children went the length of obliterating the wheel marks left on the carriage way of the residence, no doubt because they feared the sequel to the discovery of the wheel marks by their father. The husband complained that within a month of the reconciliation his wife spoke to her mother when the latter visited a relative who lived in the neighbourhood, accompanied her mother to hospital to visit a sick cousin, and went to her uncle's house on the pretext of borrowing a saree. I do not think it is relevant to inquire whether the wife did any of these things or not. Even if she did, I cannot believe that a reasonable husband would have resented such conduct. The wife complains that there were quarrels over alleged breaches of his commands in the course of which she was assaulted. The learned Judge has believed her evidence that one such assault took place in April 1948.

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The climax came on the 10th December, 1948, when a young man came to the house to return a music book, which the wife had lent him. She says it was her daughter's book, and she had lent it to the young man when he came to borrow it in her daughter's absence from the house. The husband apparently objected to this young man's arrival to return the book ; he admits he scolded his wife and attempted to slap her. The learned Judge was satisfied that he actually assaulted her, and abused her in filthy language and even coupled her name with that of the young man. The wife left the house the next day, having complained to the Police that she was assaulted and abused on the 10th night. It is unfortunate that in this complaint she also said of her husband, " As far as I believe he has other attachments ". No such allegation has been made by her since, and it should never have been made. The learned Judge accepts the evidence of the Inspector of Police who says he observed redness on the wife's face when she was making her complaint. He has also accepted the evidence of a neighbour who said he had heard the husband scold his wife in obscene language, and seen the wife crying on those occasions. The learned Judge formed the opinion that the husband occasionally assaulted his wife, and that he was " a fiery tempered person, very assertive and dominating in his house " who even displayed his bad temper and offensive manner in the witness-box. On the other hand the wife struck the learned Judge as " a frail and timid woman " who would not have ventured to raise her voice in opposition to her husband. The learned Judge also formed the view that the husband was fonder of his money than of his wife and children. However, what seem to have weighed most with the learned Judge when he granted the wife's application were " the continual bickerings between the husband and wife in all of which the husband was the aggressive party. He was abusive and insulting. He restricted his wife's freedom of movement ". The learned Judge also referred to the fact that the husband had ordered his wife to leave the house, and made use of trivial incidents to find fault with her. He has not dealt in his judgment with the husband's complaint that the wife would not speak to him or associate with him for two or three months at a time. But I think the wife's attitude of non-co-operation, if she adopted it at times, was a weapon of defence which she used to counter the aggressiveness of her husband. There is every indication in the judgment under appeal that the learned Judge took the view that the husband was always the aggressor, and that the wife was always on the defensive.

This is eminently a case where the findings of fact made by the learned Judge should be given full weight. The following passage in the judgment of de Villiers J.A. in *Cheek v. Cheek* [1] is in point :— " Now it has very often been laid down in this Court, that in coming to a conclusion as to the credibility of witnesses, a Court of Appeal must of necessity be greatly influenced by the opinion of the learned trial Judge. He sees the demeanour of the witnesses and can estimate their intelligence, position and character, in a way not open to the Courts who deal with the later stages of the case." The principle thus laid down applies with

[1] *(1935) A. D. 336.*

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especial force in matrimonial disputes, for as stated by Innes, C.J., in *Oberholizer's case* [1], " these matrimonial cases throw a great deal of responsibility upon a judge of first instance, with the exercise of which we should be slow to interfere. He is able not only to estimate the credibility of the parties, but to judge of their temperament and character. And we, who have not had the advantage of seeing and hearing them, must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong ".

The learned trial Judge in this case has formed very definite convictions about the parties in this case. There are no particular features in the wife's evidence which can be regarded as unsatisfactory, nor are there such improbabilities in her story such as might outweigh the effect produced by her demeanour on the Judge and induce a Court of Appeal to reverse his opinion of her. It follows that unless the learned Judge misdirected himself on the law his judgment should stand.

Now Sir Lalita Rajapakse who appeared for the husband in this appeal urged that since the learned Judge has held that the assaults themselves were not of such a nature as to endanger the wife's life there was no justification for a decree of judicial separation. But it is clear that the learned Judge has formed the definite opinion that the husband has been guilty of conduct which has impaired his wife's health and made it intolerable for her to continue to live with him. He has cited in support of his finding on the law the following passage from the judgment of Solomon, J., in *Wentzel v. Wentzel* [2] :—" When the ground relied on was cruelty the test is, Has it not been proved that by reason of the defendant's misconduct it has become intolerable for the plaintiff to live with him ? No general rule can be laid down and much will depend upon the physical and mental condition of the wife as well as upon her character and disposition ". Cruelty need not be physical ; moral cruelty will suffice. It is clear law now that " when once a spouse by unlawful conduct makes it dangerous or intolerable for the other spouse to continue cohabitation, the latter is entitled to a decree of judicial separation "—see *Armsbury v. Armsbury* [3]. de Villiers J.A. in *Cheek v. Cheek* (supra) stressed the necessity for the plaintiff not only to prove that the spouses find it intolerable to live together but also that such a condition of things was caused and created by misconduct on the defendant's part. An isolated incident is not enough, especially if the parties continue to live for a long time thereafter. There is no doubt that in this case the guilty party is the husband.

The next submission made on behalf of the husband was that, in view of the plaintiff's statement in evidence that under no circumstances will she go back to the defendant, the marriage is now a mockery and should therefore be dissolved. This submission must fail for the reason that it does not lie in the mouth of the husband, who is held to be the guilty party, to complain if his wife chooses that the marriage relationship should continue. She is entitled to ask only for a judicial separation, even if the greater relief of a divorce would have been justified upon the

[1] (*1921*) *A. D. at p. 272.*

[2] (*1913*) *A. D. 55.*

[3] (*1929*) *A. D. 109.*

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evidence, although I doubt if the husband's conduct in this case was of a sufficiently grave character to warrant the granting of a divorce. It was decided in *Orr v. Orr* [1] and *Keerthiratne v. Karunawathie* [2] that a judicial separation may be obtained on the same grounds as a divorce. Poyser, S.P.J., in the latter case quoted with approval the words of Solomon, J.A., in *Johnston v. Johnston* [3] :—" The larger remedy of divorce includes separation *a mensa et thoro* and if the injured party is satisfied to ask for the smaller remedy it is difficult to see on what grounds it could possibly be refused ".

I would dismiss this appeal with costs in both Courts. I would, however, draw the attention of the District Judge to the form of the decree signed by him in this case. It has been pointed out to us by Sir Lalita Rajapakse that the decree that has been entered is a decree of divorce. This is obviously wrong, and a correct decree for separation *a mensa et thoro* should be entered.

ROSE, C.J.—I agree.

Appeal dismissed.

1954 *Present :* **Pulle, J., and Swan, J.**

G. G. HENDRICK *et al.*, Appellants, *and* M. PODINONA, Respondent

S. C. 101 and Inty. 44—D. C. Balapitiya, 218

Partition action—Summons not duly served on a party defendant—Waiver of irregularity—Effect on final decree.

In a partition action the appellant, who was not mentioned as a defendant in the plaint, was ordered by Court to be made a party. His name thereafter appeared as one of the defendants and he took part in the proceedings between interlocutory decree and final decree. He admitted that the share allotted to him in the interlocutory decree was correct.

Held, that the failure to give the appellant notice of the action and/or to call upon him to file a statement of claim was not an irregularity that could entitle him to challenge the validity of the interlocutory decree. He was therefore bound by the final decree.

APPEALS from a judgment of the District Court, Balapitiya.

T. P. P. Goonetilleke, with *B. E. de Silva*, for the defendants appellants.

C. V. Ranawake, for the plaintiff respondent.

Cur. adv. vult.

[1] *22 N. L. R. 57.* [2] *39 N. L. R. 514.*

[3] *(1917) A. D. 292.*

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February 12, 1954. SWAN, J.—

There are two independent appeals in this case. The appeal of the 1st defendant is numbered 101/1953 (F) and that of the 2nd defendant 44/1953 (Inty). They have been argued together. In fact the same counsel appeared for both appellants. For the sake of convenience and in order to avoid confusion I shall refer to the appellant in the final appeal as the 1st appellant and to the appellant in the interlocutory appeal as the 2nd appellant.

The appellants were sued by the respondent for declaration of title to a certain allotment of land, for ejectment and for damages. After trial the learned District Judge gave judgment against the 1st appellant and as the 2nd appellant was in default ordered decree nisi against her.

I shall first dispose of the appeal of the 2nd appellant. When decree nisi was served on her she appeared and took time to show cause. The ultimate result of her application was that the decree nisi was vacated and she was allowed to file answer and contest the case. In these circumstances I cannot see what cause she has for complaint. In my opinion there is no merit in her appeal and I would dismiss it with costs.

I shall now deal with the appeal of the 1st appellant. The respondent claimed to be entitled to the land in question under and by virtue of the Final Decree dated 10.5.1939 entered in partition suit No. 28019 of the District Court of Galle. The 1st appellant's main defence was that he was not bound by that decree because, though ordered to be made a party and named in the caption, he was not served with summons. He also pleaded a title by prescription. The learned District Judge held against the 1st appellant on both these issues and gave judgment for the respondent as prayed for but with damages at Rs. 5 per mensem from date of decree till restoration of possession and half costs of action.

Admittedly the 1st appellant had been in occupation of the lot in dispute after the Final Decree and, as this action was instituted on 19.8.49, he had more than ten years' possession. But the learned District Judge came to the conclusion that his possession was not adverse to the respondent. In the Final Decree the respondent had been ordered to pay the 1st appellant compensation. This amount was deposited in Court only on 10.2.49. In these circumstances the learned District Judge held on the authority of *Sediris v. Dingirimenika* [1] that the 1st appellant could not claim a prescriptive title.

Mr. Goonetilleke who appeared for the appellants does not challenge the proposition that possession under a *jus retentionis* is not adverse possession. He based his whole argument on the invalidity of the Final Decree as against the 1st appellant. Undoubtedly, if the 1st appellant was not bound by the decree, it could hardly be contended that he was in occupation on the strength of his *jus retentionis*. But the learned District Judge has said in his judgment, " I am satisfied that the defendants had continued to occupy these premises with her leave and licence as they had no place to go to on the understanding that they were to pay the taxes. " I shall ignore this finding and decide this appeal on the issue whether or not the Final Decree was binding on the 1st appellant.

[1] *(1948) 51 N.L.R. 6.*

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That the name of the 1st appellant appears in the Final Decree there can be no question. He is the 156th defendant. That he took part in the proceedings between interlocutory decree and final decree also cannot be denied. He was, however, not a defendant mentioned in the plaint. There were only 106 defendants at that stage. But his name was disclosed by the 91st defendant and the learned District Judge who heard the partition action ordered that he be made a party. His name thereafter appears as the 156th defendant. It was contended in the lower court that he must have been present when he was added a party defendant and therefore had sufficient notice of the action. But the learned District Judge who heard this case very rightly refused to accept that contention in the absence of proof of the 1st appellant's presence on that occasion. After interlocutory decree was entered the 1st appellant submitted a petition (P5) complaining that a surveyor had come to the land and " partitioned it in such a way that the portion on which the petitioner's residing house stands was allotted to another person while the petitioner was given a portion less than a perch in extent from a corner. " He stated that he objected to the scheme and prayed that he should be noticed before the partition was confirmed.

This petition is dated 15.3.1938. Thereafter on 8.9.38 the 1st appellant gave a proxy (P6) to Mr. H. de S. Kularatne authorizing him to appear for him and " *to file all necessary papers in case No. 28,019 D. C. Galle.* "

The point I want to emphasize is that the 1st appellant did not in his petition complain that the share allotted to him in the Interlocutory Decree was incorrect. He only objected to the scheme of partition. Could it then be seriously contended that the failure to give him notice of the action and/or to call upon him to file a statement of claim upon his being disclosed as a necessary party by the 91st defendant in consequence of which he was made the 156th defendant is an irregularity that invalidates as against him the final decree entered in the case ? I certainly do not think so.

In spite of the fact that he sent the petition and gave a proxy to Mr. Kularatne " to file all necessary papers " I find that no further steps were taken in that behalf either by the 1st appellant or by Mr. Kularatne. He was given due notice (see Journal Entry P9 of 8.9.38) of the confirmation of the scheme but did not choose to appear in person or by proctor to support the objection he had taken in P5. The learned District Judge in accepting the scheme said :—" The 1st defendant has filed no objections. He is only entitled to a very small share and it would not be possible to give him his house which stands on lot 1 ". That was the lot to which the respondent was declared entitled. There was an appeal from the Final Decree to which he was a party. The journal entries P10 and P11 show that he was served with notice of appeal and with notice of security. " In these circumstances, " observed the learned District Judge, " it is futile for him to challenge the validity of the Final Decree. "

With that observation I am in complete agreement. Learned counsel for the appellant, however, sought to support his argument on the authority of *Pablis v. Euginahamy* [1] in which Dias J. held (Nagalingam J. agreeing) that where summons was not properly served on a party in a

[1] *(1948) 50 N.L.R. 346.*

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partition case the court had the power to vacate the decree even where the irregularity was discovered after the final decree. It is true that in the course of his judgment Dias J. remarked that " the final decree derives its regularity from the interlocutory decree, which in turn depends upon proper service of summons on the various parties to make it a binding decree." But the *ratio decidendi* of *Pablis vs. Euginahamy* [2] was that a court of first instance had the power to vacate a final decree upon proof that summons was not duly served upon a party to the action.

The case of *Pablis v. Euginahamy* [1] is in my opinion distinguishable on material points. There the appellant was the 5th defendant upon whom summons could not be personally served. Substituted service was ordered but was not properly served, and the case proceeded to trial on the footing that the substituted service was in order. After interlocutory decree was entered he appeared in court through a firm of proctors to whom he had given a proxy. He was allowed time to file objection but failed to do so. One member of the firm of proctors he had retained stated to court that the 5th defendant did not admit the correctness of the share allotted to him in the interlocutory decree. The learned District Judge stated, " the 5th defendant is bound by the interlocutory decree and I am unable to interfere in this matter now." Dias J. observed that at that date it was not known to anybody that the service of summons on the 5th defendant was irregular. In the circumstances he held that the final decree entered was not binding on the defendant.

In this case, however, the appellant did not complain in his petition P5 that he was given a smaller share in the interlocutory decree than he was entitled to. Even in the course of this trial it was not suggested that the 1st appellant was prejudiced because the interlocutory decree did not allot to him his correct share or interests in the land sought to be partitioned. Both in the lower court and here the interlocutory decree was attacked on the ground that the 1st appellant was not served with summons.

Non-service or improper service of summons is undoubtedly an irregularity, but I do not think that every such irregularity is necessarily fatal to the decree subsequently entered. It was pointed out in *Senanayake v. Appu and others* [2] that a defendant who is not duly served with summons need not appear but if he does appear his appearance cures the irregularity. In the words of Withers J., " The issue of summons unauthorised by the judge's signature and entry of date was no doubt irregular but, in my opinion, this irregularity was waived. The defendants applied for time to file answer." Browne J. considering the same matter remarked :— " The object of any summons that could have been regularly issued had been attained by all the defendants . . . . having caused appearance to be entered for them in the action as they might always voluntarily do before service on them of summons."

I do not think any judgment entered for default of appearance could be vacated merely on the ground of non-service or irregular service of summons if in point of fact the defendant admits the plaintiff's claim. And that is how I interpret the 1st appellant's application in P5 to be

[1] *(1918) 50 N. L. R. 346.* [2] *2 S. C. R. 137.*

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allowed to object to the scheme of partition. In my opinion it is a tacit admission that the share allotted to him in the interlocutory decree is correct. He entered an appearance thereafter, and was given an opportunity of objecting to the confirmation of the scheme. In those circumstances I would hold that he cannot be allowed to question the validity of the interlocutory decree. On the assumption that the interlocutory decree is in order there can be no doubt that he is bound by the Final Decree. I would therefore dismiss the appeal of the 1st appellant with costs.

PULLE, J.—I agree.

Appeals dismissed.

1956 *Present :* **Sansoni, J.**

ANDIRIS FONSEKA, Appellant, *and* ALICE PERERA, Respondent

S. C. 40—M. C. Matugama, 22,985

Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy —"Access".

The word "access" in section 112 of the Evidence Ordinance means "opportunity of intercourse" and not "actual intercourse". The judgment of the Full Bench in *Jane Nona v. Don Leo* (1923) 25 N. L. R. 241 is no longer law.

APPEAL from a judgment of the Magistrate's Court, Matugama.

R. A. Kannangara, for the defendant appellant.

C. D. S. Siriwardene, for the applicant respondent.

Cur. adv. vult.

March 28, 1956. SANSONI, J.—

This appeal arises out of an application for maintenance made by the applicant-respondent against the defendant-appellant, who is not her husband, claiming maintenance from him on the ground that he was the father of her child Ranjit. The applicant-respondent was married in 1949 ; that marriage has not been dissolved and the child in question was born to her on 10th August, 1953. The defendant denied paternity, but after inquiry the learned Magistrate held that the defendant was the father of the child and ordered him to pay maintenance.

The learned Magistrate carefully considered the question whether there was intimacy between the applicant and the defendant at the time relevant to the application, and there can be no doubt that on the evidence before him the learned Magistrate came to the only possible conclusion on that matter. But since the child was born during the continuance

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of a valid marriage between the applicant and her husband, the more important question which requires consideration is whether the applicant has discharged the onus of rebutting the conclusive presumption created by S. 112 of the Evidence Ordinance. Unless the applicant has succeeded in doing so, the fact that she was intimate with the defendant has no bearing on the question of paternity.

In order, I suppose, to rebut that presumption evidence was given by the applicant and her witness the Village Headman to the effect that the applicant and her husband had separated in 1950 or 1951. The time of the alleged separation is itself uncertain. The applicant stated in her evidence in chief that she and her husband separated in 1950 ; under cross-examination she stated at first that they lived together till about the middle of 1951, but she later said that they separated in the latter part of 1951. According to the Village Headman the applicant and her husband came to him on 20th January, 1950 and informed him that they were separating from each other and signed his diary. The diary entry itself is open to suspicion because the date first appears as 18th January 1950 ; this date has then been scored off and the date 20th January 1950 substituted. No evidence was led as to the place of residence of her husband thereafter, and it is impossible to conclude that because the husband and wife told the Headman they were separating, they did not meet again. The applicant's evidence itself disproves such a theory.

Every assumption should be made in favour of the legitimacy of this child, and its illegitimacy can only be conceded if the applicant proved beyond reasonable doubt that her husband had no " opportunity of intercourse " with her at any time when the child could have been conceived. This she has completely failed to do. It cannot be held, therefore, that the child Ranjit, in respect of whom this application has been made, was the child of the defendant.

I use the phrase " opportunity of intercourse " advisedly for that, I think, is the authoritative definition of the word " access " in S. 112. On this question there are conflicting decisions. Basnayake, J. in *Pesona v. Babonchi Baas*[1] and Swan, J. in *Kiri Banda v. Hemasinghe*[2], held that the word meant " actual intercourse ", as decided by the Full Bench in *Jane Nona v. Don Leo*[3]. Howard, C.J. in *Ranasinghe v. Sirimane*[4], and Dias, J. in *Selliah v. Sinnamma*[5] followed the decision of the Privy Council in *Karapaya Servai v. Mayandi*[6], in which it was held that the word meant " opportunity of intercourse ".

I have no doubt that this decision of the Privy Council is binding on me. It dealt with S. 112 of the Evidence Act of India (1 of 1872) which is in almost identical terms with our S. 112. The only question which their Lordships had to decide in that case, as they themselves say, is whether it had been shown that a husband and wife had no access to each other at any time when the person claiming to be their lawful son could have been begotten. Therefore, the meaning of the word " access " had a direct bearing on that question, although their Lordships said that nothing

[1] (*1948*) *49 N. L. R. 442.*
[2] (*1950*) *52 N. L. R. 69.*
[3] (*1923*) *25 N. L. R. 241.*
[4] (*1946*) *47 N. L. R. 112.*
[5] (*1947*) *48 N. L. R. 261.*
[6] *A. I. R.* (*1934*) *P. C. 49.*

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seemed to turn upon the *nature* of the access. The judgment contains a close examination of the evidence, and the conclusion arrived at was that no Court could hold on that evidence that non-access at the relevant time had been proved.

That being my view I consider myself bound to follow that decision. Any doubt which may have existed previously has, I think, been removed by the judgments of the Privy Council in *Nadarajan Chettiar v. Tennekoon*[1] and *Cooray v. The Queen*[2]. In *Cooray v. The Queen* the Court of Criminal Appeal in Ceylon had not followed a line of English decisions which had construed an English Act upon which S. 392 of the Penal Code was modelled. Lord Porter therefore had occasion to consider whether the rule in *Trimble v. Hill*[3] still held good. In *Trimble v. Hill* the Privy Council said :

> " Their Lordships think the Court in the Colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in Colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it ".

These remarks were made because the New South Wales Court had differed from the Court of Appeal in its construction of a section which was similar to a Section which appeared in an Imperial Act. Lord Porter then said :

> " It is true that in that case the decision referred to was one given by the Court of Appeal and that the Courts which it was said should follow it were Courts of a Colony, but in their Lordships' view English Courts should themselves conform to the same rule where there has been a long established decision as to a particular section of an Act of Parliament and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the Courts of a member of the British Commonwealth of Nations a similar course should be followed ".

In *Nadarajan Chettiar v. Tennekoon*, Sir John Beaumont said that the rule still applied to the Courts in Ceylon except in cases where local conditions make it inappropriate.

The comment of de Villiers (then J. P.) in *Benkes v. Knights Deep*[4], when referring to this rule will bear repetition. He said :

> " Even apart from this ruling, the Court of this Province naturally inclined, on account of their inherent weight, to follow so eminent a College as a Court of Appeal in England ".

Even, therefore, if there was no duty cast on me to follow the Privy Council in *Karapaya Servai v. Mayandi*, I should have no hesitation in following that decision, for, to quote the words of Goddard, L.J. in *Ingall v. Moran*[5] when referring to another Privy Council judgment,

[1] *(1950) 51 N. L. R. 491.*
[2] *(1953) 54 N. L. R. 409.*
[3] *(1879) 5 A. C. 342.*
[4] *(1917) T. P. D. at 689.*
[5] *(1944) 1 A. E. R. at 102.*

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"though not technically binding on this Court, it is impossible to treat a pronouncement of such high authority as otherwise than conclusive of the point".

In my view the judgment of the Full Bench in *Jane Nona v. Don Leo* is no longer law.

For these reasons I allow this appeal and dismiss the application for maintenance.

Appeal allowed.

1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

MOHAMADU, Appellant, *and* MOHAMADUTHAMBY *et al.*, Respondents

S. C 366—D C. Batticaloa, 816/L

Irrigation Ordinance No. 32 of 1946—Sections 87 and 88—Non-payment of rates—"Defaulter"—Cancellation of certificate of sale—Person in whom title re-vests—Irrigation Ordinance (Cap. 312), ss. 61, 66.

For the purpose of irrigation rates payable in respect of an Irrigation Scheme the person whose name is on the register of proprietors is the one who is liable to pay the rates and if he does not pay the rates at the due time he is the defaulter.

Where land which is liable to the payment of irrigation rates is sold to the Crown for non-payment of irrigation rates, the title to it re-vests in the deaulter whose name was on the register at the time of the sale, if he subsequently obtains, under section 88 of the Irrigation Ordinance No. 32 of 1946, a cancellation of the certificate of sale on payment of the amount due.

Obiter : Section 88 of the Irrigation Ordinance No. 32 of 1946 does not apply to sales under the repealed Ordinance (Cap. 312).

APPEAL from a judgment of the District Court, Batticaloa.

J. N. David, with *E. R. S. R. Coomaraswamy*, for the Defendant-Appellant.

C. Renganathen, with *P. Naguleswaram*, for the Plaintiff-Respondents.

July 14, 1955. BASNAYAKE, A.C.J.—

It is common ground that one Aliarpody was the original owner of the land which is the subject-matter of this action. He died leaving two sons, Meeralebbe and Sheriffthamby, who possessed the land. Thereafter in proceedings instituted in the Court of Requests of Batticaloa one Adambawa obtained a decree against Meeralebbe and Sheriffthamby and sold the land in execution and obtained a Fiscal's transfer therefor. Though an application was made for a writ of possession, no further steps appear to have been taken in that behalf. It is not disputed that the land in question is an allotment liable to the payment of irrigation rates

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under the Pattipal Aru Scheme and that in 1927 it was sold for non-payment of irrigation rates under the provisions of the Irrigation Ordinance (Chapter 312) (now repealed by Ordinance No. 32 of 1946) and purchased by the Crown and a certificate under section 66 of that Ordinance vesting the land in the Crown was executed by the Government Agent on 21st February 1931.

The Crown continued to be the owner of the land till 7th March 1951 when the defendant's mother Seinambu daughter of Meeralebbe above-mentioned on whom the notice of the original sale for default of irrigation rates had been served obtained a cancellation of the certificate of sale having paid the amount due on 19th February 1951. The question is whether upon the cancellation of the sale in favour of the Crown the land re-vested in Seinambu the defaulter whose name appears to have been in the register kept under section 61 of the repealed Irrigation Ordinance. In cancelling the certificate the Government Agent purports to have acted under section 88 of the new Irrigation Ordinance No. 32 of 1946 although that section does not apply to sales under the repealed Ordinance. It provides that upon the payment by the defaulter or by any person on behalf of the defaulter of the amount due from the defaulter in respect of any land purchased on behalf of the Crown under section 87 the Government Agent shall cancel the sale by endorsement on a certified copy of the certificate and upon the registration of such endorsement such land shall re-vest in the defaulter. The land in question was not purchased under section 87 of the present Ordinance. The Government Agent had therefore no power under section 88 to cancel the certificate. Even if section 88 was applicable the Government Agent had no power on 7th March 1951 to cancel the sale as the amendment of section 88 effected by section 17 of Act No. 1 of 1951 authorises the cancellation of a certificate only if the defaulter pays the amount due within five years from the date of purchase of any land on behalf of the Crown. But as the trial had proceeded on the assumption that the cancellation of the certificate of sale on 7th March 1951 was valid we have decided this appeal on that basis.

It was contended that Seinambu did not come within the ambit of the expression defaulter in section 88. We are unable to uphold that contention. For the purpose of irrigation rates payable in respect of an Irrigation Scheme the person whose name is on the register of proprietors is the one who is liable to pay the rates and if he does not pay the rates at the due time he is the defaulter. In this case Seinambu's name appears to have been on the register at the time of the sale and she being the defaulter the property has vested in her. The defendant who claims by virtue of a transfer dated 8th December 1951 by Seinambu is now clothed with whatever rights vested in the transferor by the cancellation of the certificate of sale.

We therefore set aside the judgment of the learned District Judge and allow the appeal with costs.

PULLE, J.—I agree.

Appeal allowed.

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

PEDURU FERNANDO, Appellant, *and* R. E. J. AMARASEKERA (S. I. Police), Respondent

S. C. 1,186—M. C. Negombo, 6,187

Motor vehicle—Omission to provide an efficient braking system—Elements of offence—Motor Traffic Act, No. 14 of 1951, ss. 192, 216, 239.

Failure to maintain the braking system of a motor vehicle in a state of efficiency in breach of Regulation 4 of the Motor Traffic (Use of Vehicles) Regulations is an offence which is separate and distinct from the offence of omitting to provide the vehicle with an efficient braking system in breach of Regulation 6 of the Motor Traffic (Construction of Vehicles) Regulations.

Comments on *Thomas Singho v. S. I. Police, Gampaha* (1954) 55 N. L. R. 395.

APPEAL from a judgment of the Magistrate's Court, Negombo.

Stanley de Zoysa, with *P. Naguleswaram*, for the accused appellant.

George Candappa, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 6, 1956. H. N. G. FERNANDO, J.—

The appellant has been convicted on a charge of using or driving an omnibus without an efficient braking system in breach of Regulation 6 of the Motor Traffic (Construction of Vehicles) Regulations (*Gazette* 27.2.1952) read with sections 192, 216 and 239 of the Motor Traffic Act, 1951. According to the evidence for the prosecution, the vehicle was equipped with both a mechanical and a hydraulic system of braking, and each system was capable of operation by two means, namely, by the hand brake and the foot brake. There was no allegation in the evidence of the Examiner that either system, *as a system*, was not efficient, and he rightly conceded that Regulation 6 only requires one such system provided it can be operated by hand and by foot. It seems to me therefore that in regard to its braking equipment the construction of the vehicle was such as to be in compliance with the Regulation ; for in my opinion the purpose of that Regulation is only to require that a vehicle *must be equipped* with at least one efficient braking system with two means of operation, the efficiency of the system being determined by the soundness or correctness of the principle on which it operates, and not by the question whether any particular component of the system is operating at optimum efficiency. An electric lighting system installed in compliance with standard requirements would not I take it be described as an *inefficient* system merely because some of the light switches have ceased to operate smoothly.

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Here the evidence was that the foot brakes were 75% efficient, but the efficiency of the hand brakes was nil—indicating that the means of operation by foot had become defective or inefficient, a situation for which provision is made in Regulation 4 of the Motor Traffic (Use of Vehicles) Regulations published in the same *Gazette* :—

> " Every windscreen wiper required by regulation made under this Act to be fitted to a motor vehicle and every part of every braking system and of the means of operation thereof fitted to a motor vehicle and the steering gear fitted to a motor vehicle shall, at all times, while such vehicle is used on any highway, be maintained in good and efficient working order ".

The accused should therefore have been charged for a breach of the latter regulation which deals with the maintenance of the braking systems of vehicles *in a state of efficiency*.

I should make a few observations with regard to the judgment in *Thomas Singho v. S. I. Police, Gampaha.*[1] The attention of the Court was not drawn in that case to the regulation to which I have just referred, —a regulation which to my mind fulfils the purpose which (so far as brakes are concerned) was served by section 5 of the repealed Ordinance of 1938 and makes punishable the use of a vehicle the brakes of which are not in *efficient working order*.

I also do not agree that the Legislature did not intend that a failure to equip a motor vehicle with an efficient braking system in terms of Regulation 6 of the Motor Traffic (Construction of Vehicles) Regulations should be punishable as an offence. Although sub-section (2) of section 216 does not cover the *use* of a vehicle without an efficient braking system, that sub-section provides that " if anything is omitted to be done in connection with a motor vehicle in contravention of . . . . any regulation ", the owner and the driver will be guilty of an offence. In my view the terms cited are wide enough to include the case of a vehicle in relation to which there has been an omission to provide an efficient braking system or any other equipment which is required by the regulations to be fitted to motor vehicles.

After consideration, I think the accused in the present case was entitled to rely on the fact that the charge against him was laid under the wrong regulation, and on the fact that the evidence led by the prosecution did not establish the charge actually framed. He must therefore be acquitted

Appeal allowed.

[1] *(1954) 55 N. L. R. 395.*

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

S. M. DON NEREUS, Appellant, *and* HALPE KATANA CO-OPERATIVE STORES SOCIETY, LTD., Respondent

S. C. 170—D. C. Negombo, 16,683

Co-operative Societies Ordinance—Section 45—Reference of dispute to Registrar—Procedure—Requirement of agreed reference—Award of arbitrator—Appeal therefrom—Parties must be heard—Referability of dispute to arbitration—Crucial date—Validity of Rule 38 (13) made under Section 46 (2) (t).

In an appeal to the Registrar under section 45 (3) of the Co-operative Societies Ordinance, the appellant should be afforded an opportunity of being heard before a decision is made against him. Failure to observe the rule of *audi alteram partem* would vitiate the decision of the Registrar.

BASNAYAKE, C.J.—(i) The proper way to refer a dispute to the Registrar under section 45 of the Co-operative Societies Ordinance is to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute. An ex parte statement signed by one of the parties alone would not be a proper reference.

(ii) The referability of a dispute to arbitration under section 45 must be determined on the state of the law at the time the dispute arises.

(iii) Rule 38 (13) which provides that an award shall be enforceable as if it were a decree of Court is *ultra vires*.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q. C., with *S. W. Jayasooriya* and *A. C. M. Uvais*, for Judgment-Debtor-Appellant.

E. R. S. R. Coomaraswamy, with *B. A. R. Candappa*, for Judgment-Creditor-Respondent.

Cur. adv. vult.

May 16, 1956. BASNAYAKE, C. J.—

The appellant was the Secretary of the Halpe Katana Co-operative Stores Society Ltd from 1944 till 31st January, 1945. In November, 1946, a claim appears to have been made against the appellant for a sum of Rs. 1,492/08 being the value of textiles lost in consequence of the Stores being burgled. He disputed his liability and the dispute was referred to arbitration. In 1948 the arbitrators made an award for Rs. 1,492/08 against the appellant. He appealed to the Registrar and in 1949 the award was set aside on the ground that section 45 of the Co-operative Societies Ordinance, as it then stood, was not applicable to the dispute between the appellant and the Society because the appellant had left the service of the Society at the time the dispute arose and was therefore not an " officer of the Society ". Thereafter the Society at a general

2——J. N. B 56332—1,592 (7/56)

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meeting held on 29th April, 1951, unanimously decided to waive the claim. Sometime later Don Stephen Jayakody, a member of the Society, applied to the Registrar to refer the same dispute to arbitration and an award was made on 3rd January, 1952, ordering the appellant to pay a sum of Rs. 700 to the above-mentioned Society. He appealed to the Registrar, and on 5th February, 1952, his appeal was dismissed.

On 29th July, 1952, the Society made application for enforcement of the award as if it were a decree of Court. On 5th May, 1953, the appellant applied for a stay of execution and in the petition he filed he prayed *inter alia* that the award be declared null and void. On the same day the Society also filed a petition setting out the facts relating to the arbitration with an affidavit from one W. D. Saviel Appuhamy who claimed to be the duly appointed legal representative of the Society. On 12th November, 1953, the appellant filed objections to the Society's petition challenging the procedure adopted and also attacking the award as a nullity on several grounds.

The main points urged at the hearing of this appeal are :—

"(1) that the second reference was bad as the appellant was an ex-officer of the Society and that under the law in force at the time the claim arose a dispute between the Society and an ex-officer could not be referred to arbitration,

(2) that the second award was bad and contrary to the rules of natural justice as the Registrar dismissed the appellant 's appeal without affording him an opportunity of being heard,

(3) that rule 38 (13) which provides for the enforcement of an award as if it were a decree of Court is *ultra vires.*"

Before I discuss the above points I should like first to refer to section 45 of the Co-operative Societies Ordinance in the form in which it stood before its amendment in 1949. It reads as follows :—

"45 (1) If any dispute touching the business of a registered society arises—

(*a*) among members, past members, and persons claiming through members, past members and deceased members ; or

(*b*) between a member, past member or person claiming through a member, past member or deceased member, and the society, its Committee or any officer of the society ; or

(*c*) between the society or its Committee and any officer of the society ; or

(*d*) between the society and any other registered society,

such disputes shall be referred to the Registrar for decision.

A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, shall be deemed to be a dispute touching the business of the society within the meaning of this subsection.

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(2) The Registrar may, on receipt of a reference under sub-section (1)—

(*a*) decide the dispute himself, or

(*b*) refer it for disposal to an arbitrator or arbitrators.

(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar within such period and in such manner as may be prescribed.

(4) A decision of the Registrar under subsection (2) or in appeal under subsection (3) shall be final and shall not be called in question in any civil court.

(5) The award of the arbitrator or arbitrators under subsection (2) shall, if no appeal is preferred to the Registrar under sub-section (3) or if any such appeal is abandoned or withdrawn be final and shall not be called in question in any civil court. "

It would appear from an examination of the section that it provides for the reference to arbitration of four classes of disputes. Before a reference to arbitration can be made under the section there must in the first place be a dispute i.e. a contention or controversy or a disagreement in which one party claims something and the other denies it. Then the dispute must be one of the classes (*a*), (*b*), (*c*), or (*d*). In the instant case it would appear that after the Stores was burgled the Society asserted that the appellant was liable to make good the loss and he denied it. But as the appellant had left the service of the Society at the time the dispute arose it was held that it did not fall within category (*c*) in sub-section (1), because he was no longer an officer of the Society.

It was on that ground that the Registrar appears to have set aside the first award against the appellant. It would appear from the minutes of the general meeting of the Society held on 29th April, 1951, that the dispute between the Society and the appellant had ceased to exist, and the Society did not again ask for a reference. It was not till 26th September, 1951, that D. S. Jayakody, a member of the Society, made his application to the Assistant Registrar, Co-operative Societies, Western Province. By then section 45 of the Ordinance had been amended by section 9 of Act No. 21 of 1949 so as to permit disputes between the Society or any member and any officer or employee of the Society, whether past or present, to be referred to arbitration. That application is in these terms :—

" ARBITRATION

Submission to the A.R.C.S., W.P.

The dispute between Don Stephen Jayakody of Ambalayaya, Katana, Plaintiff, and Setunga Mudalige Don Nereus of Halpe, Katana, Defendant, submitted to the Assistant Registrar of Co-operative Societies, Western Province, for arbitration under section 45 of Ordinance No. 16 of 1936 (Cap. 107) as amended by Act No. 21 of 1949.

Amount claimed is Rs. One thousand four hundred & ninety two 8/100.

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The above named Setunga Mudalige Don Nereus Defendant was the Manager of the Halpe Katana Co-op. Stores from 1944 up to 31st January, 1945.

The claim for Rs. One thousand four hundred & ninety two and cents eight only is made up as follows '—

(*a*) Loss of textiles	..	Rs. 1,492·08
(*b*)		—
(*c*)		—
Total	..	Rs. 1,492·08

The above named Plaintiff requests an award authorising the recovery of the said sum of Rs. One thousand four hundred & ninety two and cents 8/100 with interest at 10% per centum per annum from January 1945 to up to date and the cost of this arbitration.

All summonses and other notices regarding the arbitration may be served on Don Stephen Jayakody of Ambalayaya, Katana, and others given in overleaf.

A copy of the Letter of Demand served on the defendant annexed hereto.

Sgd. D. S. Jayakody
Member, Halpe Katana Co-operative Stores Society Ltd.

Dated at Ambalayaya, Katana,
on the 26th day of September, 1951 ".

The matter was on 4th October, 1951, referred by the Additional Assistant Registrar of Co-operative Societies, Western Province, to arbitration in the following terms :—

" REFERENCE TO ARBITRATION

Under the authority given in section 45 of the Co-operative Societies Ordinance No. 16 of 1936 (Cap. 107) as amended by Act No. 21 of 1949 and the rules in force thereunder, I hereby refer for the decision of Mr. D. K. Samaranayake, 330, Union Place, Colombo, as Arbitrator(s) the dispute which has arisen between Mr. Don Stephen Jayakody a member of the Halpe Katana Co-operative Stores Society Limited, of Ambalayaya, Katana, and Mr. Setunga Mudalige Don Nereus of Halpe, Katana, (namely) whether the said Mr. S. M. Don Nereus do owe the said Society the sum of Rupees one thousand four hundred and ninety-two and cents eight (Rs. 1,492.08) being the loss of textiles which occurred during the period he was the manager of the said Society from 1944 to 31.1.1945 with 10 % interest).

Sgd. T. B. Elkaduwa
Addl. Asst. Registrar, Co-operative Societies, W. P.
4.10.51 ".

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Although the reference speaks of a dispute between Don Stephen Jayakody and Setunga Mudalige Don Nereus it sets out the old dispute between the Society and Don Nereus which had been referred to arbitration and had come to an end with the quashing of the award. The Society did not re-agitate the matter thereafter, and regarded it closed.

Such being the case the reference does not fall within section 45 even in its form as amended in 1949. For, there is now in fact no dispute between the Society and the appellant nor is there any real dispute between Jayakody and the appellant. Even if in fact there was, between Jayakody and Don Nereus, a dispute falling within the ambit of section 45 as amended there has been no proper submission to arbitration in this case.

In declaring that any dispute falling within the ambit of the section " shall be referred to the Registrar for decision " the section does not prescribe the person who shall make the reference. In the absence of such provision the proper way to refer a dispute to the Registrar for decision would be to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute. An ex parte statement signed by one of the parties alone would not in my opinion be a proper reference under the section.

Arbitration is essentially a matter which can take place only when the parties are agreed as to the disputes between them and also as to the person by whom they should be decided. The award is therefore bad not only because there is in fact no dispute between Jayakody and Don Nereus as contemplated in section 45 but also because there has been no agreed reference to the Registrar.

Arbitration proceedings under section 45 have far reaching consequences and it is important that the proper procedure should be followed if the finality contemplated in subsection (4) is to be attached to the decisions made under the powers granted by the section.

It would be convenient at this point to deal with the submission of Counsel that the parties to an appeal to the Registrar should be afforded an opportunity of being heard before a decision is made.

Seeing that the Registrar's decision is final and cannot be called in question in any civil Court I am of opinion that the Registrar is bound to afford such an opportunity.

One of the principles of natural justice is that no party ought to be condemned unheard.

In the case of *Builders v. Union Government* [1], Wessels, J. A., stated the rule thus in regard to tribunals created by Statute :—

> " Unless we adopt the view that the Legislature always implies that the principle *audi alteram partem* should be read into a statutory inquiry, the grossest injustice may be done to the person charged ".

This same principle is thus stated in the New Zealand case of *New Zealand Dairy Board v. Okitu Co-operative Dairy Co., Ltd.* [2].

[1] *1928) A. D. 46 at p 59.* [2] *(1953) N. Z. L. R. 366 at p. 383.*

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" It is a sound principle that natural justice exists unless so denied by statute ".

The principle is equally applicable to tribunals as well as arbitrators [1]. There is no hard and fast rule to be observed as to the procedure by which the tribunal is to hear the cases of the parties. A principle can however be deduced from the decisions on the point that a hearing implies that the procedure and methods adopted by the tribunal must not manifestly depart from the procedural standard appropriate to a tribunal of its kind. The appropriate standard depends upon the nature of the tribunal and of the inquiry and the matters that have been left to its adjudication. Where matters which, but for the statute, would ordinarily have come before the Courts are left to be decided by a special tribunal then its procedure should approximate as near as may be to the standards of the Courts. Having regard to the extensive ramifications of the co-operative movement in this country many of the disputes which come within the ambit of the section are such as would but for the statute ordinarily be agitated in the Courts and their monetary value can in certain cases be extremely high. The present dispute though the amount involved is only Rs. 1,492/08 is one that would ordinarily have been adjudicated upon in the Courts. The Registrar did not afford the appellant an opportunity of being heard before an order against him was made. He has therefore failed to observe the rule of *audi alteram partem* and his decision is therefore vitiated.

The next question that arises for consideration is whether the second reference was bad as under the law in force at the time the dispute arose it was not one that fell within the ambit of the section. It is admitted that at the time the dispute arose it was not referable to arbitration. For that reason the first award was set aside by the Registrar. The referability of a dispute to arbitration under the section must be determined on the state of the law at the time the dispute arises, because that is the time at which the decision to make a reference has to be made—not many years later. In the instant case the dispute that arose in 1945 was referred to arbitration a second time in December, 1951. I am of opinion that the appellant is entitled to succeed on this point too.

The third ground taken by the appellant is that Rule 38 (13) of the Rules appearing in Gazette No. 10,086 of 24th March, 1950, which provides that an award shall be enforceable as if it were a decree of Court is *ultra vires*. The enabling provision, section 46 (2) (t), reads—

" (*t*) prescribe the mode of appointing an arbitrator or arbitrators, and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or awards of arbitrators " ;

The rule made under this power purports to do more than prescribe " the enforcement of the decisions of the Registrar or the awards of the arbitrators ". It purports to give an award the legal effect of a decree of a Court of law. Such a thing can be done only by legislation and the enabling section affords no authority for such a rule.

[1] *In re Carus-Wilson & Greene (18 Q. B. D. 7).*

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The Civil Procedure Code makes express provision for the enforcement of the awards of arbitrators where a matter has been referred to arbitration without the intervention of a Court of Justice (section 696). Even in that provision the award is not equated to a decree. On this ground too the appellant is in my opinion entitled to succeed.

For the above reasons the judgment of the District Judge is set aside and the appeal is allowed with costs.

DE SILVA, J.—

I have had the advantage of reading the Judgment of My Lord the Chief Justice and I agree that this appeal should be allowed with costs. In my opinion the second award was bad in that there was a breach of a rule of natural justice when the Registrar dismissed the appeal without affording the appellant an opportunity of being heard. I would also wish to observe that the procedure to be followed in referring a dispute to the Registrar for decision in terms of Section 45 of the Co-operative Societies Ordinance was not a point which was argued in this appeal and I would therefore refrain from expressing an opinion on that matter.

Appeal allowed.

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

MATHEW, Appellant, *and* MATHEW, Respondent

S. C. 280—D. C. Colombo, 2,990/D

Husband and wife—Decree of separation—Permanent alimony—Scope of ss. 614 and 615 of Civil Procedure Code—Distinction between the words "secure" and "pay".

The Court, when granting a decree of separation in favour of a wife, ordered the husband to pay an annual sum of Rs. 20,400 in monthly instalments of Rs. 1,700. With a view to securing for the wife the payment of the annual sum of Rs. 20,400 the husband was ordered to hypothecate certain immovable property specified in the decree.

Held, (i) that the order for hypothecation of immovable property did not fall within the ambit of either sub-section 1 or sub-section 2 of section 615 of the Civil Procedure Code and could not therefore stand.

(ii) that the order for paying the annual sum of Rs. 20,400 in monthly instalments did not come within the ambit of sub-section 1 of Section 615 of the Civil Procedure Code but could be treated as an order falling within the ambit of sub-section 2.

Held further, that in deciding the amount of permanent alimony no fetter was imposed by section 615 of the Civil Procedure Code on the discretion of the Judge. Nor was the Judge bound by the amount awarded as alimony *pendente lite*.

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APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *John de Saram*, for defendant-appellant.

E. G. Wickremanayake, Q.C., with *Vernon Wijetunge*, for plaintiff-respondent.

Cur. adv. vult.

May 7, 1956. BASNAYAKE, C.J.—

The plaintiff, the wife of the defendant, has been granted a separation on the ground of malicious desertion. The Court has also ordered the defendant to pay an annual sum of Rs. 20,400 in monthly instalments of Rs. 1,700 and a sum of Rs. 750 as maintenance for the five children of the marriage. With a view to securing for the plaintiff the payment of the annual sum of Rs. 20,400 the defendant has been ordered to hypothecate certain immovable property specified in the decree.

Learned Counsel for the appellant did not question the part of the order granting the separation but he canvassed the order for the payment of an annual sum of Rs. 20,400 and the order directing the defendant to hypothecate his property.

It is contended on behalf of the appellant that the sum ordered as alimony *pendente lite* was Rs. 750 and that that sum was determined as a sum sufficient for the plaintiff's maintenance by the learned District Judge (who is not the Judge who made the order for separation), after considering all the circumstances of the appellant and the respondent. He did not complain against the order in respect of the children, but he submitted that the order for the payment by the defendant of such a large annual sum as Rs. 20,400 to the plaintiff as permanent alimony is unreasonable and should be reduced.

Learned Counsel also submitted that the order that the appellant should hypothecate his properties in a sum of Rs. 60,000, is not warranted by section 615 of the Civil Procedure Code.

For the decision of this appeal it is necessary that the true meaning and content of the provisions of section 615 should be ascertained. That section reads as follows :—

> "615. (1) The Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of separation obtained by the wife, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable ; and for that purpose may cause a proper instrument to be executed by all necessary parties.
>
> (2) In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable :
>
> Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to

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discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court seems fit ".

Sub-section (1) enables the Court to *secure* to the wife a gross or annual sum of money for a term not exceeding her own life. It does not empower the Court to order the husband to pay direct to the wife a gross or annual sum.

The meaning of the word " secure " in a similar context has been the subject of decision in the case of *Medley v. Medley* [1]. In that case Jessel M. R. observed as follows :—

> " The further point was, however, one of more difficulty, as to the form of the order by which the appellant was ordered in the alternative to pay to the petitioner the annual sum of £ 500 by monthly payments. Now, when we look at the 32nd section of the 20 & 21 Vict. c. 85, the word ' secure ' appears to be used in a particular way. It is contrasted with payment. The words are, ' that the Court may order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune, etc., it shall deem reasonable ' ; and then at the end of the section it provides that ' upon any petition for the dissolution of marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or allowance to his wife as it would in a suit instituted for judicial separation '. Therefore I think that the intention of the legislature was that the gross or annual sum should not be ordered at once to be paid over to the wife but should be secured, and being secured should be paid to her from time to time, that would give a meaning to the word ' secure ' as contrasted with ' pay ' ".

In the later case of *Yates* (*Inspector of Taxes*) *v. Starkey* [2] Jenkins, L.J., when dealing with a similar provision in the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 10, sub-section 4 of the Matrimonial Causes Act, 1937, expresses the following opinion :—

> " An order ' to secure ' seems to me to suggest a disposition or obligation of some sort made or entered into pursuant to the order, as opposed to a mere direction to pay contained in the order itself. This is borne out by the provision of reference to conveyancing counsel at the end of sub-section 3. It is also supported by the clear distinction drawn in section 190 between an order on a husband to secure a gross or annual sum to the wife for any term not exceeding her life under sub-section 1 and a direction on a husband to pay to the wife during the joint lives a monthly or weekly sum under sub-section 2 ".

Sub-section (2) authorises the Court, either in addition to or instead of an order under sub-section (1), to order the husband to pay to the wife such monthly or weekly sums, for her maintenance and support, as it

[1] *7 L. R. Probate 122 at 124.* [2] *(1951) L. R. Ch. Div. 465 at 473.*

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thinks reasonable. It would appear from a comparison of the two sub-sections that an order under sub-section (1) can operate even after the husband 's death in the event of his predeceasing the wife and can be made only where the husband has assets which can be secured. The claim of the wife in whose favour an order to secure has been made is enforceable even after the death of the husband against his estate.

An order under sub-section (2) can operate only during the joint lives of the husband and the wife. Any maintenance ordered under this sub-section is liable to cancellation, temporary suspension, or modification, or reduction if the husband becomes unable to make the payments. But an order under sub-section (1) is not liable to be varied.

The order for hypothecation of immovable property by the defendant does not fall within the ambit of either sub-section and cannot therefore stand. The order for paying the annual sum of Rs. 20,400 in monthly instalments does not come within the ambit of sub-section (1) but may be treated as an order falling within the ambit of sub-section (2). The payment is one that may properly be described as maintenance and not permanent alimony. Permanent alimony as opposed to alimony *pendente lite* is granted on dissolution of a marriage or grant of judicial separation. Section 614 limits the maximum amount that may be ordered as alimony *pendente lite* to one-fifth of the husband 's average net income for the three years next preceding the date of the order while there is no such limit in the case of permanent alimony. In the early days the Ecclesiastical Courts of England observed the one-fifth rule in regard to alimony *pendente lite* and granted a sum in the neighbourhood of a third of the husband's income in the case of permanent alimony. Neither the English statutes nor our Code has imposed such a limitation in the case of permanent alimony. The Court has a discretion and is not bound by any hard and fast rule. There are instances in which the Courts in England have awarded as much as half. In the instant case the plaintiff was awarded alimony *pendente lite* in a sum of Rs. 750 per mensem if she was permitted to reside in the house belonging to the defendant No. 10 Frances Road, Wellawatte, and Rs. 1,000 per mensem if she was not permitted to do so. The learned District Judge who made the order granting a separation has considered all the matters which were before the Judge who ordered alimony *pendente lite* as well as the facts and circumstances disclosed by the evidence led at the trial. The section in no way fetters the discretion of the Judge in deciding the amount of permanent alimony, nor is he bound by the amount awarded as alimony *pendente lite*. On the material before me I am not prepared to interfere with the order made by the learned trial Judge as I am unable to hold that his order is unreasonable.

The order for hypothecation of property and that portion of the decree which relates to it is set aside.

I make no order as to costs of appeal.

DE SILVA, J.—I agree.

Order partly set aside.

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1954 *Present:* **Gratiaen, J., and Gunasekara, J.**

SOOTHIRATNAM (widow of V. Velupillai) *et al.*, Appellants, *and* ANNAMMA (widow of Amirthalingam), Respondent

S. C. 403—D. C. Jaffna, 4,900/L

Abatement of action—Actio rei vindicatio—*Transfer of subject-matter by plaintiff pending action—Effect of abatement order on separate action instituted by plaintiff's transferee—Civil Procedure Code, ss. 396 403, 404—Registration of Documents Ordinance, s. 11 (1) and (3).*

Section 403 of the Civil Procedure Code, which prohibits a fresh action being brought when an action has abated, directly affects only those persons who, while they are precluded from instituting separate proceedings on the same cause of action, nevertheless enjoy the alternative remedy of having the order of abatement vacated in order that the original action may be proceeded with.

A instituted against B an action for the recovery of certain property. The *lis pendens* was not registered. During the pendency of the action, A transferred the property in dispute to C. Subsequently A died, and, as his legal representatives took no steps to continue the proceedings, an order of abatement was made by Court under section 396 of the Civil Procedure Code. Before A's action had abated, C had instituted the present action in his own right to have the same defendant, B, ejected from the premises.

Held, that the provisions of section 403 of the Civil Procedure Code did not prevent the maintenance of the present action.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, for the plaintiffs appellants.

H. W. Tambiah, for the defendant respondent.

Cur. adv. vult.

January 21, 1954. GRATIAEN, J.—

On 23rd March 1946 the appellant obtained from Velupillai Vinasithamby for valuable consideration a notarial lease of the property in dispute for a period of ten years commencing on 1st April 1946. He was unable to obtain vacant possession of the leased premises, and on 8th October 1948 he filed this action alleging that the defendant was a trespasser on the premises, and prayed *inter alia* for a decree of ejectment against him. That such a remedy is *prima facie* available to a lessee of immovable property by virtue of the *pro tanto* alienation in his favour is not disputed.

The defendant denied that he was a trespasser, and claimed to be the owner of the property by virtue of a title superior to that of the appellant's lessor Vinasithamby. A number of issues were framed at the commencement of the trial, but, after some evidence had been led, certain additional issues were raised which, in the submission of the defendant's counsel, went to the root of the action. The learned Judge agreed to adjudicate upon these additional issues in the first instance, and after hearing argument upheld the defendant's plea that the appellant was precluded from maintaining the action by reason of certain admitted facts which I shall now proceed to examine.

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It was established by the evidence that, before the execution of the lease in favour of the appellant, his lessor Vinasithamby had himself instituted a *rei vindicatio* action on 16th October 1944 against the defendant for the recovery of the property in dispute. Before the trial was concluded, however, Vinasithamby died, and, as his legal representatives took no steps thereafter to continue the proceedings, an order of abatement was duly made by the trial Judge on 15th October 1948 in terms of section 396 of the Civil Procedure Code. It will be observed that, before the date of this order, the appellant had already instituted the present action in his own right to have the defendant ejected from the premises. Nevertheless, the learned Judge upheld the plea that the subsequent order of abatement made in the action filed by Vinasithamby was binding on the appellant and had the effect of precluding him from pursuing his independent remedy against the defendant.

The consequences of a valid order of abatement under section 396 or under any other provision of Chapter 25 of the Civil Procedure Code are set out in section 403. It operates *in personam* so as to preclude a plaintiff (or his personal representative, as the case may be) from instituting separate proceedings upon the same cause of action ; and his only remedy is to apply to have the order of abatement in the original action vacated with the result that, unless this result is achieved, he cannot obtain a final adjudication of the merits of his claim against the opposite party. The principle involved is analogous to, but not the same as, that which applies in the doctrine of *res adjudicata*. Shortly stated, the latter rule prohibits the re-agitation by a party (or his privy) of issues which have already been finally and conclusively settled by a concluded judicial decision ; the former prevents a party whose failure to prosecute his remedy with due diligence has led to a discontinuance of the action from seeking relief on the same grounds in separate proceedings. On the other hand, section 403 has no direct application to a lessee under the plaintiff or to any other transferee of an interest pending the action. If the action has not abated, he may, if he thinks fit, apply to be added or substituted as a party under section 404 ; and if he does not take that precaution he runs the risk of being adversely affected by the ultimate decree passed in those proceedings by the operation of the doctrine of *lis pendens*. But section 404 does not apply to an action after it has abated and so long as it has thus ceased to be " pending " within the meaning of the section.

There can be no doubt that Vinasithamby's legal representatives would be precluded from instituting fresh proceedings against the defendant upon the earlier cause of action. But the question is whether the order of abatement is similarly binding upon the appellant whose right to eject the defendant admittedly depends upon the validity of the title of his lessor Vinasithamby.

Section 403 primarily affects only a plaintiff or his legal representatives. It is unnecessary to decide for the purposes of this appeal whether a person who, *after* the date of an order for abatement in an action relating to property, purchases or obtains an interest in that property from the plaintiff, would be prevented (as a privy) by some other principle of law

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from re-agitating the same issues in separate legal proceedings instituted on his own behalf against the same defendant. We are here concerned with the position of a litigant whose alleged rights as lessee were obtained before the order of abatement had been entered against his lessor, and who had actually instituted legal proceedings for the enforcement of his independent remedy before the lessor's action had abated. In such a situation, the provisions of section 403 do not prevent the maintenance of the action which he had previously instituted in his own right. Section 403 directly affects only those persons who, while they are precluded from instituting separate proceedings on the same cause of action, nevertheless enjoy the alternative remedy of having the order of abatement vacated in order that the original action may be proceeded with.

As I have already pointed out, the effect of an order of abatement is not precisely the same as that involved in the doctrine of *res adjudicata*. But let us even assume that, instead of Vinasithamby's earlier action against the defendant having abated, it had actually proceeded to trial and finally terminated in a decree in favour of the defendant subsequent to the execution of the notarial lease in favour of the appellant. Even in that event, the final decree against Vinasithamby would not have been binding on the appellant unless the defendant relying on the decree in bar of the appellant's remedy had proved that *lis pendens* had been duly registered in the earlier action—*vide* sections 11 (1) and 11 (3) of the Registration of Documents Ordinance. In the present case, the defendant has not established due registration of the *lis* in which the order of abatement against the appellant's lessor was made after the date of the lease relied on by the appellant. For this reason, the preliminary issues of law raised by the defendant should have been answered against him even if the order of abatement could properly have been regarded as the equivalent of a final decree dismissing Vinasithamby's action.

I would set aside the judgment under appeal, and send the record back for a trial *de novo*. The appellant is entitled to his costs of appeal and to his costs in the abortive trial. I desire, in conclusion, to point out that the procedure adopted in the Court below was not in conformity with that prescribed by section 147 of the Code. In an appropriate case, a trial may at the outset be confined to the disposal of preliminary issues of law which are considered to go to the root of the litigation. But, after a trial has commenced for the determination of all the issues of fact and law which properly arise, it should not be interrupted at a later stage for the intermediate disposal of some only of the issues. Such a procedure is not warranted by the Code, and very often leads to unnecessary delay and expense to litigants. For instance, the consequence of the learned Judge's erroneous decision on some issues in an action instituted in October 1948 is that the entire proceedings must now commence afresh. If the learned Judge had insisted, as he should have done, on all the evidence being led at the earlier trial, the case might well have been finally disposed of at the hearing of the present appeal upon a consideration of his recorded findings on all the issues.

GUNASEKARA, J.—I agree.

Judgment set aside.

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

U. DHAMMALOKA THERO, Appellant, *and* P. SARANAPALA THERO, Respondent

S. C. 482—D. C. Kandy, 3,220/L

Buddhist Ecclesiastical Law—Sisyanu sisya paramparawa—Extinction of line of succession—Appointment of new Viharadhipathi—Proper procedure—Prescription.

Upon the extinction of the line of pupillary succession to a Buddhist temple governed by the rule of succession known as sisyanu sisya paramparawa, the temple vests in the Sangha and the right of appointing a new Viharadhipathi vests in the Mahanayake of the fraternity which has jurisdiction over it. The fact that a stranger has functioned as Viharadhipathi for a long period does not entitle him to defeat the Mahanayake's right of appointment, which is a right that cannot be lost by prescription.

APPEAL from a judgment of the District Court, Kandy.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant appellant.

Sir Lalita Rajapakse, Q.C., with *M. L. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

April 30, 1956. DE SILVA, J.—

The Rev. Saranapala Thero, the plaintiff, instituted this action against the defendant Rev. Dhammaloka Thero praying for a declaration that he is the controlling Viharadhipathi of the Buddhist temple called Illupendeniya Vihare and as such he is entitled to the full control and management of the said Vihare and its temporalities and for the ejectment of the defendant therefrom. The defendant resisted the claim of the plaintiff and asserted that he was the lawful Viharadhipathi of this temple by right of appointment to that office by the Mahanayake of the Asgiriya fraternity of Buddhist monks on deed D 1 of November 4 of 1946. The learned District Judge entered judgment for plaintiff as prayed for. This appeal is from that judgment.

Admittedly, this temple is within the jurisdiction of the Asgiriya fraternity and it is governed by the rule of succession known as Sisyanu Sisya Paramparawa. It is also common ground that one Palledeniye Ratanapala Thero was at one time the Viharadhipathi of this temple and he by deed P 1 in the year 1897 gifted this temple together with its temporalities to his only pupil Rev. Wanaratana Thero and Rev. Sobita who was not in the line of pupillary succession. Wanaratana Thero gave up his robes in the year 1902. Thereafter, in the same year, Rev. Sobitha by deed P 2 purported to gift this temple and the lands belonging to it to Rev. Randewella Piyadassi Thero who died in the year 1937.

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No rights passed on this deed P 2 as neither the donor nor the donee was in the pupillary succession of Ratanapala Thero. The deed P 1 also did not confer any rights on Sobita Thero as he was not in this line of succession. Piyadassi Thero, however, functioned as the Viharadhipathi of this temple without let or hindrance from anyone. He had two pupils namely the plaintiff and the defendant of whom the former is admittedly the senior. Shortly before his death Piyadassi Thero by deed P 6 dated 2.7.37 gifted this temple and its temporalities to his two pupils, the plaintiff and the defendant in equal shares. This deed would not pass any title as the property dealt with by it is Sangika. Neither party rests his claim on this document. In or about the year 1938 the plaintiff began to receive his education in a Pirivena at Gampola while the defendant continued to reside in this temple. The plaintiff however used to visit this temple about once a week. The temple appears to be a fairly valuable one. It owns paddy fields and tea lands. According to the plaintiff the defendant began to dispute his right only in the year 1950 but it appears from the evidence that the defendant made up his mind to set up a claim to the incumbency as far back as 1946.

It is not denied that when Rev. Wanaratana Thero gave up his robes in the year 1902 the pupillary succession which existed so far came to an end. On the extinction of that line of succession the temple vested in the Sangha of the Asgiriya fraternity and the right of appointing a new Viharadhipathi vested in the Mahanayake of that fraternity—*Dharmapala Unnanse v. Medagama Sumana Unnanse* [1]. It is true that the Mahanayake exercises this right with the concurrence of the Asgiriya Chapter. The defendant in order to resist the claim of the plaintiff appears to have approached the Mahanayake with the object of getting himself appointed as the incumbent. He was successful in this venture, for, the then Mahanayake by deed D 1 dated 4.11.46 appointed him as the Viharadhipathi together with the right of transmitting the succession to his pupils. The plaintiff's claim is based on the fact that he is the senior pupil of Piyadassi Thero. If, however, Piyadassi Thero was not the lawful Viharadhipathi the plaintiff cannot successfully assert a claim to the office of Viharadhipathi although he is admittedly the senior pupil of Piyadassi Thero. In the original plaint the plaintiff did not set out how his tutor became entitled to this temple. He later amended the plaint by setting up an averment that Piyadassi Thero had been appointed Viharadhipathi by the Mahanayake of Asgiriya. The plaint was once more amended. In the second amended plaint the plaintiff averred that his tutor had been verbally appointed Viharadhipathi by the Mahanayake. The question for decision therefore is whether Rev. Piyadassi Thero was verbally appointed Viharadhipathi by the Mahanayake and if so whether the terms of appointment included the right of transmitting the succession—*Dhammaratna Unnanse v. Summangala Unnanse* [2]. The Mahanayake who is alleged to have made this appointment is now dead. He died in the year 1914. No witness has been called who was present at this alleged appointment. The plaintiff stated that he had a witness namely Rev. Silananda his co-tutor to prove this appointment. But this witness was not called. The plaintiff also stated that about two

[1] *2 Current Law Reports 83.*

[2] *14 N. L. R. 40.*

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years before the deed P 6 was executed Rev. Piyadassi Thero had told him that the Mahanayake had appointed him as Viharadhipathi of this temple with the right of pupillary succession. This is hearsay evidence which is clearly inadmissible. This evidence was given by the plaintiff in examination-in-chief. Although no objection was taken this evidence should have been disallowed. The learned District Judge stated that " the probabilities of the case " supported the theory that Rev. Piyadassi had been appointed Viharadhipathi by the Mahanayake. While it is true that Rev. Piyadassi Thero functioned as Viharadhipathi for thirty-five years and that thereafter the Mahanayake did not make any appointment for a period of nearly nine years the story that Piyadassi Thero had been appointed to this office by the Mahanayake with the right of transmitting the succession is negatived by the recitals in the deed P 6 by which Piyadassi Thero donated this temple and its temporalities to his two pupils. In that deed Piyadassi Thero sets out his title as follows :—

> " Which said premises have been held and possessed by me the said donor since a period of over thirty years past for and on behalf of the said Illupedeniya Vihare under and by virtue of a deed which is not forthcoming at present. "

The deed referred to here could be no other than P 2 by which Sobita Thero gifted this temple and its lands to Piyadassi Thero in the year 1902. Surely, if his title was based on the verbal appointment by the Mahanayake he would have referred to it in this deed. The present Mahanayake has stated that when a vacant incumbency such as this is filled a deed is executed by the Mahanayake in favour of the new incumbent. That would be particularly so when the incumbency is a valuable one. That the temple and its temporalities in question are of fairly considerable value cannot be denied. Although this temple was a valuable one, probably, the successive Mahanayakes did not realise that Rev. Piyadassi was not the rightful incumbent according to the rules of pupillary succession. There is strong reason to think that it was only when the defendant brought to the notice of the then Mahanayake Thero that the pupillary succession to this temple had come to an end with the departure of Rev. Wanaratana from the priesthood and that the temple had vested in the Asgiriya Chapter that the Mahanayake became aware that he was entitled to appoint a new Viharadhipathi to it. It was on such realization that the Mahanayake appears to have appointed the defendant by deed P 1 as the Viharadhipathi. There is no doubt that in obtaining this deed the defendant secured an undue advantage over the plaintiff. The Mahanayake's right to appoint, however, cannot be denied. It is not a right which is lost by prescription. I would therefore hold that Rev. Piyadassi Thero was not appointed Viharadhipathi by the Mahanayake. Consequently the plaintiff is not entitled to the office of Viharadhipathi. His action must fail. I would therefore allow the appeal and dismiss the plaintiff's action with costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

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1956 *Present :* **Weerasooriya, J., and Sansoni, J.**

D. THOMAS *et al.*, Appellants, and
D. R. FERNANDO, Respondent

S. C. 190—D. C. Colombo, 6,646/L

Evidence Ordinance, s. 92—Deed of sale—Parol evidence to contradict its terms relating to the consideration—Admissibility.

The consideration is an essential term in a contract of sale. Section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction.

APPEAL from a judgment of the District Court, Colombo.

H. A. Koattegoda, with *P. Ranasinghe*, for the defendants appellants.

C. V. Ranawake, with *C. Wickremenayake*, for the plaintiff respondent.

Cur. adv. vult.

February 3, 1956. SANSONI, J.—

The plaintiff sued three defendants in this action for a declaration of title to four lands, damages for alleged wrongful possession of those lands by the defendants, and for ejectment. He based his claim on a deed dated 23rd February 1952 by which their owner Venjo Fernando conveyed them to him. That deed purports to be a deed of sale by Venjo Fernando to the plaintiff for a consideration of Rs. 3,000. The defendants by their first answer pleaded that the plaintiff had procured the execution of this deed by fraud and undue influence, without paying Venjo Fernando any part of the consideration, and they claimed that no title passed to the plaintiff. They further pleaded that when Venjo Fernando died on 26th February, 1952, her title passed to her grandson and sole heir, the 1st defendant. By an amended answer they claimed alternatively that as the consideration of Rs. 3,000 had not been paid by the plaintiff to Venjo Fernando, the plaintiff was liable to pay that sum to the 1st defendant in the event of the Court holding that the plaintiff was entitled to the lands in dispute.

When the trial began the defendants' Counsel stated that as he had insufficient evidence to establish the pleas of fraud and undue influence, he rested his case only on the claim for the payment of the consideration as set out in the amended answer. The plaintiff 's Counsel then suggested the following issues :—

1. Was there consideration for the deed in question ?
2. Damages (damages agreed upon at Rs. 25 a month).

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The defendants' Counsel then suggested :

3. Was the consideration of Rs. 3,000 mentioned in the deed 1458 of 23rd February 1952 paid to Venjo Fernando ?

4. If not, is the plaintiff liable to pay the said sum to the 1st defendant ?

The plaintiff 's Counsel finally suggested :

5. Even if issue (4) is answered in the affirmative, can the minor claim this money in this case ?

The notary who attested the deed was called as a witness for the plaintiff. It then became clear that Venjo Fernando executed this deed without any prior agreement between her and the plaintiff that he should buy, or that she should sell, the lands. The consideration of Rs. 3,000 seems to have been fixed by the notary because a figure had to be mentioned for the purpose of stamping the deed. The plaintiff was not present when the deed was executed, nor had he given any earlier instructions to the notary to prepare the deed. The plaintiff also gave evidence, in the course of which he said : " I knew Venjo was going to transfer the properties to me. I did not know whether she was going to sell or gift the lands to me. She only told me that the lands would be written in my name ".

In view of this evidence the learned District Judge took the view that although the deed purported to be a deed of sale the transfer was not in fact a sale. He held that it was a donation and accordingly gave judgment for the plaintiff and dismissed the defendants' claim in reconvention. The defendants have appealed.

It was in the light of the evidence of the notary that the learned Judge analysed the transaction and reached the conclusion to which I have referred. Apparently that evidence was regarded by him as relevant and admissible on issue (1) which seems to have been suggested by the plaintiff 's counsel in anticipation of the evidence which the notary and the plaintiff were to give. The plaintiff stated that as he had assisted and looked after Venjo (who was his sister) in her last illness, and as she was expecting further assistance from him, she had executed the deed in his favour. The plaintiff 's counsel seems to have argued that on these grounds the consideration for the deed was not Rs. 3,000 as recited in it but something else, namely, the assistance already rendered and to be rendered by the plaintiff to Venjo. Although no objection was raised by the defendants ' Counsel to issue (1) or to the evidence of the notary, he seems to have become alive to the situation when the plaintiff gave evidence, and he objected to it. I understand the objection to be that such evidence was not admissible to contradict or vary the consideration recited in the deed or any other term of it. It seems to me that since the plaintiff came into Court on the basis that title to the lands in dispute had vested in him on this deed which on the face of it (though not so stated in the plaint) was a sale for a consideration of Rs. 3,000, and the *only defence* on which the defendants went to trial was the alternative claim in the amended answer for the payment of the consideration of Rs. 3,000, the plaintiff was precluded from raising the issue whether there was consideration for the deed. It follows that the evidence of

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the notary and of the plaintiff should also not have been admitted, since what the plaintiff tried in effect to prove by means of that evidence was that the consideration for the deed was not money and that therefore the deed was not a sale but represented an entirely different transaction, and the admission of such evidence contravened the provisions of S. 92 of the Evidence Ordinance.

I would refer to *Nadarajah v. Ramalingam* [1]. Bertram C. J. in that case held that the consideration for a grant is a term of the grant, and having regard to the essentials of a sale the consideration is an essential term in a transaction of sale. He also held that a party to a deed of sale was not entitled to contradict its terms relating to the consideration.

This is not one of those cases where one party to a deed attempts to go behind a statement in the deed regarding the actual payment of consideration, in which event the other party will be permitted to show what the real consideration was. Here the plaintiff has without justification contradicted the term of the deed relating to the consideration, although no attempt was made by the defendant to attack any term of the deed. Further authority for this view will be found in *Velan Alvan v. Ponny* [2]. Keuneman J. held that oral evidence was not admissible to prove that the consideration was different from that stated in the deed, except in cases to which proviso (1) to S. 92 applies, namely, where the validity of the deed was in issue, or where a decree or order was being sought relating to the deed itself. He accordingly decided in that case that oral evidence was not admissible to prove that a deed which purported to be a transfer for valuable consideration was a deed of donation.

It follows that the deed in question must be treated as a valid deed of sale by Venjo to the plaintiff for a consideration of Rs. 3,000, and as this sum has admittedly not been paid by the plaintiff, it is now due to Venjo 's sole heir, the first defendant.

I would therefore set aside the judgment and decree under appeal and direct that a decree be entered declaring the plaintiff entitled to the lands described in the Schedule to the plaint, and to possession, and ejectment of the defendants therefrom, and ordering the plaintiff to pay into Court a sum of Rs. 3,000 for the benefit of the minor 1st defendant. The decree will further provide that the plaintiff is not entitled to enforce his right to possession of the lands, or to eject the defendants therefrom, until payment into Court of the said sum of Rs. 3,000, and that as from the date of such payment he will also be entitled to damages at the rate of Rs. 25 per mensem till he is restored to possession. Since the plaintiff was neither ready nor willing to honour his obligation to pay the purchase price mentioned in the deed, he was not entitled to claim damages for being kept out of possession of the lands in dispute prior to such payment.

As the plaintiff has failed on the only matter in controversy at the trial and on this appeal, he must pay the defendants their costs in both Courts.

WEERASOORIYA, J.—I agree.

Appeal allowed.

[1] (*1918*) *21 N. L. R. 38.* [2] (*1939*) *41 N. L. R. 106.*

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[In the Court of Criminal Appeal]

1954 *Present :* **Nagalingam, A.C.J. (President), Pulle, J., and Swan, J.**

REGINA *v.* Y. M. DHARMADASA BANDARA

Appeal 78, with Application 134, of 1953

S. C. 4—M. C. Ratnapura, 33,817

Charge of murder—Circumstantial evidence—No evidence of use of lethal weapon—Inference of intention requisite to constitute offence of murder.

The accused was convicted of murder. The verdict of the jury implied that the death of the deceased was caused by the accused. According to the evidence, however, which was purely circumstantial, there were no signs of the use of a lethal weapon.

Held, that in the circumstances the verdict should be altered to one of voluntarily causing grievous hurt.

APPEAL with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. B. Perera, with *J. C. Thurairatnam* and *Austin Jayasuriya* (assigned), for the Accused-Appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 1, 1954. Pulle, J.—

The appellant by a verdict of five to two was convicted on the charge that he did on or about the 15th November, 1952, commit murder by causing the death of one Welikala Mudiyanselage Danawardena Bandara and was sentenced to death. The evidence against him was purely circumstantial and the principal submission on his behalf which we have to consider is that there was no evidence on which the jury could properly find that the deceased died of violence at the hands of the appellant.

The deceased and the appellant were related to each other as cousins and had since May, 1952, been jointly working a rubber land as sub-lessees. They lived in a hut on this land which had a verandah and one room. On the evening of the 21st November, 1952, the body of the deceased was dug out of this room. The information which led to the discovery of the body had been given by the appellant to one J. G. A. Weerakoon on the 20th November and on the following day he communicated that

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information to the Police. But for a loin cloth the body was naked. The knees were drawn up to the chest and tied with a rope one end of which was drawn round the neck. The body was in an advanced state of decomposition. Two post-mortem examinations were held one on the 23rd November by the District Medical Officer, Kahawatte, and the other on the 24th November by the Assistant Judicial Medical Officer, Colombo. Neither of the medical officers could state what the cause of death was. There were no signs of any external ante-mortem injuries. The lungs had decomposed, the heart dried up and the brain had melted into pulp. The condition of these organs precluded the expression of any opinion as to whether the deceased was asphyxiated or not. On the other hand the appellant had numerous linear abrasions on his left arm and left side of chest which might have been caused on the date of the alleged murder.

The inconclusive character of the medical evidence was strongly relied on at the argument in appeal to show that there was no case of any kind to go to the jury. The question, therefore, has to be considered whether the rest of the evidence which was not met by any evidence called for the defence was sufficient to entitle the jury to find that the deceased died as a result of violence inflicted by the appellant.

The deceased was an able bodied young man who was about 22 years old. He and the appellant, who to all appearances were friendly, used to tap the rubber trees on a land called Nebelligodelewatte. The dried latex used to be delivered to a rubber maker and thereafter the sheets sold to a trader in a neighbouring village. There was nothing to suggest that the deceased was otherwise than in normal health on the day of his death which on the appellant's statement to Weerakoon occurred on the 15th November. The deceased was last seen alive about noon-day on the 15th November. He was then returning to his land after a bath in a neighbouring stream. About 3 p.m. the witness Jayasekerage Piyadasa heard the cry of " minimaranawo " coming from the direction of the rubber land. Piyadasa was then weeding his land at a point about 300 yards from the hut. At the same time a woman named Alpi Nona living on a land adjoining Piyadasa's who also heard the cries asked him to find out what they were about. He then set out a short distance and then met the appellant coming towards him. He asked him, " What is the noise I heard from your direction ? ". He replied that a boy called Methya Kolla and the deceased were joking and both of them had cried out in fun. Piyadasa was satisfied with this explanation and they separated, the appellant stating that he was going for a bath and that thereafter he would take some rubber sheets to be smoked. Methya Kolla was called for the prosecution and he stated that he did not know who the deceased was and that he had never visited the hut. The story about Methya was the first of a series of falsehoods uttered by the appellant to allay suspicion as to the fate of the deceased and to prevent those inquiring about his whereabouts from visiting the rubber land or the hut. The appellant had his night meal at Alpi Nona's and slept at Piyadasa's. The reason he gave to Piyadasa for not sleeping in his hut was that he was alone. He said that the deceased had decamped with Rs. 250. On the next day he left saying that he was going to his village. The mother of the

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deceased was expecting him to be present at her house on the 19th November being the day fixed for giving notice of his sister's marriage. The appellant met the mother and delivered a false message to the effect that the deceased had said that he could not attend the ceremony because he had obtained employment on an estate. It is needless to advert to other falsehoods which clearly indicate that the appellant's conscience was not at ease. Fearing that discovery was bound to come soon he decided on the 20th November to disclose to J. G. A. Weerakoon a relation of his that the deceased lay buried in the hut. According to the account given by the appellant to Weerakoon the deceased, one Hendrick Mudalali and one Arnolis, the husband of Alpi Nona referred to earlier, came to the hut at about midnight of the 15th November. They were all drunk. He opened the door and the deceased took his plate of rice to the verandah. The appellant was inside the room reclining on a " messa " when he heard the deceased crying out loudly " minimaranawo ". He came out of the room and saw the deceased fallen dead on the ground. On one side of the deceased was Arnolis who was armed with a katty and on the other side Hendrick Mudalali with a long pointed knife. Under threat of instant death he assisted them in tying up the body and burying it inside the hut. Both Hendrick Mudalali and Arnolis were called for the prosecution. Their evidence which appears to have been accepted by the jury shows that they had been falsely implicated. As a result of the appellant's statement these two witnesses were held in custody for three weeks.

The loud cry of distress uttered by the deceased and the admission by the appellant that the deceased was dead before he was buried unmistakably point to violence as being the cause of death. If, as was suggested at the argument that the deceased died suddenly owing to natural causes, the conduct of the appellant in circulating numerous false accounts of the movements of the deceased whom he knew to be buried is wholly inexplicable. In so far as the verdict of the jury implies that the death of the deceased was caused by the appellant we see no reason to differ from them. The evidence, however, throws no light on the mode of violence from which one could infer the intention requisite to constitute the offence of murder. The complete absence of any signs of the use of a lethal weapon on the deceased renders it unsafe to allow the verdict of murder to stand. On the other hand the cries of distress raised by the deceased indicate that he either apprehended or suffered grave violence at the hands of the appellant and that coupled with the fact that he must have died almost immediately afterwards lead to the conclusion that while the appellant may not be guilty of murder he was guilty of the offence of voluntarily causing grievous hurt. To reach such a verdict it is not necessary that we should be in a position to state precisely the manner in which death was brought about.

We accordingly set aside the conviction and sentence under appeal and substitute therefor a verdict under section 316 of the Penal Code and sentence the appellant to six years' rigorous imprisonment.

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Verdict altered.

1955 *Present* : Basnayake, A.C.J., and Weerasooriya, J.

BELL *et al.*, Appellants, *and* F. ARNOLDA *et al.*, Respondents

S. C. 42—D. C. Colombo, 24,377

Contract—Employer and employee—Provident Fund—Nomination of beneficiary.

A Provident Fund was kept by an employer Company for the benefit of its employees. One of the Rules relating to it provided that on the marriage of an employee the nomination previously made by him would cease to be valid and that a fresh nomination should be made by such employee which " shall be duly registered ". No separate register of nominees was ever maintained.

Held, that the failure to enter the second nomination in a separate register could not invalidate such nomination.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. A. G. de Silva*, *M. L. de Silva* and *T. G. Gunasekera*, for Defendants-Appellants.

N. E. Weerasooria, Q.C., with *E. S. Amarasinghe*, for Plaintiffs-Respondents.

October 7, 1955. BASNAYAKE, A.C.J.—

The point that arises for determination on this appeal is whether Mae Bow Bell, widow of Charles Isaac Bell (hereinafter referred to as Bell) who died on 2nd July, 1948, was his nominee for the purpose of his Provident Fund.

Bell was at the time of his death and at all relevant times an employee of Brodie & Company Limited which he joined in 1928. In that year the firm started a Provident Fund for its employees. Bell, who was then a bachelor, became a member of the Fund and it is not disputed that he nominated his mother Jessie Bow Bell as his nominee, in terms of Rule 16 of the Provident Fund Rules.

Bell married in November, 1947, and on his return to Ceylon about January, 1948, he obtained the Provident Fund Pass Book from Mr. Brodie, the Managing Director, and scored off the words " Jessie Bell, mother " from the space provided therein for the name of the nominee and substituted the words " Mae Bow Bell, wife ". In July of that year, Bell died leaving a sum of Rs. 23,269·11 to his credit in the Provident Fund. The money was paid to his widow as her name appeared in the Pass Book as his nominee. The plaintiffs, the mother, sister and brother of Bell, claim that his nomination of his widow is not valid and that the money should be distributed as on a failure of nomination among the deceased's lawful heirs in terms of Rule 17 of the Provident Fund Rules (hereinafter referred to as the Rules). On that footing they claim one half of the money and allow the other half to the widow.

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The learned District Judge has held that the deceased's nomination of his widow is not a valid nomination and that the money standing to his credit should, in terms of Rule 17, go to his lawful heirs. We are unable to agree with him.

Rule 16 of the rules provides that on the marriage of an employee the nomination previously made by him shall cease to be valid and that a fresh nomination shall be made by such employee which shall be duly registered.

We are of opinion that the entry " Mae Bow Bell, wife ", in Pass Book D3, which was made by the deceased in the presence of the Managing Director and with his knowledge and consent almost immediately after his marriage, is a valid, fresh nomination for the purposes of Rule 16.

Counsel for the respondents strenuously argued that the nomination made by the deceased was a change in the nomination and that it should in terms of Rule 16 have been made by application to the Directors of the Company, and that as there has been no such application there was no change in the nomination. He also submitted that the failure to register the nomination was fatal.

It is common ground that no separate register of nominees was ever maintained. The failure to enter the nomination of Bell's wife in a separate register cannot invalidate his fresh nomination which was entered in the Pass Book in the same way as the first nomination of his mother. The lawful heirs can only come in where there is no nominee and not on account of failure to register a nomination.

We therefore set aside the order of the learned District Judge and allow the appeal with costs both here and below.

WEERASOORIYA, J.—I agree.

Appeal allowed.

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1956 *Present:* **Basnayake C.J., Gunasekara J., Pulle J., de Silva J. and Sansoni J.**

SOOSAIPILLAI *et al.*, Appellants, *and* SOOSAIPILLAI, Respondent

S. C. 119—D. C. Jaffna, 5,605

Thesavalamai—Property of deceased wife—Rights of husband—Sale by son—Rights of vendee—Cap. 51, Part I, ss. 9 and 11—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 4, 14, 37, 38, 40.

Sections 9 and 11 of Part I of the Tesawalamai (Cap. 51) apply to the estate of a spouse married before, and dying after, 17th July 1911 (the date of commencement of the Jaffna Matrimonial Rights and Inheritance Ordinance). Section 37 of the Ordinance has no application to such a case.

APPEAL from a judgment of the District Court, Jaffna. This case was referred to a Bench of five Judges under section 51 of the Courts Ordinance.

One Anasipillai, who was married to the plaintiff in 1901, died in August 1938 leaving a major son, Tiruchelvar. In 1941 Tiruchelvar sold certain lands to the 1st defendant purporting to claim them by right of inheritance from his mother Anasipillai. In the present action the plaintiff, who did not re-marry, claimed the right of possession of the lands left by Anasipillai, by virtue of section 11 of Part I of the Tesawalamai (Cap. 51).

C. Renganathan, with *M. Shanmugalingam*, for Defendant-Appellants.

S. Thangarajah, for Plaintiff-Respondent.

Cur. adv. vult.

July 4, 1956. BASNAYAKE, C.J.—

The only question that arises for determination on this appeal is whether sections 9 and 11 of Part I of the Tesawalamai apply to the estate of a spouse married before 17th July 1911, the date of commencement of the Jaffna Matrimonial Rights and Inheritance Ordinance (hereinafter referred to as the Ordinance), dying after that date. This very question has been decided in the affirmative in the case of *Swamipillai v. Soosaipillai* [1] and I am in entire agreement with the opinion expressed by Windham J. in that case.

A contrary view appears to have been taken by de Kretser J. in the earlier case of *Ambalavannar v. Ponnamma and the Secretary, District Court, Colombo* [2], wherein he has expressed the opinion that sections 9 and 11 of the Tesawalamai have been repealed by section 40 of the Ordinance.

[1] *(1947) 49 N. L. R. 83.* [2] *(1941) 20 C. L. W. 1 at 4.*

2——J. N. B 57342—1,592 (8/56)

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The latter case cannot be regarded as in point as the Judgment does not state that the deceased spouse was married before the Ordinance came into force. The Tesawalamai is undoubtedly repealed by section 40 of the Ordinance, but only in respect of those to whom the Ordinance applies and then only in so far as it is inconsistent with the Ordinance. I am unable to agree with the view taken by de Kretser J. if he intended that section 40 affected the rights of those who fall outside the ambit of the Ordinance, viz., those who were married before its commencement.

The facts on which the above question arises for decision are as follows. One Anasipillai who was married to the plaintiff in 1901 died in August 1938 leaving a major son by name Tiruchelvar who died in 1944. By deed No. 2230 of 19th November 1941 (D1) Tiruchelvar sold the lands in dispute to the 1st defendant claiming them by right of inheritance from his mother. The plaintiff, who has not re-married, claims the right of possession of the lands left by Anasipillai by virtue of section 11 of Part I of the Tesawalamai.

Learned counsel for the appellant contended that the provision that applies to the instant case is section 37 of the Ordinance, and not section 11 of Part I of the Tesawalamai. He argued that the limitation imposed by section 14 of the Ordinance is confined to Part III of it and has no application to Parts IV and V and that section 37, which occurs in Part IV, is therefore not governed by section 14, which reads as follows :—

> " The following sections of this Ordinance shall apply to the estate of such persons only as shall die after the commencement of this Ordinance, and shall be then unmarried, or if married shall have been married after the commencement of this Ordinance. "

The words " following sections of this Ordinance " are wide enough to extend to all the sections that follow section 14, and there is nothing in the context of that section or the sections that follow it which has the effect of confining the limitation imposed by it to the sections in Part III of the Ordinance. Those words in my opinion are wide enough to catch up all the succeeding sections, including sections 37 and 38 though they be in Part IV. Both Parts III and IV deal with the estates of deceased persons.

Learned counsel also laid great emphasis on the heading to Part III of the Ordinance. He contended that the heading " Inheritance " confines the application of section 14 to Part III. Headings in a statute do not always control the text. Headings in statutes belong to two classes [1]—headings which can be read grammatically into the group of sections to which they relate and headings which have no direct connection with the language of such sections. Headings of the first class constitute a sort of preamble [2] to the sections immediately following them and are not used in more recent statutes. Headings of the latter class are generally regarded as having been inserted for the purpose of convenience of reference, and not as being intended to control the interpretation of the sections grouped under each heading as in the case of

[1] *The King v. Suppar*, 18 N. L. R. 322 at 326.
[2] *Martins v. Fowler*, (1926) A. C. (P. C.) 746.

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the Ordinance under consideration. Headings may be looked at only for the purpose of resolving any doubt as to ambiguous words. They cannot be used to give a different effect to clear words of a section. In the instant case the section is in my opinion clear, and the heading cannot be called in aid to give it a different meaning.

It is also evident from section 4 that the Ordinance does not apply to persons married before its commencement except where it is otherwise expressly provided therein.

For the above reasons I am of opinion that section 37 of the Ordinance has no application to the instant case.

Learned counsel's contention is therefore not entitled to succeed. The appeal is accordingly dismissed with costs.

GUNASEKARA, J.—I agree.

PULLE, J.—I agree.

DE SILVA, J.—I agree.

SANSONI, J.—I agree.

Appeal dismissed.

1956 *Present :* **Pulle, J., and Sansoni, J.**

D. F. ABEYEWARDENA, Appellant, *and*
REV. SIRI NIVASA *et al.*, Respondents.

S. C. 301—D. C. Matara, 22,666/M

Delict—Landlord and tenant—Wrongful dispossession of tenant by landlord—Injuria—*Landlord's liability to pay damages.*

A landlord is not entitled to take possession of the rented premises unless the tenant has vacated them or surrendered possession of them. The fact that the tenant agreed to quit the premises is not material if the landlord knows that, in spite of the agreement, the tenant intends to remain in occupation of the premises.

Wrongful dispossession of the tenant by the landlord constitutes an *injuria* involving *contumelia*.

APPEAL from a judgment of the District Court, Matara.

Sir Lalita Rajapakse, Q.C., with *T. B. Dissanayake*, for the plaintiff appellant.

N. E. Weerasuria, Q.C., with *M. L. S. Jayasekera*, for the 1st defendant respondent.

M. L. S. Jayasekera, for the 2nd defendant respondent.

Cur. adv. vult.

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May 10, 1956. SANSONI, J.—

The plaintiff in this action was carrying on the business of a Forwarding Agent at premises Nos. 1011 and 1012, Kadevidiya, Matara. He was a tenant of those premises, first under one Wickremesinghe and later under the second defendant. He had admittedly been paying rent to the second defendant, and it is not in dispute that he was in occupation of the premises on 31st March, 1951. The first defendant is a Buddhist priest and the Principal of a Pirivena which stands on the adjoining premises. The second defendant, as one of the chief Dayakayas of the Pirivena, purchased Nos. 1011 and 1012 in trust for the Pirivena in August 1949. The plaintiff had also been residing in the premises in question but he ceased to reside there from early March, 1951. He claimed that he continued in occupation of the premises for the purposes of his business.

This action was filed in January, 1952 against both defendants on five causes of action. On the first cause of action, the plaintiff complained that on or about 1st April, 1951, while he was still a tenant and in occupation of the premises, the defendants entered the premises and unlawfully dispossessed him. He estimated his damages at Rs. 2,400 on this cause of action. On the second cause of action, he complained that the defendants after such entry removed and converted to their use motor accessories and spare parts belonging to him worth Rs. 5,000 ; he claimed this sum and a further sum of Rs. 1,000 as consequential damages. On the third cause of action, he complained that the defendants converted to their own use the engine and other valuable parts of a lorry No. CE 576 belonging to him, which was in the said premises ; on this cause of action he claimed the return of the lorry or its value, Rs. 15,000, and damages at the rate of Rs. 500 per mensem from 1st April, 1951. It is not necessary to refer to the other two causes of action because the matters arising under them were adjusted at the beginning of the trial.

The defendants filed separate answers, but their common defence was that they took possession of the premises on behalf of the Pirivena on 1st April, 1951, on the expiration of the plaintiff's tenancy and after the plaintiff had vacated these premises. They further stated in their answers that when the plaintiff vacated the premises he failed to remove lorry No. CE 576, although he was requested to do so ; and they denied that any damages were payable by them. The first defendant claimed in reconvention a sum of Rs. 15,000 as damages sustained by him by reason of the plaintiff having initiated a false and malicious prosecution against him in Case No. 22995 of the Magistrate's Court of Matara.

After trial, the learned District Judge dismissed the plaintiff's action save in respect of a sum of Rs. 67·50. This amount had been brought into Court by the defendants on the fifth cause of action, and the parties had agreed that it should be drawn out of Court by the plaintiff. The first defendant's claim in reconvention was also dismissed and the plaintiff was ordered to pay the defendants half their costs. The learned Judge took the view that the defendants lawfully took possession of the premises on 1st April, 1951, on the termination of the plaintiff's tenancy.

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He appears to have taken the view that the plaintiff had agreed to quit the premises on 31st March, 1951. He does not, however, find that the plaintiff had vacated the premises or surrendered possession of them in any way to the defendants.

On the evidence placed before him I do not see how the learned Judge could have held in favour of the defendants on the first cause of action. It has been proved that on 1st April, 1951, one Wijenaike, a retired Postmaster who had also been associated with the plaintiff in business previously, went to the premises to have them cleaned. He was there till 1 p.m. supervising the cleaning, which was not completed. He then locked the doors of the building and went home to lunch, taking the door keys with him. About an hour later, on receiving certain information, Wijenaike went near those premises. He found the main gate locked, although he had not locked that gate when he left the premises at 1 p.m. He saw several priests on the verandah and two lorries belonging to the plaintiff in the garage. He went to the Police Station and complained to the Police at 3.15 p.m. The plaintiff had gone to Deniyaya that day. On his return that night Wijenaike informed him of what had happened, and both of them went to the Headman of Kadevidiya and the plaintiff complained to him.

Now, it is not disputed that the second defendant took possession of these premises on 1st April, 1951, through his nephew Dharmasena who went into occupation on that day. The first defendant admits that possession was taken on his own behalf also. Both defendants are therefore jointly liable for the entry. As I said earlier, they sought to justify their action in going into possession on the ground that the plaintiff had earlier agreed to quit the premises on 1st April, 1951, but such agreement, even if proved, does not justify their action. The learned judge seems to have been greatly influenced by the view he took that Wijenaike had cleaned these premises on behalf of the plaintiff for the benefit of the defendants. I think the opposite conclusion may as easily have been drawn from the fact that the defendants were admittedly anxious to move into these premises for the purpose of extending the Pirivena. With great respect, I am unable to take the same view as the learned judge. Is it of no significance that there were two lorries belonging to the plaintiff standing in the garage at the time the defendants took possession, one of these lorries being fully laden with vegetables which were to be transported to Colombo? Surely this circumstance must have satisfied any reasonable person that the plaintiff had not taken the necessary steps to give up possession, and had no intention of doing so on that day. The keys of the building were not surrendered either, nor does any request appear to have been made for them. The invasion seems to have been well-timed to coincide with Wijenaike's temporary absence from the premises. I would therefore reverse the finding of the learned judge in regard to the first cause of the action and hold that the defendants unlawfully dispossessed the plaintiff of these premises.

As to the damages which the plaintiff should be awarded on this cause of action, he has not proved that he suffered special damages Under

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cross-examination on this point he stated that he was claiming Rs. 2,400 as damages for the discontinuance of his business, on the basis of the previous year's income from his lorry No. CE 576 which did not ply on the road after 1st April, 1951. Here the plaintiff seems to have been mixing up his claim on the first cause of action with his claim on the third cause of action, for the latter deals with the loss he incurred by having been deprived of the use of lorry No. CE 576. At the same time, there is no doubt that the plaintiff has suffered a wrong because he was illegally dispossessed of these premises by the defendants ; he is entitled to some damages on that account. The wrongful dispossession of the plaintiff by the defendants constituted an *injuria* involving *contumelia*, for I am satisfied that the defendants well knew that the plaintiff intended to remain in occupation of these premises, in spite of an alleged agreement to quit by 1st April, 1951. I would award the plaintiff a sum of Rs. 1,000.

On the second cause of action the plaintiff claimed the value of motor accessories and spare parts according to amounts which he said were entered in his account books. It was suggested to him, for the defence, that all accessories, spare parts and account books had been removed by him previously to other premises where he has already residing. He insisted, however, that all his account books were still on the premises in dispute on 1st April, 1951. If that were so, it is strange that when he made his complaint to the Headman he made no reference whatever to these books. The learned judge points out in his judgment that in the Magistrate's Court too the plaintiff made no reference to his books of account, and the first reference ever made to them was on 5th June, 1953, when a notice was sent to the defendants to produce the books at the trial of this action.

After a consideration of the evidence I find it clearly proved that the defendants were always willing, from the time they went into occupation of these premises, to allow the plaintiff to remove all articles belonging to him of whatever nature. The Headman made this quite plain in his evidence, for he said that when he spoke to the second defendant's nephew, Dharmasena, and asked that the lorries be released, Dharmasena was quite willing that they should be removed. He added that Dharmasena was prepared to allow the plaintiff to remove any goods that were in the garage. Although the lorry laden with goods was removed, the other lorry CE 576 was not. The Headman stated that he waited for somebody to come and remove that other lorry but nobody came for that purpose. The plaintiff suggested in evidence that lorry CE 576 could not be removed because the tyres had been taken off the wheels, but he did not claim to have seen that himself ; he was speaking to some information which his driver is alleged to have conveyed to him, but that driver has not been called as a witness. He later added that it was only on 4th April, 1951, that he was informed that the tyres had been removed, and that until then he had not sent anybody to remove that lorry. It seems obvious that the claim made in regard to the spare parts and accessories is on as shaky a foundation as the claim in regard to the lorry CE 576.

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The learned judge rejected the claim on the second and third causes of action because he was not satisfied that the defendants had converted either the lorry or the spare parts and accessories to their own use. I think the plaintiff has entirely failed to prove that the spare parts and accessories described in the schedule to the plaint were on these premises, and it also seems to me that, for reasons best known to himself, the plaintiff deliberately chose not to remove lorry CE 576, although he had every opportunity to do so.

In the result the plaintiff has failed on the major part of his claim. This action was brought to recover a total sum of Rs. 29,967·50 and continuing damages at Rs. 500 a month. The plaintiff has succeeded to the extent of only a sum of Rs. 1,000 and I therefore think that the order of the learned judge as to costs in the lower Court should stand. I would vary the decree under appeal and give judgment for the plaintiff in the sum of Rs. 1,000 plus Rs. 67·50, totalling Rs. 1,067·50, but the plaintiff will pay the defendants half their costs in the District Court. Each party will bear his own costs in this Court.

PULLE, J.—I agree.

Decree varied.

1955 *Present :* **Basnayake, A.C.J., and Pulle, J.**

S. H. M. MOHIDEEN *et al.*, Petitioners, *and* REGISTRAR OF TRADE MARKS, Respondent

S. C. 196—D. C. (Inty.) Colombo, 481/Spl.

Trade Marks Ordinance—Section 17—" Calculated to deceive "

When considering whether a trade mark, which is proposed to be registered, so nearly resembles an already registered trade mark as to be " calculated to deceive " within the meaning of section 17 of the Trade Marks Ordinance, a test to apply is not whether if a person is looking at the two trade marks side by side there would be a possibility of confusion, but whether the average person who sees the proposed trade mark in the absence of the registered trade mark would mistake the proposed trade mark for the registered trade mark.

APPEAL from an order of the District Court, Colombo.

H. V. Perera, Q.C., with *N. K. Choksy, Q.C.*, and *S. H. Mohamed*, for the Petitioner-Appellants.

Mervyn Fernando, Crown Counsel, for the Respondent.

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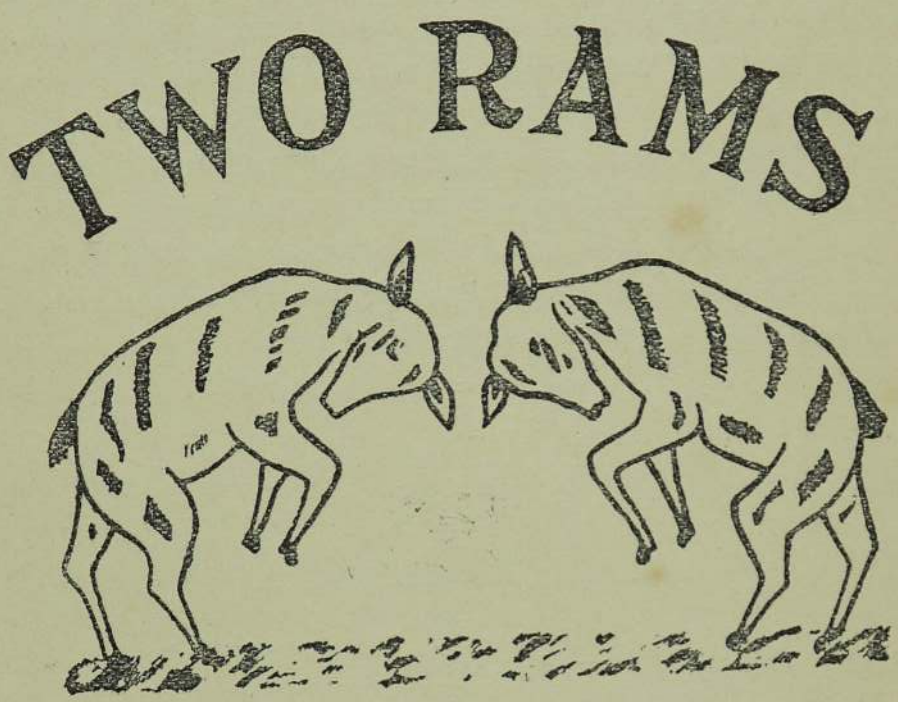
July 13, 1955. BASNAYAKE, A.C.J.—

Shahul Hamid Mohamed Mohideen and Mohamed Assan Kizar, exporters of tea and Ceylon produce, both carrying on business in Colombo under the business name of "Kizar & Co." (hereinafter referred to as the appellants) applied to the Registrar of Trade Marks for the registration of a trade mark in respect of tea in class 42. The trade mark is depicted in the application and has the words "TWO RAMS" above what appear to be two hornless rams in a gambolling attitude as in the illustration given below :



The Registrar refused the application on the ground that he was precluded by the terms of section 17 of the Trade Marks Ordinance from registering the appellants' trade mark as it so nearly resembled a registered trade mark in respect of the same class of goods (hereinafter referred to as the registered trade mark) belonging to a firm trading under the name of T. V. K. Cader Meera Saibo & Co. as to be calculated to deceive.

The registered trade mark as shown in the illustration given below depicts two bearded goats with curved horns standing almost erect on a box or stand with the legend "Marque Deposse". On the heads of the goats rests a circle with a lotus device with the capital letters "SIT" in the centre.



The appellants appealed under section 10 (3) of the Trade Marks Ordinance from the Registrar's decision to the District Judge. The learned

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District Judge upheld the Registrar's decision that the appellants ' trade mark so nearly resembled the registered trade mark as to be calculated to deceive.

Before deciding the question whether the appellants' trade mark so nearly resembles the registered trade mark, it is necessary to decide the meaning of the words " calculated to deceive " in section 17 of the Trade Marks Ordinance. These words are identical with the words in the corresponding provision of the English Trade Marks Act of 1905 and the decisions on that Act afford some guidance in the interpretation of those words in our Act. It has been held in England that the word " calculated " in the context " calculated to deceive " does not imply any intention to deceive and means no more than " likely ". The question then is whether the appellants' trade mark is likely to deceive.

Apart from the two gambolling rams and the words " TWO RAMS " there are no other features in the appellants' trade mark while the registered trade mark has many features which are not to be found in the appellants' trade mark. The registered trade mark has a bold outline within which the two goats are placed. The features of the two goats are entirely different from those of the animals in the appellants' trade mark. The lotus design with the letters " S I T " on the registered trade mark is not to be found in the appellants' trade mark and is a distinctive feature of it. The stand or box on which the goats are standing is peculiar to the registered trade mark and even the attitude of the goats in it is different.

No standard test of what is likely to deceive the purchaser can be laid down. The tests laid down in the decided cases are rarely capable of extension to other cases. In the circumstances of this case we think the test to apply is not whether if a person is looking at the two trade marks side by side there would be a possibility of confusion ; but whether the average person who sees the appellants' trade mark in the absence of the registered trade mark and in view only of his general recollection of the registered trade mark would mistake the appellants' trade mark for the registered trade mark. With all these marked differences no customer is likely to mistake the appellants' trade mark for the registered trade mark. The appellants have not taken into their trade mark any distinctive feature of the registered trade mark.

For the above reasons we are unable to agree with the learned District Judge that taken as a whole the appellants' trade mark so nearly resembles the trade mark already registered as to be likely to deceive the purchaser.

We therefore set aside the order of the learned District Judge and of the Registrar. There will be no costs of this appeal.

PULLE, J.—I agree.

Order set aside.

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1954 *Present :* **de Silva, J.**

A. D. P. RANASINGHE, Appellant, *and* H. A. R. PIERIS, Respondent

S. C. 33—C. R. Gampaha, 5,438

Appeal—Security for costs of appeal—Procedure for furnishing it—Civil Procedure Code, ss. 756 (1) and (3), 757.

A notice of security for costs of appeal given in terms of section 756 of the Civil Procedure Code is not invalid if the amount of security is not specified in it.

Where the security bond was perfected upon its acceptance by an officer of the court and before the security was accepted by the Judge—

Held, that the provisions of sub-section 3 of section 756 of the Civil Procedure Code could not be invoked to cure the defect.

APPEAL from a judgment of the Court of Requests, Gampaha.

N. K. Choksy, Q.C., with *A. W. Goonewardene* and *John de Saram*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

October 21, 1954. DE SILVA, J.—

This is an appeal from the judgment of the Commissioner of Requests, Gampaha, declaring the plaintiff respondent entitled to a decree for rent, ejectment, and damages. The judgment was delivered on 22nd October 1952. The defendant filed this appeal 2 days later. Along with the petition of appeal he deposited a sum of Rs. 26 as security for costs of appeal.

A preliminary objection was taken to the hearing of this appeal on the ground that it was not properly constituted inasmuch as the provisions of Section 756 had not been complied with. Firstly it was contended that the notice of appeal was not a valid one as the amount of security was not specified in it. This objection was raised in the court below also, but the learned Commissioner held that it was not essential to specify the amount of security in the notice. The Civil Procedure Code provides a specimen form for the purpose of giving notice of security. That is form 126. It is contended on behalf of the appellant that this form has not been complied with. The relevant part of this form reads " . . . . . move to tender security by (mention how) for any costs which may be incurred by you in appeal in the premises etc. " Mr. Jayawardene argues that the words " mention how " appearing in this form require the insertion of the amount of security proposed to be given. I do not think that that interpretation is the only one which can be assigned to these words. It certainly is desirable and convenient to mention the amount of security to be furnished. Section 757 of the Civil Procedure Code provides that security may be given in 2 ways, that is to say, by way of mortgage of immovable property or by the deposit and hypothecation of money. The word " how " appearing in form 126 may therefore refer to the form of security, namely, property or money. In the instant case it was set out in the notice that security would be

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tendered by depositing cash. I am satisfied that is sufficient compliance with the requirements of form No. 126. It is conceded by the respondent's counsel that the sum of Rs. 26 tendered as security is the maximum security required in the Court of Requests, Gampaha, in this class of cases.

The 2nd objection urged by Mr. Jayawardene was raised in appeal for the first time. He maintains that the security bond was perfected even before notice of security was served on his client and before the security was accepted by the court. The date of the bond is 24.10.'52 whereas the notice of security was served on the respondent and his proctor only on the 28th and 29th October respectively. Section 756 of the Civil Procedure Code provides that when a petition of appeal is received by the court the petitioner shall forthwith give notice to the respondent that he will, on the date specified in such notice within a period of 14 days from the date of decree, tender security for the respondent's costs of appeal. On the day specified, the respondent is entitled to show cause if any against the acceptance of such security. The security has to be perfected within 14 days of the date of decree. It is clear that the security can be accepted only after notice of security is served on the respondent. Mr. Choksy who appears for the appellant while conceding that the security bond had been perfected before the notice of security was served, argued that he was entitled to relief under sub-section 3 of Section 756 of the Civil Procedure Code. This sub-section reads " In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced may grant relief on such terms as it may deem just". The point which arises in this case came up for consideration in the Divisional Bench Case *de Silva v. Seenathumma* [1]. In that case security was accepted before notice of security had been served on one of the two respondents. In appeal it was contended on behalf of the respondent that the security was bad inasmuch as it had been accepted before the notice of security had been served on one of the respondents. It was urged on behalf of the appellant that he was entitled to relief under sub-section 3 of Section 756 of the Civil Procedure Code. Soertsz J. who wrote the judgment in that case held that two of the requirements of Section 756 namely the giving of notice forthwith, and the furnishing of the copy of appeal were matters immediately in the power of the appellant and that the court had no power to grant relief under sub-section 3 for a breach of either of those two matters. He further held that relief may be given in case of " reasonable " omission, mistake or defect in regard to the tendering of security and the depositing of money to cover the expenses of the service of notice of appeal. In the circumstances of that case relief was in fact granted to the appellant but he proceeded to state " But I think we should state quite clearly that our decision in this case does not mean in future cases we shall, necessarily, give relief in similar circumstances. "

In the instant case a further difficulty arises, namely, that the security bond was perfected before security was accepted by the court. As I

[1] *41 N. L. R. 241.*

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observed earlier the petition of appeal was filed on 24.10.'52 and the appellant moved for a deposit note for Rs. 26 and that motion was allowed. On the same day there is a journal entry which shows that the security bond was filed. This shows that the security bond was perfected without the authority of the court. The fact that the application for a deposit note of Rs. 26 was allowed does not mean that the court accepted that amount as security. In the case of the *Demodera Tea Company Ltd. v. Pedrick Appu*[1] De Sampayo J. said, " It is clear that the acceptance of the security is a judicial act and should be evidenced by an order of court. " In this case too, an officer of the court appears to have accepted the security bond without an order from the Commissioner of Requests. That bond therefore would be unenforceable. The provisions of sub-section 3 cannot be invoked to cure that defect. The appeal must therefore be rejected. I make no order for costs in favour of the plaintiff respondent as the objection on which he succeeds was not raised in the court below.

Appeal rejected.

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

S. KUMARASAMY, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 122—In the Matter of an Application under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949

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

In an application for citizenship under the Indian and Pakistani Residents (Citizenship) Act, proof of a mother's continuous residence in Ceylon during a period in which children were born to her raises a very strong inference that the children, while of tender age, were cared for by their mother in a home provided by their father.

APPEAL from an order of the Commissioner for Registration of Indian and Pakistani Residents.

S. P. Amarasingham, for the applicant-appellant.

Walter Jayawardene, for the respondent.

Cur. adv. vult.

June 13, 1956. H. N. G. FERNANDO, J.—

The only reason why the Deputy Commissioner has refused this application is that he was " unable to hold " that the applicant's daughter Ambujan had been in Ceylon during two periods :—(1) September, 1941, to April, 1944, and (2) October, 1947, to May, 1949. It was proved that Ambujan was born in Ceylon in 1936 and was admitted to an estate school in April, 1944, and the first of the periods referred to was accordingly one during which Ambujan was between 5 and 8 years of age. It was also proved that a second child of the marriage was born in Ceylon

[1] *22 N. L. R. 381.*

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in December, 1939, and that the third child was born in Ceylon in April, 1942. In regard to the two younger children the Deputy Commissioner has apparently accepted the evidence that they remained in Ceylon from the time of their birth onwards; and in regard to the mother he was apparently satisfied that she remained continuously in Ceylon from 1939 onwards. This evidence raises a strong inference that the eldest child Ambujan, who was only 3 years of age in 1939, also remained in Ceylon with her parents. The parents and the younger children having been in Ceylon during the whole of the first mentioned period, it was most unlikely that Ambujan would have been separated from her family before she commenced to attend school. I think therefore that there was no reason why the Deputy Commissioner should have rejected the evidence of the applicant that Ambujan did not leave Ceylon after the time of her birth and prior to her entry into school.

Ambujan left school in September, 1947, at the age of 11 years and the Check Roll register shows that she was employed on an estate from May, 1949. Here again the Deputy Commissioner was satisfied that during the interval the mother and the other children had continued to be ordinarily resident in Ceylon. That being so, there was little or no reason to disbelieve the applicant's evidence that Ambujan who was then quite a young girl, was also in Ceylon during that time.

I would like to take this opportunity to point out that in cases where there is proof of a mother's continuous residence in Ceylon during a period in which children were born to her, the circumstances raise a very strong inference that the children, while of tender age, would have been cared for by their mother in a home provided by their father. Hence, when oral evidence is tendered in proof of what might be legitimately inferred from the circumstances, the evidence should not be rejected merely because an applicant is unable to adduce documentary evidence in addition.

The appeal is allowed with costs fixed at Rs. 105, and the Deputy Commissioner is directed to take the further steps necessary under the Act on the footing that a prima facie case for the registration of the applicant and his dependants has been made out.

T. S. Fernando, J.—I agree.

Appeal allowed.

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

A. A. M. THASSIM, Appellant, and N. M. M. SULEIMAN, Respondent

S. C. 157—D. C. Matara, 46

Estoppel—Recital in a deed—Right of a person to act on the faith of that representation—Evidence Ordinance s. 115.

Where A holds B out as owner of A's property and a third person C purchases it for value from the apparent owner B in the belief that B is the real owner, neither A nor any person who subsequently purchases that property from A will be entitled to dispute C's claim to be its owner.

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APPEAL from a judgment of the District Court, Matara.

C. V. Ranawake, for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *E. A. G. de Silva*, for the defendant-respondent.

Cur. adv. vult.

August 4, 1954. SANSONI, J.—

In this partition action the only dispute concerns a house on the land sought to be partitioned and it arises in this way. Under a partition decree of 1947 three persons, Abdul Rahim, Abdul Hamid and Abubucker were declared entitled to the lot on which this house stood. They sold that lot to one Thassim in 1948 and Thassim in turn sold it to Salahudeen by deed P3 of 1.3.51. By deed D1 of 12.5.51 Salahudeen sold "All that undivided 2/3 parts or shares of the soil and fruit trees (exclusive of the buildings standing thereon belonging to the vendees hereto)" to Abdul Rahim and Abdul Hamid already mentioned, and they by deed D2 of 14.5.51 sold "all that undivided 2/3 part or shares of the soil and fruit trees together with the entirety of the nine cubits tiled house standing thereon" to the defendant. Eleven days later, by deed P4 of 25.5.51 Salahudeen sold "all (his) right title claim and interest to and upon the land" to the plaintiff. The plaintiff claimed that Salahudeen was still entitled to 1/3 share of the house at the time deed P4 was executed, and this 1/3 share was accordingly claimed by the plaintiff who conceded that the defendant was entitled to 2/3 share of the house. The defendant, however, claimed that the plaintiff was estopped, by the representation made by Salahudeen in Deed D1, from claiming any share of this house, and a point of contest was raised on this basis. A further point of contest suggested by the defendant's counsel at the trial was "Did any rights in the house pass on the deed D1 ?". Obviously no rights in the house could have passed from Salahudeen and his two vendees on the deed, seeing that the 2/3 share was sold exclusive of the buildings.

The only question that arises, therefore, is whether the defendant has made out his claim that the plaintiff is estopped from claiming any share of the house by reason of the representation made by Salahudeen in the deed D1. Now it must be borne in mind that the plea of estoppel is not raised by Abdul Rahim and Abdul Hamid. It might in that situation have been contended against them that they were aware that Salahudeen was the owner of the house ; they would also have had to prove that they were persuaded to purchase by reason of the particular statement made in D1.

The position of the defendant is different. He gave evidence, which the learned District Judge has accepted, in the course of which he said :— "The deed D1 in favour of the vendors showed that they were the sole owners of the house. That is why I purchased the house." In other words, his case was that he bought the 2/3 share and the entire house on deed D2, believing and acting on the statement made by Salahudeen as

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regards the house. In this state of things it seems clear that if Salahudeen had claimed the 1/3 share of the house now in dispute he would have been estopped. "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 would be precluded from contesting its truth"—per Parke B. in *Freeman v. Cooke* [1]. That is the rule which has always obtained in England and it is the rule in our Law despite the fact that Section 115 of the Evidence Act (Cap. 11) uses the words "intentionally caused another person to believe a thing to be true" while the English rule laid down in *Pickard v. Sears* [2] used the words "wilfully caused another to believe the existence of a certain state of things".

Supposing again that Salahudeen, and not the plaintiff, was claiming the 1/3 share of the house, would the circumstance that the representation made by Salahudeen appears in a deed to which the defendant was not a party make a difference ? I think not, seeing that the statement made in the deed D1 was, in this case, the approximate cause of the defendant buying on the deed D2, and the defendant is the representative of the purchaser on deed D1. I can best give the reason in the words of a principle which Layard, C.J. said, in *Sadiris Appu v. Cornelis Appu*[3], had been enunciated by the Judicial Committee of the Privy Council :— "It is a principle of natural equity that where A allows B to hold himself out as owner of A's property"—*a fortiori* where A holds B out as owner of A's property—"and a third person purchases it for value from the apparent owner in the belief that he is the real owner, A shall not be permitted to recover, unless he can prove that the purchaser had direct notice of the real title, or that there existed circumstances which ought to have put him on inquiry which, if pursued, would have led to a discovery of it". An analogous case arose in *Silva v. Thedris* [4] where this same principle was applied. There too the representation was made not directly to the person who pleaded the estoppel, but to his vendor.

And that brings me to the submission which was strongly pressed upon us by the plaintiff-appellant's counsel. He urged that the defendant was put on inquiry as to who in truth was the owner of the house, but we were not told what circumstances should have raised suspicion in the defendant's mind and put him on inquiry. He was entitled to rely on the statement regarding the house in D1. His vendors produced it as proof of their claim to the entire house. The case of *Trinidad Asphalt Co. v. Coryat* [5] cited by the appellant's Counsel only decided that a recital in a deed creates no estoppel in favour of a *stranger* who does not claim under a party to the deed. But the defendant is not a stranger in that sense. His immediate source of title is the deed D1 which contains the representation which misled him. Any reasonable man was entitled to act on the faith of that representation in the absence of actual or constructive notice that the truth was otherwise.

[1] *2 Exch. 654.*
[2] *6 A. & E. 469.*
[3] *(1905) 8 N. L. R. 350.*
[4] *(1920) 22 N. L. R. 65.*
[5] *(1896) A. C. 587.*

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Upto this point I have dealt with the matter as though Salahudeen and not the plaintiff was disputing the defendant's claim to be owner of the entire house. I have tried to show why Salahudeen would have been estopped from raising a dispute. The plaintiff who purchased from Salahudeen *after* the defendant had purchased upon D2 can be in no better position than Salahudeen. Since the plaintiff claims through Salahudeen he is equally bound.

For these reasons I would dismiss this appeal with costs.

ROSE, C.J.—I agree.

Appeal dismissed.

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

P. W. WAAS, Appellant, *and* E. GANEGODA (Inspector of Labour), Respondent

S. C. 507—M. C. Negombo, 77,497

Wages Boards Ordinance, No. 27 of 1941—Prosecution thereunder—Burden of proof—Sections 21, 39 (1), 42.

Where an employer is charged with failing to pay a worker wages at not less than the minimum rate, in contravention of section 21 of the Wages Boards Ordinance, but the evidence properly admitted at the trial is insufficient to prove that the worker was entitled to payment of wages in respect of the period mentioned in the charge, there is no burden on the accused to prove, in terms of section 42, that payment was duly made by him.

APPEAL from a judgment of the Magistrate's Court, Negombo.

G. E. Chitty, with *J. A. L. Cooray* and *Daya Perera*, for the accused-appellant.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 22, 1956. GUNASEKARA, J.—

The appellant was convicted of three offences punishable under section 39 (1) of the Wages Boards Ordinance, No. 27 of 1941, alleged to have been committed by him on or about the 1st December, 1953. The allegation in each count of the charge was that being the employer of a worker in the coconut manufacturing trade he had, in contravention of section 21 of the Ordinance, failed to pay that worker for work done in the period 22nd to 28th November wages at not less than the minimum rate. The workers were three women named Jane Silva, Winifreda Fernando and Julihamy.

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Part II of the Ordinance, in which sections 21 and 39 occur, was applied to the coconut manufacturing trade on the 1st April, 1949, by an order made under section 6 (1), and a wages board for that trade was established on the same day by an order made under section 8 (1). At the time material to the charge there were in force decisions of the wages board determining, among other things, minimum rates of wages for piece work "applicable to certain processes in the activities of the Coconut Manufacturing Trade" and minimum rates for time work applicable to all other processes in the activities of that trade. Section 21 of the Ordinance provides that

> where any decision of a Wages Board, whereby a minimum rate of wages for any trade is determined, has come into force, every employer shall pay to every worker to whom such minimum rate is applicable, wages at not less than such minimum rate ;

and section 39 (1) provides that

> every employer who fails to pay wages to any worker in accordance with the provisions of section 21, shall be guilty of an offence.

The appellant was at the material time the owner of a mill for the manufacture of coconut fibre, an activity of the coconut manufacturing trade as defined in the order by which Part II of the Ordinance was applied to that trade. The prosecution put in as part of its case a document, marked P13 and headed "Pay list of Workers employed at Kapuwatte Mills from 23rd November 1953 to 28.11.53", which was alleged to be an extract from the wages records kept at the appellant's mill. One of the grounds on which the appeal was pressed was that this document was improperly admitted in evidence.

The admission of the document was objected to at the trial by Mr. Cooray, who appeared for the appellant, and the learned magistrate made the following order overruling the objection :

> "The accused has been noticed to produce these records but according to Mr. Adv. Cooray these records are with the Assistant Commissioner of Labour. The prosecution states that the records had been returned to the accused. The application of the prosecution to lead secondary evidence, with regard to the contents of these records is therefore allowed."

According to the case for the prosecution, P13 is an extract from a book that was in the mill on the 20th August, 1954, and was made by an inspector of labour at the mill itself on the occasion of an inspection held by him on that day. Evidence to this effect was given by the inspector, Mr. Ganegoda, after the learned magistrate had made the order quoted above. The witness denied a suggestion made to him in cross-examination that he was keeping the books with him. It was also suggested to him that the appellant had come to the Labour Department's office on the 8th August, 1954, and he said that he could not remember whether the appellant had done so. He admitted that the appellant was not present at the mill on the 20th August, 1954, and there is no evidence that the appellant had notice of the inspection.

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The appellant gave evidence to the effect that he had taken to the Labour Department's office on the 8th August, 1954, "all the books" (meaning apparently all the wage records) and had left with Mr. Ganegoda all except those relating to the year 1954. "All the books were forwarded to the Labour Department", he said. "Mr. Ganegoda wanted the books. I left the books in the office of the Department of Labour. I have the 1954 books." Cross-examined on this point he said "I took the records to the Labour Office, Negombo. That was on 8th August 1954. The books were kept by the Inspector, Mr. Ganegoda."

It appears from the learned magistrate's judgment that he has accepted the appellant's evidence that the books were taken to the Labour Department's office on the 8th August, 1954. He holds, however, that they were taken away again by the appellant and were in the latter's custody at the time of the trial. Having dealt with certain evidence to the effect that Mr. Ganegoda had removed wage records from the mill on 7th December, 1953, and returned them on the 17th December, the learned magistrate says :

> "Thereafter the books were taken to the Labour office by the accused on 8.8.54. The accused says these books were retained at the office from that date, but Inspector Ganegoda's evidence, which I have no reason to doubt is that they were removed by the accused and that he took extracts from them at the Mills on 20.8.54. P13 is one such extract. I am satisfied that the wage records for the relevant periods are in the custody of the accused and that he has not produced them in Court in spite of the notices served on him. The prosecution was therefore entitled to lead secondary evidence of the contents of the wage records for the relevant period".

The finding that the wage records were in the appellant's custody is based on a misdirection as to the evidence given by Mr. Ganegoda ; for it appears from the record of the evidence that he has not said anything to the effect that the books that were brought to his office on the 8th August, 1954, (or any books) were removed by the appellant. At the time when the learned magistrate made his order allowing the prosecution to adduce secondary evidence of the contents of the wage record in question there was no material before the court to support a finding that the original was shown or appeared to be in the possession or power of the appellant ; there was only a denial by the officer conducting the prosecution of an allegation made by counsel for the defence that the wage records had been "left at the Department of the Commissioner of Labour for inspection". For these reasons the contention that the document P13 was improperly admitted in evidence must be upheld, and that document cannot be relied upon by the respondent in support of the conviction.

It appears that in November, 1953, the minimum rate of wages applicable to each of the three workers mentioned in the charge was a time-rate of Rs. 1·79 for a normal working day of 9 hours and 28 cents an hour for overtime work. The prosecution relied mainly on the document P13 to

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prove the quantity of time-work done by each of the three women during the period 23rd to 28th November, 1953, and the rate at which they were paid. The three women themselves were called as witnesses for the prosecution, and it is contended by the learned crown counsel that even if P13 is left out of consideration their evidence, which was given on the 30th March, 1955, is sufficient to support the conviction.

Jane Silva, who is the worker to whom the first count relates, stated that she had been working as a labourer at the appellant's mill from the 3rd November, 1953, and was still employed there, that she had always been paid at the rate of Rs. 1·50 a day and no more, and that she had not been paid any overtime wages. She admitted, however, that she could not say on how many days she worked during the period in question, and she did not claim to have worked or to have been at the mill on even a single day that week. She said "I start work at 6.30 a.m. and work till 5.30 p.m. . . . . We have one hour for our meals"; but she did not say that in the material period, too, which was sixteen months earlier, these were her hours of work or even that she was present at the mill on any day in that period.

Although this witness alleged in her evidence that right up to the 30th March, 1955, she had been paid at the rate of Rs. 1·50 a day, she admitted that when she was paid on Saturday the 12th March, 1955, her wages for the week that ended on that day she signed a receipt (D1) acknowledging that she had been paid at the rate of Rs. 1·87 a day. She explained that she signed it because the appellant said that otherwise he would refuse to give her work. In re-examination she said that she could not read the document and that her sight was "not good". In further cross-examination she admitted that she could "read and sign in Sinhalese". D1 is written and signed in that language.

The 12th March, 1955, was the day on which the trial began. The appellant had appeared before the magistrate's court on the 5th March and pleaded not guilty to the charge, and on that day the magistrate had fixed the trial for the 12th March and ordered the issue of summonses requiring the prosecution witnesses to attend at the trial. It so happened that the 12th March was also a pay-day. According to the appellant's evidence that was the first occasion on which he had obtained receipts from the workers. "I am aware", he said, "that they had gone and complained that they had received Rs. 1·50 as wages. I took receipts in order to safeguard myself".

Winifreda Fernando, to whom the second count relates, stated that she had been working as a labourer at this mill from August, 1953, but she did not say whether she did or did not do any work or attend at the mill during the week in question. She said that her wages had always been Rs. 1·50 a day, and that she had never been paid overtime wages. She too stated what her hours of work were at the time of the trial but not what they had been in the period 22nd to 28th November, 1953, if she did do any work that week. She too had signed a receipt (D2) on the 12th March, 1955, acknowledging that she had been paid at the rate of Rs. 1·87 a day. This document too has been written and signed in Sinhalese.

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When this witness was cross-examined about the receipt D2 she said :

> " This bears my signature. In this I have been paid Rs. 1·87. I was paid only Rs. 1·50 a day. I am unable to read this. I can read Sinhalese. I did not write this but I only signed it. Through fear I signed the document. The accused told us that he would not pay us if I did not sign it. "

She further said :

> " I was not aware that I was signing a receipt for Rs. 1·87. I thought that I was signing for my weekly salary. Before this we did not sign such documents. When I questioned him the accused said that he suspected us. He said that he would not make payments without receipts ."

Julihamy, to whom the third count relates, said that she had been " working in the mill from the day it started ", that she had been " working from 1953 " and that " in November 1953 also " she worked there. There is nothing in these vague statements to show clearly that she worked at the mill or was present there on any of the days in the period 22nd to 28th November, 1953. Her evidence as to what she was paid referred only to the rate at which she was being paid at the time of the trial. She too signed a receipt (D3) on the 12th March, 1955, acknowledging that she had been paid at the rate of Rs. 1·87 a day and she admitted that she could read Sinhalese, the language in which the document was written and in which she had signed it. Her explanation was that she signed it because she was " in a hurry to go home ", that she " was made to understand that this was a receipt for weekly wages ", and was also told that she would not be paid her weekly wages if she did not sign it.

The prosecution also adduced, through Mr. Ganegoda, evidence to the effect that the appellant had committed other offences besides those alleged against him in the present charge. It was elicited from this witness in examination-in-chief that at an inspection of the mill held by him on the 11th November, 1953 (before the period to which the charge relates) he had questioned Jane Silva and Winifreda Fernando and they had made statements to the effect that they were being paid wages at less than the minimum time-rate, and that Winifreda's statement was confirmed by Julihamy. He also stated, in examination-in-chief, that on that occasion he " examined the wages record and found that women had been underpaid ". All these items of evidence were inadmissible, both on the ground that they were not relevant to the charge and on the ground that they constituted inadmissible hearsay.

The prosecution also put in evidence a letter dated the 14th December, 1953, (P14) from the appellant to Ganegoda in which the appellant had said that " the wages paid at the rate of Rs. 1·50 per day " were wages " paid to the boys and girls and not to men and women ". (Jane, Winifreda and Julihamy were 46, 48 and 38 years old, respectively, and were entitled to be paid at the rate applicable to adults.) Referring to this statement made by the appellant Mr. Ganegoda said in his examination-in-chief " He says that Jane and Winifreda are girls ". There is no such

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statement in the letter itself, however, and there is no evidence that warrants a view that the appellant admitted that Jane and Winifreda were two of the workers paid at the rate of Rs. 1·50 a day at the material time (or, indeed, at any time).

It seems clear that the learned magistrate's findings that the three women witnesses worked, or were present at the mill for work, during the period specified in the charge and that in respect of that period they were paid wages at less than the minimum rate were based mainly upon the document P13, which was improperly admitted in evidence. It was contended by the learned crown counsel that even so the conviction should be affirmed on the ground that under section 42 of the Ordinance the burden was on the appellant to prove that he had paid these workers wages in accordance with the provisions of section 21. I am unable to accept this contention. What section 42 provides is that

> on the prosecution of any employer under sub-section (1) or sub-section (2) of section 39 for the failure to make any payment to any worker, the burden of proving that the payment was made shall lie on the employer.

But an issue as to whether the employer has failed to make any particular payment to the worker can arise only when it has been proved that he had become liable to make that payment. The evidence that has been properly admitted at the trial is insufficient to prove that any of the workers mentioned in the charge had become entitled to payment of wages in respect of the period 22nd to 28th November, 1953. There was therefore no burden on the appellant to prove that he had paid them in respect of that period wages at not less than the minimum rate.

I set aside the conviction of the appellant and the sentence passed on him.

Conviction set aside.

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

D. S. ATTYGALLE AND COMPANY, LTD., Petitioner,
and THE COMMISSIONER OF MOTOR TRAFFIC *et al*,
Respondents

S. C. 867—In the matter of an appeal to the Supreme Court from the decision of the Transport Appeals Tribunal in terms of section 212 of the Motor Traffic Act No. 14 of 1951

Lorry—Public carrier's permit—One ground for granting it—Motor Traffic Act No. 14 of 1951, ss. 89 (1) (b), 90 (3) (b).

Any person, who held a licence of the requisite character immediately before the specified date, is duly qualified under section 89 (1) (*b*) of the Motor Traffic Act to apply for a permit authorising "long distance carriage" of goods by lorry. Failure to satisfy the Commissioner that he regularly (if at all) made use of that licence during the relevant period does not divest him of his statutory qualifications to receive a permit.

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APPEAL from a decision of the Transport Appeals Tribunal in terms of section 212 of the Motor Traffic Act.

H. V. Perera, Q.C., with *Izadeen Mohamed* and *Carl Jayasinghe*, for the petitioner.

H. L. de Silva, Crown Counsel, for the 1st respondent.

No appearance for the 2nd respondent.

Cur. adv. vult.

March 2, 1956. GRATIAEN, J.—

The petitioner, which is a Company with limited liability, was at all material times empowered to carry on the business of carrying goods for hire. Shortly after the Motor Traffic Act No. 14 of 1951 came into operation, the Company applied to the Commissioner for a public carrier's permit under section 89 (1) (*b*), authorising the use of two lorries in the Uva Province and along the route " Badulla to Colombo via Ratnapura and Avissawella ". The second respondent objected to the issue of a permit on the following grounds :

(1) that the Company was not qualified to make an application under section 89 (1) (*b*) because it was not, immediately prior to December 31st 1949, " the holder of a licence authorising the use of lorries for substantially the same purposes and in substantially the same area of operation ; "

(2) that the Company had, in the alternative, not operated in the said area during the relevant period and was therefore not " the holder of a licence " within the meaning of section 89 (1) (*b*) ;

(3) that there were already suitable transport facilities to meet the requirements of the area.

The General Manager of Railways also objected to the Company's application on the first ground enumerated above, but later withdrew his objection on being satisfied that the Company did in fact hold licences " for the same area and payload ".

After inquiry, the Commissioner made an order on 24th April 1952 allowing the Company's application. He held as a fact that the Company did hold licences prior to December 31st 1949 for two lorries for the same purposes and payload and within the same area, and therefore possessed the necessary qualifications to apply for a public carrier's permit. He was also satisfied that, having obtained similar licences for 1950 and 1951, the Company had during these latter years carried on a considerable transport business within the area. He rejected the 2nd respondent's evidence that the Company was a " new comer " and that the area was already adequately served by other carriers of goods.

The 2nd respondent appealed to the Transport Appeals Tribunal against the order, his main complaint being that the Commissioner's inquiry was irregular in that he had been refused permission to scrutinise

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certain documents relied on by the Company in support of its application. He also contended, as a matter of law, that the Company was in any event not qualified to apply for a permit under section 89 (1) (*b*) without proof that, besides holding licences for its lorries for the period terminating on December 31st 1949, it had in fact "operated the area regularly during that particular period."

On January 11th 1953, the Tribunal, without giving its ruling as to the qualifications necessary to make an application under section 89 (1) (*b*), held that the Commissioner was wrong in refusing to allow the 2nd respondent to inspect certain documents. The Tribunal accordingly directed the Commissioner (i) to hold a fresh inquiry and to admit any further evidence which the parties might place before him, and (ii) thereafter to make his recommendations as to whether the Tribunal, in the exercise of its appellate jurisdiction, ought to make order allowing or refusing the Company's application.

The fresh inquiry before the Commissioner commenced on September 19th 1953 and was not concluded until October 2nd 1954. In due course the communicated to the Tribunal his findings of fact upon the evidence led before him, and made alternative recommendations as to how in his opinion the Company's application should be disposed of. His findings of fact, which bind the Tribunal and this Court, were to the following effect :

(1) that the Company did hold, for the period terminating 31st December 1949 and also for the years 1950 and 1951, licences of the description specified in section 89 (1) (*b*) ;

(2) that the Company had not used its lorries in the area in 1949, but that it had done so in 1950 and in 1951 and had thereby "provided a much-needed service to the public" in the carriage of goods generally and of vegetables in particular. He rejected the 2nd respondent's contention that the area was already "adequately and well served" in either of those respects.

Having recorded these findings of fact, upon which he was specially competent to reach a decision, the Commissioner made alternative recommendations to the Tribunal. He recommended that if, *as a matter of law*, an applicant was disentitled to a permit under section 89 (1) (*b*) unless he had in fact provided during the year 1949 a service for "substantially the same purposes and in substantially the same area," the Company's application under that section should be refused ; in that event he proposed that the appellant should be granted a permit under section 89 (1) (*a*) for the carriage of vegetables between the Welimada area and Colombo. On the other hand he recommended that if, *as a matter of law*, the mere possession of a licence prior to December 31st 1949 constituted a sufficient qualification to apply for a permit under section 89 (1) (*b*), the Company's application ought to be granted in view of his other findings of fact which I have already summarised.

The argument in appeal against the Commissioner's original order dated 24th April 1952 was resumed on March 26th 1955. On this occasion the Tribunal made an order refusing the Company a permit

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under section 89 (1) (*b*) but adopting the Commissioner's alternative recommendation for the grant of a permit under section 89 (1) (*a*) restricted to the carriage of vegetables from the Welimada area to Colombo. The Company claims that the Tribunal was not justified in interfering with the Commissioner's discretion to grant a permit under section 89 (1) (*b*) authorising the carriage of goods generally within the area and along the route specified in the Commissioner's order dated April 24th 1952.

The Tribunal admittedly had no jurisdiction to set aside the Commissioner's order in favour of the Company except on a question of law, and in my opinion, the only justification for substituting an order for a restricted permit under section 89 (1) (*a*) in the present case would have been :

either (1) that the Company was disentitled in law to a permit under section 89 (1) (*b*)

or (2) that the Commissioner, in exercising his discretion in favour of the Company, had either disregarded the factors which he ought to have taken into consideration before reaching his decision, or been influenced by irrelevant and extraneous considerations.

With regard to the question of law, I take the view that any person who in fact held a licence of the requisite character immediately before the specified date was duly qualified under section 89 (1) (*b*) to apply for a permit authorising " long distance carriage " of goods by lorry. Failure to satisfy the Commissioner that he had regularly (if at all) made use of that licence during the relevant period did not divest him of his statutory qualifications to receive a permit : on the other hand, it certainly constituted " previous conduct in the capacity of a carrier of goods "—within the meaning of section 90 (3) (*b*) of the Act—which ought to be taken into account by the Commissioner in exercising his discretion whether to allow or refuse the permit applied for.

In the present case, the terms of the Commissioner's original order and of his subsequent " recommendations " makes it clear that this factor was given due weight by him ; he was satisfied, however, that it was counter-balanced by other important considerations such as (1) the interests of the public generally, (2) the circumstance that the area was inadequately served and (3) that the Company had regularly and efficiently " provided a much-needed service " in 1950 and 1951. Accordingly the Tribunal was not justified in deciding, " as a matter of law ", that the Commissioner's order dated 24th April 1952 ought to be quashed or varied on appeal. The order of the Tribunal must therefore be set aside and the Commissioner's original order granting the Company a public carrier's permit under section 89 (1) (*b*) in respect of lorries Nos. CY 170 and CN 8829 should be restored. Let the Registrar now remit the case to the Tribunal for appropriate action under section 211 (6). The 2nd respondent must pay the Company's costs of this appeal which I would fix at Rs. 525.

SANSONI, J.—I agree.

Order set aside.

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[IN THE PRIVY COUNCIL]

1956 *Present :* **Viscount Simonds, Lord Radcliffe, Lord Tucker, Lord Cohen and Mr. L. M. D. de Silva**

KALIKUTTY KANAPATHIPILLAI, Appellant, *and* VELUPILLAI PARPATHY, Respondent

PRIVY COUNCIL APPEAL NO. 45 OF 1955

S. C. 346—M. C. Batticaloa, 10,248

Maintenance—Evidence Ordinance—Section 112—Birth during marriage—Presumption of legitimacy—" No access ".

Non-access within the meaning of section 112 of the Evidence Ordinance can be established by proof of the absence of such personal contact between husband and wife as would give rise to the presumption of sexual intercourse. " The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived."

In an application for maintenance in respect of an illegitimate child born on 24th May, 1950, the following facts were established :—The applicant was married about nine years before the hearing to one M. M left her after a few years—whether 2 or 4 is not clear—and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the applicant was living at all material times. For 5 or 7 years before the hearing the applicant and her husband had been living apart and during the time three children were born to M's mistress. In August, 1949, the applicant was living at Kallar where she had sexual intercourse with the defendant in his house in which she was residing with him and his wife and daughter. At this time, M was living with his mistress at Annamalai some 3 or 4 miles distant, but the applicant had never seen him from the time he left her.

Held, that the facts warranted a finding of no access within the meaning of section 112 of the Evidence Ordinance.

APPEAL by special leave concerning a judgment of the Magistrate's Court, Batticaloa.

Stephen Chapman, Q.C., for the defendant-appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

July 24, 1956. [*Delivered by* LORD TUCKER]—

This appeal concerns a judgment of the Magistrate's Court of Batticaloa in Ceylon dated 31st January, 1951, whereby it was adjudged that the appellant was the father of an illegitimate child born to the respondent on 24th May, 1950, and ordered that he should pay the respondent Rs. 30 a month for its maintenance.

The appellant lodged a petition of appeal from this judgment with the Supreme Court on 19th February, 1951, but his appeal was subsequently rejected by the Supreme Court as incompetent on the ground that the petition had been lodged out of time.

2—J. N. B 57724-1,593 (9/56)

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The present appeal, at the hearing of which the respondent was not represented, comes before the Board pursuant to special leave granted by Her Majesty in Council on 22nd February, 1952. It involves the meaning of the word "access" in a provision of section 112 of the Evidence Ordinance of Ceylon, with regard to which there has been over the years a considerable divergence of opinion in the Supreme Court of Ceylon.

The provision reads as follows :—

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

The respondent brought proceedings under the Maintenance Ordinance against the appellant in respect of a child born to her on 24th May, 1950.

The relevant facts are as follows :—

The respondent was married about nine years before the hearing to one Mylvaganam. He left her after a few years—whether 2 or 4 is not clear—and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the respondent was living at all material times. For 5 or 7 years before the hearing the respondent and her husband had been living apart and during this time three children were born to Mylvaganam 's mistress.

It is not now contended that there are any grounds for disturbing the findings of the Magistrate that the appellant and respondent had sexual intercourse in August, 1949, and that such intercourse resulted in the birth of the child on 24th May, 1950, unless the appellant can invoke the provisions of section 112 of the Evidence Ordinance set out above. It is accordingly unnecessary to refer to the evidence upon which the Magistrate based his decision on the issue of sexual intercourse between the appellant and the respondent.

For present purposes it can be taken that the only relevant facts are (1) that in August, 1949, the respondent was living at Kallar where she had sexual intercourse with the appellant in his house in which she was residing with him and his wife and daughter ; (2) that at this time Mylvaganam was living with his mistress and children at Annamalai some 3 or 4 miles distant. To these facts must be added the uncontradicted evidence of the respondent, accepted by the Magistrate, that she had never seen her husband from the time he left her.

The question is whether as a matter of law, as the Magistrate held, these facts warrant a finding of no access. It was submitted by counsel for the appellant that "access" in this section means opportunity for intercourse in the geographical sense that it was physically possible for the parties at the relevant time to have had sexual intercourse if they had so desired and consequently that in order to prove non-access impossibility of the creation of such opportunity must be established.

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In 1923 this question was considered in Ceylon by a full Bench in the case of *Jane Nona v. Leo* [1], where a previous decision in the case of *Sopi Nona v. Marsiyan* [2] was overruled and it was held that "access" means "actual intercourse". Subsequently, in 1946, Howard C.J., in *Ranasinghe v. Sirimanna* [3], held that in view of the decision of the Privy Council in *Karapaya Servai v. Mayandi* [4] on the corresponding section of the Indian Evidence Act (which is in identical language save for the omission of the words "or that he was impotent"), *Jane Nona's* case could no longer be considered as binding on him, and that "access" should be interpreted as meaning "possibility" or "opportunity" of intercourse. This decision was followed in *Selliah v. Sinnammah* [5].

In 1948, however, Basnayake, J., in *Pesona v. Babonchi Baas* [6], and in 1950 Swan J., in *Kiri Banda v. Hemasinghe* [7], considering the Privy Council decision on an Indian Act not binding on them, felt themselves free to revert to and follow the full Bench decision in *Jane Nona* (*supra*).

In this state of the authorities their Lordships consider it is desirable that they should endeavour to state what is in their view the true meaning to be given to this word in the context in which it appears in this Ordinance. They are of opinion that the language of this section, though not purporting or intended to reproduce exactly the English law on this subject, was clearly influenced by the English legal outlook on the subject matter as disclosed in the authorities in the course of years in which the word "access" so frequently appears.

It is true that the word has not in every case been used in precisely the same sense, but perhaps for present purposes the passage which is most helpful is the one referred to by Basnayake, J., in the case of *Pesona v. Babonchi Baas* (*supra*) at page 455, where he quotes the words used by Lord Eldon in *Head v. Head* [8], with reference to the opinion of the Judges in the Banbury Peerage Case. It runs as follows :—

> "I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse."

[1] (*1923*) *25 N. L. R. 241.*
[2] (*1903*) *6 N. L. R. 379.*
[3] (*1946*) *47 N. L. R. 112.*
[4] *A. I. R.* (*1934*), *P. C. 49.*
[5] (*1947*) *48 N. L. R. 261.*
[6] (*1948*) *49 N. L. R. 442.*
[7] (*1950*) *52 N. L. R. 69.*
[8] (*1823*) *Turn. L. R. at 140.*

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Their Lordships are of opinion that the significance of the words "no access" in section 112 of the Evidence Ordinance is not fully conveyed by assigning a precise verbal definition to the word "access" itself. They are satisfied that a test which considers merely the bare geographical possibility of the parties reaching each other during the relevant period must be rejected completely. Taken at its face value such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in many cases. Again, their Lordships are of opinion that "no access" would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been "personal access" of husband to wife in the sense given to that phrase in the passage from Lord Eldon's judgment which has been quoted above. On the other hand, if the evidence in a case did disclose that at any time during the period there had been such personal access—and it must be remembered that the section may often have to be applied when there has been no separation between the married pair—then "no access" would not be established unless the presumption that sexual intercourse had in fact resulted were rebutted by evidence that displaced the presumption. It is only necessary to add that, though the presumption arising from personal access is, as has been said, a rebuttable one, it is in the nature of things that nothing less than cogent evidence ought to be relied on for this purpose.

Applying this test to the facts as found by the Magistrate it is clear that the absence of such personal contact as would give rise to the presumption of sexual intercourse was established and his order consequently justified. His finding would equally be unassailable if non-access required positive proof of no actual sexual intercourse.

Their Lordships do not consider that this decision in any way conflicts with the judgment of the Board in *Karapaya v. Mayandi* [1], where the finding that the appellants had failed to establish non-access at the material date, December, 1911, could be justified on either view of the meaning of the word access. It is true that in delivering the judgment of the Board, Sir George Lowndes said: "It was suggested by counsel for the appellants that 'access' in the section implied actual cohabitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

This shows that their expression of opinion was purely obiter. Moreover the judgment does not define precisely what is meant by "opportunity of intercourse" and certainly lends no support to the appellant's test of bare geographical possibility.

As was said in the judgment of the Board in the recent case of *Alles v. Alles* [2]:—"The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived."

[1] *(1934) A. I. R. (P. C.) 49.*

[2] *(1950) 51 N. L. R. 416 at 418.*

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In the present case their Lordships are of opinion that the conclusion of "no access" was one which it was safe and proper for the Magistrate to draw and they will accordingly humbly advise Her Majesty that this appeal should be dismissed.

Appeal dismissed.

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

MRS. C. F. SENEVIRATNE, Appellant, *and* J. L. TISSAVERESINGHE, Respondent

S. C. 45—C. R. Colombo, 56,680

Landlord and tenant—Payment of rent—Agreement by landlord to accept cheques sent by post—Computation of date of payment—Rent Restriction Act, No. 13 of 1948, s. 13 (1) (a).

Where a landlord had expressly agreed that payment of rent should be made monthly by means of a cheque posted to his address—

Held, that the posting of the cheque by the tenant on a particular date operated as payment of the rent on that date, for the purpose of ascertaining whether the tenant was in arrear of rent.

APPEAL from a judgment of the Court of Requests, Colombo.

N. K. Choksy, Q.C., with *Miss M. Seneviratne*, for the defendant appellant.

E. R. S. R. Coomaraswamy, with *B. A. R. Candappa*, for the plaintiff respondent.

Cur. adv. vult.

March 14, 1956. GRATIAEN, J.—

This was an action to have the defendant ejected from a residential bungalow situated in Colombo, of which she had been the monthly tenant for several years, on the ground that the rent for August 1954 had been "in arrears for more than one month after the same became due" within the meaning of section 13 (1) (*a*) of the Rent Restriction Act, No. 13 of 1948.

There is no dispute as to the facts. The plaintiff, who is the landlord, resided and carried on his profession as a Proctor in Batticaloa, and the contract of tenancy had originally provided that the rental for

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each month should be paid on or before the 10th day of that month. It was subsequently agreed, however, that the rental should be paid before the last date of each month, and that, in order to suit the plaintiff's convenience, each payment should be made on the defendant's behalf by her Proctor (who lived in Colombo) by means of his cheque posted to the plaintiff's office at Batticaloa.

At the end of August 1954 the defendant's Proctor omitted through inadvertence to post a cheque as usual to the plaintiff. On 30th September 1954 he became aware of this omission, and immediately wrote to the plaintiff a letter apologising for the delay and enclosing a cheque for Rs. 194/32 which represented the total amount due as rental for August and September. This cheque was received by the plaintiff at Batticaloa on 1st October 1954.

Upon these admitted facts, the learned Commissioner of Requests took the view that, as the rent for August 1954 should have been "paid" not later than the last date of that month, the plaintiff had lost her statutory protection at the time when the cheque actually reached the plaintiff on 1st October—that is to say one month and one day after the rent "became due" within the meaning of section 13 (1) (*a*). The learned Commissioner rejected the defendant's contention that, having regard to the terms of the contract, the actual posting of the cheque in Colombo on 30th September operated as payment on that day itself. It is common ground that, if this latter view be correct, the defendant's protection under the Act has not been lost.

The issue must be determined by reference to the terms of the contract between the parties. In this case the plaintiff, as creditor, had expressly agreed to accept payment of the debt due to him in some form other than cash, and it was agreed that payment should be made by means of a cheque posted at Colombo to his address in Batticaloa. In other words, he constituted the postal authorities his agents to receive on his behalf at Colombo the letter containing the cheque. In these circumstances, the posting of the cheque must be taken as the equivalent in law of delivery to the plaintiff himself. In the result, the posting of the cheque on 30th September operated as a payment of the debt on that date. *Norman v. Ricketts* [1]; *Pennington v. Crossley* [2]; *Baker v. Lipton* [3]; *Thairwall v. The G. N. R. Co.* [4]. The legal position would, of course, have been different if the agreement between the parties had merely provided for payment of the rent on or before a particular date, in which event the unilateral decision of the debtor to send the rent by post at his own risk would not have sufficed to constitute payment until the money actually reached the landlord.

I would allow the appeal, and dismiss the plaintiff's action with cost in both Courts.

GUNASEKARA, J.—I agree.

Appeal allowed.

[1] *(1886) 3 T. L. R. 132.*
[2] *(1897) 13 T. L. R. 513.*
[3] *(1899) 15 T. L. R. 435.*
[4] *(1910) 2 K. B. 509 at 515.*

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1955 *Present* : **Pulle, J., and Weerasooriya, J.**

K. V. DINGIRI NAIDE *et al.*, Appellants, *and*
K. N. KIRIMENIKE, Respondent

S. C. 67—D. C. Anuradhapura, 3,566

Construction of Deeds—Two deeds executed contemporaneously—One single transaction—Kandyan Law Declaration and Amendment Ordinance, No. 3 of 1938—Section 2—" Gift "—Evidence Ordinance, s. 92, proviso 1— Fideicommissum—Revocability.

Where several deeds form part of one transaction and are contemporaneously executed each deed must speak only as part of the one transaction.

While a conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable, yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer.

By deed P2, A, a Kandyan, conveyed to her father, B, certain property for a consideration in money paid by B. By a separate deed, P3, executed on the same day as deed P2, B purported to make a fideicommissary gift to A of the identical property which he obtained on deed P2.

Held, that P2 and P3 constituted a single transaction and that, when they were read together, P3 did not fall within the definition of the word " gift " in section 2 of the Kandyan Law Declaration and Amendment Ordinance.

APPEAL from a judgment of the District Court, Anuradhapura.

Sir Lalita Rajapakse, Q.C., with *E. R. S. R. Coomaraswamy* and *A. Karunatilleke*, for the 1st to 3rd defendants-appellants and 1st added defendant-appellant.

H. W. Jayewardene, Q.C., with *E. S. Amarasinghe* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

August 4, 1955. PULLE, J.—

This appeal relates to a contest in an action instituted on the 18th August, 1952, to partition two allotments of land described in the schedule to the plaint. The parties are Kandyans. It is beyond dispute that at the date of action the plaintiff was entitled absolutely to a 4/20th share of the land and a further 7/20th share subject to a life interest in favour of her father, the 1st added defendant, who is one of the appellants. The 7/20th share was the subject matter of two deeds P2 and P3 bearing respectively numbers 3597 and 3598 executed almost at the same time on the 1st July, 1950. By P2 the plaintiff conveyed to the 1st added defendant-appellant 7/20th share of the two allotments, the subject matter of the action, and ten others for the sum of Rs. 500. It would appear that the interests conveyed by P2 were worth about Rs. 4,000. By deed P3 the 1st added defendant-appellant purported to gift to the plaintiff the identical interests which he obtained on P2, reserving to himself a life interest. The gift contained a clause which was the subject of much discussion both in appeal and in the trial court as to whether it created a fideicommissum.

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The trial of this case commenced on the 13th August, 1953, but pending the trial the 1st added defendant-appellant executed the deed 4 D1 of the 8th January, 1953, by which he sought to revoke the deed of gift P3 on the ground of plaintiff's ingratitude. Several interesting but difficult questions were argued before us. To dispose of this appeal it is not necessary to answer every one of them. It was contended on behalf of the plaintiff that upon reading P2 and P3 it is manifest that they constituted a single transaction and the implication flowing therefrom negatived the contention on behalf of the 1st added defendant-appellant that P3 was a Kandyan deed of gift. Then, assuming that P3 was a gift, it was contended that the deed, inasmuch as it created a fideicommissum, was irrevocable. On this point it was submitted that the decision in *P. Thepanissa et al. v. P. Haramanissa* [1] was erroneous and was contrary to *James Singho et al. v. Dingiri Banda* [2]. The final argument was that in any event the deed of revocation 4 D1 was void as being in contravention of section 67 of the Partition Act No. 16 of 1951.

The trial Judge held that P3 was not a deed of gift, having regard to the evidence of the circumstances in which it was executed and that the deed of revocation 4 D1 contravened section 67 of the Partition Act No. 16 of 1951. In his view P3 did not create a fideicommissum.

We are of the opinion that deeds P2 and P3 must be regarded as a single transaction and that when they are read together P3 does not fall within the definition of the word "gift" in section 2 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938. The authorities for reading the deeds together are set out in Norton on Deeds [3] where the judgment of Fletcher-Moulton, L. J., in *Manks v. Whiteley* [4] which was approved on appeal to the House of Lords is quoted. In that case the Lord Justice stated :

> "Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all others being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."

It was submitted to us on behalf of the 1st added defendant-appellant that the two deeds could not be regarded as a single transaction. Whether one looks at the evidence of the admitted circumstances in which they came to be executed or only the deeds themselves it is clear that in return for the money which the 1st added defendant-appellant paid as consideration for the purchase of the lands scheduled in P2 he agreed not to retain the whole of the beneficial interests but only a life interest, upon the termination of which the plaintiff was to enter into possession as a fiduciary, assuming that the 1st added defendant-appellant succeeded in giving effect to his intention to create a fideicommissum. On this

[1] *(1953) 55 N. L. R. 316.*
[2] *(1927) 5 T. C. L. R. 77.*
[3] *Pp. 86 to 88 Second Edition.*
[4] *(1912) 1 Ch. 735.*

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view the deed P3 cannot be regarded, within the definition of "gift" in the Ordinance, as a voluntary transfer, grant or conveyance made otherwise than for consideration in money or money's worth. The case of *Belgaswatte v. Ukku Banda et al.* [1] supports the plaintiff in her contention that while a conveyance by a Kandyan may be in the form of a gift not expressed to be irrevocable yet it would be open to the grantee to adduce evidence under the first proviso to section 92 of the Evidence Ordinance to establish the true consideration for the transfer.

Mr. Coomaraswamy was constrained to admit that, if oral evidence of the circumstances in which P2 was executed by the plaintiff could be looked at, the 1st added defendant-appellant was under a legal obligation to execute P3 and he could not by executing 4 D1 in 1953 nullify the rights flowing from P3 any more than he could have done so immediately after the execution of P3.

We have been invited to hold that since the decision of the Privy Council in *Saverimuttu v. P. Thangavelauthen* [2] and of this court in *B. M. G. Setuwa et al. v. B. T. Ukku* [3] the case of *Belgaswatte v. Ukku Banda* (*supra*) must be regarded as overruled. We are unable to accept this contention. In the first of these cases it was held that a transferor of a property for a consideration appearing on the face of the transfer was not entitled to prove a contemporaneous oral agreement by the transferee to reconvey the property, as being contrary to section 2 of the Prevention of Frauds Ordinance. In the second case the transferee sought to prove by parol evidence that although the conveyance purported to be one for valuable consideration it was in reality not a sale but a mortgage. It was held that parol evidence was not admissible. In the present case the plaintiff has only relied on the first proviso to section 92 of the Evidence Ordinance to show the true consideration for the conveyance P3.

If the deed P3 creates a fideicommissum attaching to a 7/20th share it has to be specified in the decree for otherwise the party to whom the share is allotted would take it free of the fideicommissum in terms of section 48 (1) of the Partition Act. The argument centering round P3, both here and below, as to whether it created a fideicommissum was intended on either side to serve a subsidiary purpose. For the plaintiff it was contended that if there was a fideicommissum then the transaction fell outside the purview of Kandyan Law and that, therefore, the deed P3 had only the qualities of a gift governed purely by the Roman Dutch Law. On that view it resulted, so it was argued, that P3 was irrevocable. For the 1st added defendant-appellant it was not seriously disputed before us that the donor on P3 did intend to create a fideicommissum but it was submitted that in the ultimate result the fideicommissum failed because there was no acceptance on behalf of the fideicommissarii and that, therefore, the application of the Roman Dutch Law did not arise nor the question whether *Thepanissa v. Haramanissa* (*supra*) was rightly decided. A decision that in any event P3 was irrevocable leaves the 1st added defendant-appellant indifferent as to whether there was a fideicommissum or not.

[1] (*1942*) *43 N. L. R. 281.* [2] (*1954*) *55 N. L. R. 529.*
[3] (*1955*) *56 N. L. R. 337.*

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The clause in question reads in the translation as follows :—

" Therefore all the right title and interest of me the said donor in and to the said lands be entitled to the said donee subject to the said life interest from today but shall not sell mortgage gift exchange or otherwise alienate the same except among the other heirs and after her death the same shall be entitled to her children or other heirs to possess and enjoy the same for ever so that they may do whatever with the same. "

The words " except among the other heirs " seem to be meaningless in the context and they can be excluded without impairing the rest of the clause which to my mind creates a fideicommissum in favour of the children of the donee. The donee was a married woman who at the date of action had two minor children by a man who was not her husband. Whether the word " children " in the clause means her lawful children is a question that does not fall to be determined in this case. Whether they exclude her minor children or not it is clear that the acceptance by the fiduciary donee created an irrevocable interest in favour of the fideicommissarii. Vide the case of *Mudaliyar Wijetunga v. Duwalage Rossie* [1]. I would amend the decree by providing that the 7/20th share allotted to the plaintiff be further subject to the fideicommissum created by deed No. 3598 of 1st July, 1950, attested by D. J. M. Mahipala, Notary.

Subject to the amendment indicated above the appeal should be dismissed with costs.

WEERASOORIYA, J.—I agree.

Appeal mainly dismissed.

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

THE URBAN COUNCIL OF DEHIWELA-MOUNT LAVINIA *et al.*, Appellants, *and* P. ANDY SILVA *et al.*, Respondents

S. C. 263–264—D. C. Colombo, 5,838/L

Appeal—Notice of tendering security—Signed by appellant's proctor and served on respondent's proctor—Validity—Civil Procedure Code, ss. 24, 29, 756 (1).

A notice of tendering security issued under section 756 (1) of the Civil Procedure Code is not invalid if it is signed by the appellant's proctor and addressed to, and served on, the respondent's proctor.

Urban Council—Recovery of rates—Seizure of property—Purchase of the property by Council in 1938—Prior sanction of Local Government Board not necessary—Transfer of the property by Council in 1942—Approval of Executive Committee

[1] *(1946) 47 N. L. R. 361.*

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not necessary—Municipal Councils Ordinance (Cap. 193), ss. 143, 145,146 (1)—Local Government Ordinance (Cap. 195), ss. 46, 47 (c), 182—Urban Councils Ordinance, No. 61 of 1939, ss. 48 (e) (1), 183 (1).

Where property seized by an Urban Council for the recovery of rates was purchased by the Council in the year 1938 in terms of section 182 of the Local Government Ordinance (Cap. 195), read with section 143 of the Municipal Councils Ordinance (Cap. 193)—

Held, that the prior sanction of the Local Government Board was not necessary. The provisions of section 47 (c) of the Local Government Ordinance were not applicable to such purchase.

Held further, that section 48 (e) (1) of the Urban Councils Ordinance, No. 61 of 1939, does not impose on an Urban Council any duty to obtain the prior approval of the Executive Committee in order to sell property purchased by it in the course of recovering rates and taxes.

APPEAL from a judgment of the District Court, Colombo.

S. J. Kadirgamar, with *P. Somatilakam*, for the 1st defendant appellant.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *John de Saram*, for the 3rd defendant appellant.

Stanley Perera, with *Vernon Martyn*, for the plaintiff respondent.

Cur. adv. vult.

July 3, 1956. K. D. DE SILVA, J.—

The land called Madatiyagahawatte bearing assessment No. 132, situate within the limits of Dehiwela-Mt. Lavinia Urban District Council was seized by the said Council and sold by public auction on 28.9.'38 for the recovery of a sum of Rs. 6/72 due as arrears of assessment rates. At this sale the Urban Council who is the 1st defendant in this case purchased the property and the chairman of the Council in terms of section 145 of the Municipal Councils Ordinance (Cap. 193) entered the certificate P21 on 20.12.'39 vesting the land absolutely in the Council free from all encumbrances. On 20.12.'41 the Council put up the land for sale by public auction and it was purchased by the 2nd defendant for a sum of Rs. 1,005/-. The Council having confirmed the sale executed the deed of conveyance P22 dated 22.5.'42 in favour of the 2nd defendant who by deed P23 dated 12.4.'49 sold the land to the 3rd defendant.

Admittedly the plaintiff was a co-owner of this land prior to the sale held on 28.9.'38 at which the Council purchased it. The plaintiff in his amended plaint prayed that the vesting certificate P21 and the deed of conveyance P22 be declared null and void as being ultra vires of the powers of the 1st defendant under the Local Government Ordinance (Cap. 195) and Ordinance No. 61 of 1939. The plaintiff also contended that P21 and P22 being null and void no title passed to the 3rd defendant on deed P23. He prayed that he be declared entitled to an undivided 19/45 shares of the land and also claimed the ejectment of the 3rd defendant and sought to recover damages from him. In the amended plaint

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no relief was claimed as against the 1st and 2nd defendants but they were made parties to enable the Court to effectively and completely adjudicate upon the questions involved in this action.

The learned District Judge held that the purchase of the land by the 1st defendant on 28.9.'38 was void inasmuch as the Council had failed to obtain the prior sanction of the Local Government Board as contemplated by section 47 (*c*) of the Local Government Ordinance (Cap. 195) and that therefore no title passed on P21. He further held that even if certificate P21 vested the property absolutely in the Council the sale by the latter on P23 to the 3rd defendant was ineffectual because there was a contravention of the provisions of section 48 (*e*) (1) of the Urban Councils Ordinance, No. 61 of 1939, in that the Council had failed to obtain the prior approval of the Executive Committee before the sale took place. Accordingly he entered judgment for plaintiff. The 1st and 3rd defendants have appealed from that judgment.

I would first deal with the purchase by the Council. The learned District Judge held that the vesting certificate P21 was null and void for failure of compliance with the provisions of section 47(*c*) (Cap. 195) which reads as follows :—

> 47. "For the purpose of the discharge of its duties under this Ordinance, a District Council (without prejudice to any other powers specially conferred upon it) shall have the following powers :—
>
> (*c*) with the sanction of the Local Government Board, to purchase or sell any land or buildings : "

The learned District Judge was of the view that in no circumstances is an Urban Council entitled to purchase or sell lands without the sanction of the Local Government Board. The Counsel for the appellants contended that section 47 (*c*) had no application whatsoever to the purchase of a land by the Council at a sale held for the recovery of rates and taxes in terms of section 182. The learned Counsel for the plaintiff respondent conceded that if that view was right his submission that no rights passed on P21 was untenable. Section 47 provides that an Urban Council shall have the powers set out in clauses (*a*) to (j) "for the purpose of the discharge of its duties under this Ordinance". The preceding section, i.e., section 46, enumerates the duties of the Urban Council. The collection of rates and taxes is not one of those duties. So that the powers of the Urban Council under section 47, among which is the right to purchase or sell land, are conferred on it for the purpose of discharging the duties set out in section 46. It would appear that the recovery of rates and taxes is a right and not a duty as contemplated by section 46. Therefore it would be necessary to obtain the prior sanction of the Local Government Board to purchase the land only if that purchase is made for the purpose of carrying out the duties imposed by the Council by section 46. It cannot be contended that the purchase of this particular land was made for carrying out the duties enumerated in section 46. Hence the provisions of section 47 (*c*) would not apply to this purchase. Apart from that, section 47 specifically provides that the powers

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conferred on an Urban Council by that section are " without prejudice to any other powers specially conferred upon it ". Section 182 of this Ordinance (Cap. 185) is one of a group of sections which deal with " assessment and recovery of rates and taxes ". Section 182 reads :—

> " All rates and taxes levied or imposed under this Ordinance, in respect of which no other method of recovery is specifically provided under this or any other Ordinance, or under any regulations made thereunder, shall be recoverable in the same manner as rates and taxes are recoverable under the Municipal Councils Ordinance, and all the provisions of sections 135 to 147 of that Ordinance shall with the necessary modifications apply accordingly. "

This section provides a special scheme for the recovery of rates and taxes and that scheme is the one set out in sections 135–147 of the Municipal Councils Ordinance (Cap. 193). The powers conferred by section 182 would fall within " any other special powers " of an Urban Council saved by section 47. I am unable to agree with the learned District Judge that the powers arising from section 182 are subject to the provisions of section 47 (*c*). I am of the view that the scheme set out in sections 135–147 of the Municipal Councils Ordinance (Cap. 193) operates independently of section 47 of the Local Government Ordinance (Cap. 195). Section 143 of the Municipal Councils Ordinance provides that whenever land or other immovable property is seized and sold for non-payment of rates or taxes it shall be lawful for the chairman or any other person authorised by him in that behalf to purchase the same. According to section 145 of that ordinance a certificate signed by the chairman in respect of the property purchased shall vest the property sold absolutely in the Council free from all encumbrances and such certificate is conclusive evidence of the title of the Council to such property. It is not suggested that the certificate P21 is not in the form contemplated by section 145. As I observed earlier no prior sanction of the Local Government Board is necessary before the chairman purchases a property in terms of section 143. Therefore on P21 the land in question vested absolutely in the Urban Council.

I would now deal with the sale of the land on P22 by the Urban Council to the 2nd defendant. The sale took place on 22.5.'42. By that time the Urban Councils Ordinance, No. 61 of 1939, had come into operation. By section 240 (1) of that Ordinance the Local Government Ordinance (Cap. 195) was repealed. But section 183 (1) of the new Ordinance substantially re-enacted section 182 of the repealed Ordinance. The learned District Judge held that according to section 48 (*e*) (1) of the new Ordinance the Urban Council required the prior approval of the Executive Committee before it could sell or exchange immovable property. The same observations I made on sections 46 and 47 of the Local Government Ordinance would apply to sections 47 and 48 of the Urban Councils Ordinance. Section 47 of the latter Ordinance sets out the duties of an Urban Council. Section 48 enacts " for the purposes of the discharge of its duties under this Ordinance an Urban Council (without prejudice to any other powers specially conferred upon it) shall have the following

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powers". One of those powers is to sell or exchange immovable property subject to the prior approval of the Executive Committee. The sale of this land was not effected for the purpose of discharging the duties enumerated under section 47. Besides that, section 48 was enacted without prejudice to any other powers specially conferred upon an Urban Council. Section 183 (1) of the Urban Councils Ordinance read with section 146 (1) of the Municipal Councils Ordinance (Cap. 193) in my view confers a special power on an Urban Council to sell property purchased by it in the course of recovering rates and taxes. This special power has nothing to do with Section 48 (*e*) (1). That being so the sale of this land by the Urban Council on P22 to the 2nd defendant is good. Therefore on P23 the 3rd defendant acquired a valid title to the land from the 2nd defendant. The learned District Judge held that the plaintiff had failed to establish a prescriptive title to this land. That finding was not canvassed in appeal. The plaintiff's action therefore fails. I would accordingly allow the appeal and dismiss the plaintiff's action with costs in both Courts payable to the 1st and 3rd defendants appellants.

The Counsel for the plaintiff-respondent raised a preliminary objection to the hearing of this appeal on the ground that the notice of tendering security issued under section 756 (1) C. P. C. was not in order. This notice was addressed to the proctor for plaintiff and signed by the 3rd defendant appellant's proctor and served on the plaintiff's proctor. In support of this objection Counsel relied on *Sivagurunathan v. Doresamy*[1]. In the course of his judgment in that case Basnayake J. stated :—

> " In regard to forms themselves the rule is that they are to be followed implicity so far as the circumstances of each case may admit. Section 756 and form 126 not being in conflict, the notice required by the section should be in the prescribed form and no other. "

The notice of security issued in this case is identical with form 126 except that it was signed by the appellant's proctor and addressed to the respondent's proctor. Section 24 C. P. C. states that any act required to be done by a party in an action or an appeal may be done by his proctor unless otherwise expressly provided. So that the appellant's proctor could have validly signed the notice of tendering security. In my opinion it is sufficient if the notice of tendering security is served on the respondent's proctor in view of the provisions of section 29 C. P. C. The facts in the case reported in *52 N. L. R. 207* can clearly be distinguished from those in the present case. In that case, in the notice of security served on the 7th defendant, there was a complete failure to mention that security for costs was being tendered for the 7th defendant. There is no such fundamental defect in the notice under consideration. For these reasons we overruled the preliminary objection.

SANSONI, J.—I agree.

Appeals allowed.

[1] *(1951) 52 N. L. R. 207.*

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1955 *Present:* **Gratiaen, J., and Swan, J.**

W. HERMAN SILVA *et al.*, Appellants, *and* W. KAINERISHAMY *et al.*, Respondents

S. C. 229–230—D. C. Kalutara, 28,896

Inheritance—Child of "putative marriage"—Right to inherit property of his father—Matrimonial Rights and Inheritance Ordinance (Cap. 47), ss. 23, 24, 33, 36.

In view of the express provisions of Sections 23, 24 and 33 of the Matrimonial Rights and Inheritance Ordinance, Section 36 cannot enable an illegitimate child to be recognised as enjoying the status of a legitimate child in accordance with a doctrine of Roman-Dutch Law relating to "putative marriages".

APPEALS from a judgment of the District Court, Kalutara.

S. C. E. Rodrigo, for the 2nd, 4th and 5th defendants-appellants in No. 229 and the 3–6th defendants-respondents in No. 230.

D. S. Jayawickreme, Q.C., with *C. de S. Wijeyeratne*, for the 2nd and 3rd plaintiffs-appellants in No. 230 and the 1st, 2nd and 3rd plaintiffs-respondents in No. 229.

November 25, 1955. GRATIAEN, J.—

This is an action for partition and there is only one point of contest between the parties. The dispute relates to the question as to who are the heirs of a man called Peduru who died in 1945. It is common ground that Peduru married the 1st plaintiff on 19th February, 1920, and that at the time of his death there were two lawful children of that marriage who are the 2nd and 3rd plaintiffs. One month after he had contracted this marriage, Peduru purported to marry the 2nd defendant and three children, namely, the 3rd, 4th and 5th defendants, were born to that union. The learned District Judge was attracted by an argument that, notwithstanding the clear and unequivocal provisions of section 33 of the Matrimonial Rights and Inheritance Ordinance, the 3rd defendant, although illegitimate, should be recognised as enjoying the status of a legitimate child in accordance with a doctrine of Roman-Dutch Law relating to "putative marriages". He rejected the argument that the same doctrine could be invoked by the 4th and 5th defendants because admittedly they were born after the 2nd defendant realised that Peduru was not her lawful husband. It is true that Section 36 made the rules of the Roman-Dutch Law as it prevailed in North Holland applicable to questions of intestate succession which are not expressly provided for in the Ordinance. But it seems to me that sections 23, 24 and 33 of the Ordinance leave no room for any argument which in the case of illegitimate children would permit our Courts to apply the rules of any other system of Law.

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For this reason appeal No. 230 must be allowed with costs and appeal No. 229 must be dismissed with costs. We set aside the judgment under appeal and send the case back with a direction that the learned District Judge should enter a decree for partition on the basis that the 1st, 2nd and 3rd plaintiffs are the sole intestate heirs of the deceased, Peduru. The 3rd defendant will, however, be declared in the interlocutory decree entitled to be compensated for the improvements specified in the original interlocutory decree. The plaintiffs are entitled to the costs of the contest in the court below which must be paid by the 2nd, 3rd, 4th and 5th defendants.

SWAN, J.—I agree.

Appeal No. 229 dismissed.
Appeal No. 230 allowed.

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

MARTHA IVALDY, Petitioner, *and* F. P. IVALDY *et al.*, Respondents

S. C. 429—In the matter of an Application for a Writ of Habeas Corpus

Habeas corpus—*Courts Ordinance, s. 45*—"*According to law*"—*Custody of children*—*Contest between father and mother*—*Preferential right of father*—*Applicability of Roman-Dutch Law.*

An ultimate order granting or refusing a writ of *habeas corpus* is determined by *the law of Ceylon.*

Where a mother sought, as against the father, the custody of two minor children, who were girls of the ages of thirteen and nine—

Held, that, under the Roman-Dutch Law, where there has been no legal dissolution of the common home, the father's right to the custody of his minor children remains unaffected by the fact of the separation of the spouses, and can only be interfered with on special grounds, such, for example, as danger to the life, health or morals of the children.

APPLICATION for a writ of *habeas corpus.*

G. E. Chitty, with *Cecil Gunawardena* and *A. M. Coomaraswamy*, for the petitioner.

S. J. Kadirgamar, with *John de Saram*, for the 1st respondent.

Cur. adv. vult.

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June 8, 1956. H. N. G. FERNANDO, J.—

The petitioner in this application for a writ of *habeas corpus* is the wife of the 1st respondent and the mother of the minor 3rd and 4th respondents, whose custody she seeks as against their father. The 2nd respondent is the principal of the Nuwara Eliya Convent at which institution the minor children were placed in February, 1954, by their father's authority. The minors are girls of the ages of thirteen and nine, having been born in France of parents who are respectively a Frenchman and American woman, and who married in America in 1938. There are also two male children of the marriage, one of whom is now in France and the other in America.

The husband and wife appear to have had frequent differences, particularly since the year 1948, when the wife and the children returned to America from France, and the wife had actual custody of the children until the end of 1953. Meanwhile she obtained a decree of divorce in 1952 in an American Court in an uncontested action on the ground of cruelty ; but the decree was set aside in June 1953 on the ground that the husband had not been served with summons in the action. In August, 1953, the husband met the wife in America and persuaded her to come out, with one of the boys and the two girls, to Ceylon, where the husband had been appointed to a post with the World Health Organisation ; and accordingly the wife and children arrived in Ceylon in November 1953. The wife alleged that she made the trip to Ceylon only on the understanding that her husband would deposit in advance the cost of return passages to America for herself and the children and that she would be free to return home with the children whenever she wished. Whether for good reason or not, the husband not only failed to honour this understanding, but also prevented the wife and the two girls from returning home even at her expense, and furthermore obtained an enjoining order from the District Court of Colombo restraining her from taking the children away from Ceylon. That order was by consent made applicable only pending the determination of the petitioner's present application to the Supreme Court. (I should add that the male child who came to Ceylon with the mother was sent to France from Ceylon sometime before this application was filed.)

At the inquiry held by the learned Magistrate of Nuwara Eliya, to whom the present petition was referred, a volume of evidence was led, much of which would have been irrelevant even in proceedings for divorce. Very much less evidence would, I think, have been adduced, if everyone concerned had appreciated the real issue which arises in a case where the wife of a marriage, which has not been the subject of a decree for divorce or judicial separation, challenges the husband's right to the custody of children of the marriage. Recent experience of the frequency of such applications makes me welcome the opportunity to consider the relevant authorities, and I appreciate the assistance which Mr. Kadirgamar has given me in this connection. The present case is fortunately not complicated by any question of the Conflict of Laws, counsel for both sides having conceded that I should apply the law of Ceylon. There is ample support for the view that a dispute as to the

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custody of the children may be determined by the law of the country of residence, particularly in the absence of any competing order made by a competent court of the country of domicile. (*Halsbury*—3rd Edition, p. 126, 127 ; *Dicey : Conflict of Laws*, 6th Edition p. 480.)

The writ of *habeas. corpus* was unknown to the Roman-Dutch Law, and as Schneider J. observed in the case reported in the twenty-ninth volume of the *New Law Reports* at page 52, section 45 (then section 49) of the Courts Ordinance is obviously founded on the English Law, resort to which must therefore be had in considering the purpose and scope of the jurisdiction of this Court to issue the writ. Clearly this question whether a mandate should issue under section 45 " to bring up before this Court the body of any person " must be determined in the same manner as it would be by a Court in England ; and if such only was Fisher C. J.'s opinion, when he said " we should . . . . apply English law in considering the question which has been submitted " (*Gooneratnayaka v. Clayton* [1]), I would respectfully agree. But the ultimate order made in exercise of the special jurisdiction is " to remand or discharge any person so brought up, or otherwise deal with such person *according to law* ", the section having in contemplation, in my opinion, *the law of Ceylon* relevant to the question whether the person should be remanded, discharged or otherwise dealt with. It was probably with this aspect of the matter in mind that Drieberg J. in the same case saw the need to remark that Courts under the Roman-Dutch Law had the same power as the Courts in England in respect of the particular matter with which this Court was then concerned. There have been many decisions in Ceylon which purport to follow English precedents in disputes as to the custody of children, and which, by reason of the essential similarity of the English and Roman-Dutch principles, will in all probability be found to conform with the latter. But if, as I think, the Roman-Dutch law is applicable in determining whether the right a parent to custody should be enforced or not, then there should be *direct* resort to the Roman-Dutch law.

Spiro (*The Law of Parent and Child* p. 170) points out that there are only two exceptions to the fundamental rule of the Roman law that the parental power of the parent does not allow of any interference. " Parent " where father and mother are both alive, means of course the father who is the natural guardian of his children (*Van Rooyen v. Werner* [2]). The first exception to the rule is that a court, in authorizing the parents to have a separate home, is also competent to regulate the exercise of the parental power in accordance with the interests of the minor child concerned. This exception has received statutory force in Ceylon by sections 619 to 622 of the Civil Procedure Code, which empower a District Court to make orders for custody either pending a matrimonial action, or after a decree of divorce or judicial separation has been entered. The second exception, for a case where a separate home has not been authorized, is referred to in a recent judgment in South Africa (*Calitz v. Calitz* [3]) as follows :—" The Court

[1] (*1929*) *31 N. L. R. 132 at 133.*

[2] *9 S. C. 425.*

[3] (*1939*) *A. D. 56 at page 63.*

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has no jurisdiction where no divorce or separation authorizing the separate home has been granted, to deprive the father of his custody except under the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such, for example, as danger to the child's life, health or morals."

The distinction between the two exceptions is, I think with respect, well explained in the judgment to which I have just referred. When a common home no longer exists in law, by reason of a matrimonial decree, the natural right of the father to custody, which flows from the duty to maintain the common home, is interrupted and the question of custody can be raised by either spouse for decision by the Court. The general principle applicable in that event is that the innocent spouse is entitled to an order for custody of the children, unless the Court, with due regard to the rights of that spouse and to the interests of the children, otherwise determines; and in this way, a father who is the guilty spouse will in ordinary circumstances, or even who is innocent *may* in extraordinary circumstances in the interests of the welfare of the children, be deprived of his natural right to custody. But where there has been no legal dissolution of the common home, the father's right to custody remains unaffected by the fact of the separation of the spouses, and can only be interfered with in *special circumstances*.

Spiro (idem pp. 171 and 172) refers to later decisions of the South African Courts which appear to have amplified the meaning of the expression "special grounds" in the principle as stated in the *Calitz case*. In particular, there was the observation made *obiter* in *Green v. Green* [1] that the Courts will not hesitate to deprive the father of custody where that custody is shown to be detrimental to the interests of the child. But even this observation underlines the distinction between the two exceptions to which I have referred. In applying the first, the Court will (with due regard to the preferent right of an innocent spouse) attempt to choose a course which will promote the interests and welfare of the child: in applying the second, the Courts will recognize the father's prima facie right, except when the element of danger or detriment is positively established.

The question I have to determine in this case, therefore, is not whether the estrangement of the petitioner from the respondent is attributable to the fault of the latter, nor whether it is in the interests of the happiness or welfare of the two daughters of the marriage that they be committed to the care of their mother. The sole question is whether the right of the father to custody is to be denied him owing to the prospective danger to the life health or morals of the children or owing to other circumstances establishing detriment to their interests. It is extremely difficult to cull from the recorded evidence the grounds upon which the petitioner relies, and I will deal with the principal grounds as stated by her counsel:—

(I.) The respondent assaulted his wife physically in the presence of the children.

[1] *S. A. L. R. 1948 (2), p. 1051.*

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This alleged assault, though (as far as I can gather) not directly spoken to by the petitioner in her evidence in this case, was admitted by the respondent. It took place in the attic of a house or flat in France in September 1948 when the petitioner was packing, apparently in preparation for her departure from that country for America. According to the evidence of the petitioner in the abortive divorce proceedings in America, this assault took place without any provocation and only for the reason that the defendant was " brooding " over his failure to obtain a house on which he had set his heart. The respondent, on the contrary, stated in cross-examination before the Magistrate that he had been gravely provoked by the petitioner's allegation that he had previously threatened to kill his children. While the gravity of this assault is not denied, I find it impossible to believe the version that it was unprovoked. Moreover this assault was not made the reason for the petitioner's departure for America in November 1948, which did not in the legal sense constitute a " separation " by mutual consent. Her evidence here is that she strongly objected to going to America, and only did so because her husband desired to take some medical training and suggested that she and the children should live in America with her parents in the *interim*. It is also significant that right from the time of her return to America, the petitioner regularly and even with great frequency wrote long and affectionate letters to her husband in France, in none of which (so far as I can gather from a quick reading of them) was there any direct reference to this assault ; instead, in many of them, she regrets her own treatment of the respondent and expresses her intention to behave differently in the future. Whether the petitioner can rely upon this assault in 1948 for the purposes of divorce proceedings is doubtful ; it is much more doubtful whether she can now urge it as a reason why his custody of the children should be a source of danger to the latter.

(II.) The second allegation is that the respondent " abandoned his family in a strange country " when they arrived in Ceylon in 1953.

Assuming it to be true that the father showed a marked preference for the son and at first disregarded the two daughters after one of them failed to greet him like a daughter should, there is nothing else in the evidence to warrant this serious allegation of desertion. On the petitioner's own evidence, the father provided Hotel accommodation for the family at Galle, where he was working at the time, and there is no allegation that he failed to pay the Hotel Bills. Quite soon after, and up to date, the two girls were placed by mutual agreement at the Convent in Nuwara Eliya, and much if not all of the cost of their board and education appears to have been met by the father. I do not doubt the petitioner's statement that she spent her own money in Ceylon, but, having regard to the amount of the respondent's own income, he appears to have incurred quite reasonable expenditure on the maintenance and education of his children while in Ceylon.

Connected with this allegation is the suggestion that the respondent failed to support his wife and family while in America between 1948 and 1953. Assuming that he contributed little to the family till during

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that period, the question is whether he was guilty of deliberate neglect. But it is admitted that he had then no regular or adequately remunerative employment and was trying to improve his qualifications; and the petitioner who appears to be an educated and capable woman, willingly undertook a large share of the family burden. Here again, the letters to which I have referred—there was a period during May 1950 when she wrote several pages nearly every day remembering the happiness of the past and voicing her hopes for the future—contain no complaint on the score of failure to maintain the home. The respondent was no doubt aware that the children would be adequately maintained through the mother's voluntary efforts during a period of financial stringency, but so soon as he himself obtained sufficiently remunerative employment he did again resume his normal financial obligations. I can see nothing in these circumstances to establish a case of deliberate neglect.

(III.) Thirdly it was alleged that the Respondent has contrived to evade the decison of this dispute in the American Courts by inducing the petitioner, through what was described as a trick, to bring the children to Ceylon. Connected with this is the allegation that he does not in truth desire to have charge of the two girls and is in fact utilising their presence in Ceylon in order to bargain with his wife for the custody of the eldest boy Philippe who is now in America.

In outlining the facts, I have already stated that the respondent failed to honour the understanding that monies would be deposited in advance for the return passages to America from Ceylon of the petitioner and the children. His explanation has been that the petitioner has contrary to her own agreement prevented Philippe from joining him in France. Of this there is certainly no clear evidence, the letters from Philippe and from his relatives in America indicating on the contrary that Philippe, who is now sixteen years old, is quite determined to remain in America and that owing to a serious fall from a window in May 1954, it would have been quite inadvisable for him at that time to have made the journey to France. It is impossible to set out here the various items of evidence which directly or indirectly affect the allegation of a trick, but upon a consideration of them I am of opinion that it was dishonourable on the part of the respondent to obstruct the return to America of his two daughters and that he has taken advantage of what he has been advised to be the Law of Ceylon on the subject of custody. One document is in this connection significant. In May 1955, while the present application was pending, a draft agreement was prepared by which the respondent agreed to permit the two daughters to be taken back to America but which also provided for several conditions concerning the right of the respondent to have custody and to visit the two male children. The petitioner states that she did not sign that agreement because she was not agreeable to all the terms, and there is in my opinion much substance in the suggestion that the agreement was something of a bargain. That circumstance does not however by itself establish

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that the respondent does not in good faith desire to have the custody of his two daughters ; at most it would indicate that, if a choice were to be forced on him, he would prefer the custody of the male children.

(IV.) A fourth ground—which I express in milder terms than those Mr. Chitty employed—is that the respondent is neurotic, liable to violence and mentally unstable.

It is said that his behaviour in Court and his reaction to cross-examination establish this. It is unfortunately true that in proceedings of this nature, when domestic grievances and unhappiness are the subject of searching examination and dispute in a Court of Law, the character and temperament of each spouse do not often emerge without blemish. Neither the husband nor the wife in this case was an exception to the usual rule.

The respondent is supposed to have consulted five different psychiatrists and to be thus estopped from claiming to be sane and mentally stable. But his explanation that he was forced to do so owing to the importunities of his wife is borne out by at least one certificate from one of the psychiatrists concerned. I do not think that the mere fact that a husband and wife, particularly when faced with differences of race, temperament and religion, do not understand each other, would be a good ground for thinking that either of them is abnormal or a proper subject for psychiatric treatment. Much more reliable evidence than that which the petitioner has been able to produce would be required to justify a court in forming such an opinion of her husband.

(V.) The last allegation to which I propose to refer is that the respondent has been guilty of cruelty to the eldest daughter, Anne.

Some of the items of evidence relied on are trifling and even absurd, such as the statement that Anne was reluctant to go out riding because the respondent made the horse gallop too fast. The principal fact established in this connection was that in December 1954 the respondent forcibly held down Anne for about two hours and spanked her thereafter. Apparently the respondent had requested Anne to lay a cloth on the dining table which Anne had refused to do. Anne became violent when the respondent insisted on her obedience and he then seized hold of her, insisting that she would be not released unless she laid the cloth. The child was certainly the first and very much to blame ; but even if the whole story as related by the petitioner be true, this one instance of physical interference with Anne surely cannot establish either habitual cruelty or even a tendency towards cruelty or hatred to the children on the part of the respondent.

There is, however, another aspect of this matter which has given me much anxiety. There is ample evidence on the record to show that Anne has often been disrespectful to her father even in the presence of third parties and that she undoubtedly shows a marked preference in affection for her mother. What concerns me is whether this antipathy

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to her father is so strong or so deep rooted that it will induce her to do violence to herself or will seriously affect her mental health if she is now compelled to return with her father to France.

This Court has previously applied the English principle that the wishes of a child under sixteen are not as a general rule to be consulted in determining a question of custody. (*Gooneratnayaka v. Clayton* [1]). But examination by the judge of a child and an indication of her own wishes in the matter can I think be of assistance in deciding whether custody by a particular parent would be detrimental to the child's interests. And in these circumstances I felt it necessary to summon and examine both children.

In the case of the younger child, Elaine, while it became clear to me that she would choose to be with her mother rather than with her father, she stated in answer to me that she was fond of the latter and I formed without hesitation the opinion that there would be no danger whatever in committing her to his custody even if it meant separation from the mother. The case of the elder child Anne is somewhat different. She is now thirteen years of age and appears to be thoughtful and mature for her years ; between the ages of five and eleven she has been under the care and in the company of the mother (almost to the total exclusion of the father) at Nebraska, which she still describes as " home " ; she is aware of the differences between her parents and is naturally concerned and affected by her mother's unhappiness over the family disputes ; she complains also that her father makes " scenes " at table and has not been, generally speaking, " fair " to the family ; far from entertaining the natural affection of a child for a father she appears to have a fairly strong dislike for him. One important cause of her distrust is that her father failed to keep his promise that they would be free to return from Ceylon to America whenever they wished ; and she was quite unable to appreciate the suggestion I made to her that what might seem to have been a dishonourable trick in other circumstances might be viewed in a different light in the case of a parent who is anxious to recover the custody of his children. But despite this antagonism, which was I think due partly to the unfortunate separation from the father as well perhaps as to the faults of both parents, I cannot say that the committal of Anne to the custody of her father would involve reasonable risk of danger or detriment to herself. She readily agreed that the tablecloth incident (which she said was one of many but nevertheless the most serious) was a case where both she and her father behaved badly. She said, in answer to Mr. Chitty, that she was " afraid " of her father, but it was clear that this did not mean fear of physical violence or injury but rather an anticipation of " scenes ", criticisms and disagreements. The distress and unhappiness which is often likely to arise in the course of her relations with her father would not, I feel sure, provoke her to violence or cause her to brood unduly over her misfortunes. The sister of the convent in Nuwara Eliya who has good opportunities of observation agreed that Anne is quite a normal child and that her relations with her father are not likely to be deleterious to her character. While,

[1] *(1929) 31 N. L. R. at p. 132.*

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therefore, it is abundantly clear that Anne would very much prefer to live with her mother and that in America, it cannot be said that her antagonism to her father is so serious that her committal to his custody would be a source of danger to her life, health or morals or even that (if the principle should be more widely expressed) it would be detrimental to her interests. In the result the petitioner has failed to establish sufficient grounds upon which a court can exercise the power to deprive the father of his natural right of custody. She herself undoubtedly would be anxious to promote the happiness of the children, and Anne was confident that the mother would accompany the children to France in the event of their having to go with the father. As was remarked in the *Calitz case*, it still lies with the mother, at least for the present, to return to her husband and thus avoid the disadvantage which the children might otherwise suffer in consequence of their separation from her. I trust that the advisers of both parties will attempt to secure such a solution to the present difficulties.

The petitioner's application is refused and the 1st respondent will be entitled to the custody of the two children. The order made on 11th March, 1955, by my brother Sansoni lapses with the determination of this application and the 1st respondent may, when he so desires, remove the children from the custody of the 2nd respondent and remove them from Ceylon. The order made by the Magistrate, Nuwara Eliya, on 26th March, 1955, will no longer apply against the 1st respondent.

Application refused.

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