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November, 1967, to August, 1968

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ERRATA

Page 70 — Footnote, after (1965), insert 68.

Page 476 — Last line, for *Jayatileke* read *Yapatileke*.

DIGEST

Adjournments—

See POSTPONEMENTS.

Administration of Estates—

Privy Council—Administration of estates—Judicial settlement of accounts—Application under Civil Procedure Code, s. 729—A legatee's objections to the accounts—Right of appeal to the Privy Council—Scope—Voluntary Settlement of future shares in a company—Death of Settlor before allotment of the shares—Rights, if any, of the Trustees of the Settlement to the ownership of the shares when they come to be allotted—Trusts Ordinance (Cap. 87), s. 6—Identity of property designated in a last will—Quantum of evidence—Article due to a legatee—Refusal by the executors to deliver it—Personal liability of the executors—Gifts under a will—Direction that they should take effect on the "date of distribution"—Meaning of expression "date of distribution"—Relevancy of date of final assessment of estate duty—Estate Duty Ordinance (Cap. 241).

Appeals concerned with the taking of an account, as in a judicial settlement of accounts under section 729 of the Civil Procedure Code, will not be entertained by the Judicial Committee of the Privy Council if questions of fact rather than principles of law are involved.

(i) On 28th February 1950 the principal shareholder of a company (Associated Newspapers of Ceylon Ltd.) executed, for the benefit mainly of his youngest son, a Voluntary Settlement, which included 6,000 ordinary shares in the company of which he was the registered owner and 1,000 further ordinary shares "which had been issued but not yet allotted and which the Settlor is about to be caused to be allotted into the names of the Trustees". On the same day he executed in favour of the Trustees of the Settlement a transfer of the 6,000 shares of which he was the registered owner, but died on 13th June 1950, before any allotment of the 1,000 shares of the new issue had been made. In due course the 1,000 shares were allotted to the executors of the deceased shareholder's estate on payment by them of a balance sum of money due in respect of those shares.

The question arose whether the Settlement Trustees were entitled to call upon the executors to transfer to them the 1,000 newly allotted shares. In view of doubts as to whether a valid trust had been constituted in respect of those shares, the main contention on behalf of the respondent executors was that the deceased shareholder should be regarded as having formally agreed with the Trustees to cause to be allotted, or to transfer, to them the 1,000 new shares. Consequently, it was argued, so soon as the new shares came to be allotted, the Trustees of the Voluntary Settlement were in a position to enforce the promise made by the deceased.

Held, that, assuming that if the necessary basis of fact were shown to exist an effective trust could be constituted under the law of Ceylon, there was no evidence, either extrinsic or intrinsic, to establish that the alleged promise was made by the deceased. More than a mere manifestation of intention is required in order to constitute a promise enforceable in law. Accordingly, the 1,000 shares which were the subject of the new issue did not pass to the Trustees of the Voluntary Settlement but devolved under the last will of the deceased.

(ii) Where the identity of a piece of land designated by a Testator falls to be determined upon consideration of not only a particular plan mentioned in the will but also upon other pieces of extrinsic evidence, the Privy Council will not interfere with the concurrent findings of the trial Court and the Supreme Court unless some substantial misdirection or error in law has occurred.

(iii) The respondent executors rejected the claim of the appellant to a painting to which the latter was entitled as legatee under the will and wrongly gave it to a third person.

Held, that, if the executors could not deliver the painting to the appellant, they should pay him the value of the picture, the amount of such value to be paid by the executors personally and not out of the estate of the Testator.

(iv) The last will directed that the gifts contained therein should take effect on the " date for distribution " and after the value of the relevant properties has been " finally assessed for estate duty purposes ".

Held, that the date for distribution related to the making of the final, and not a provisional, assessment for purposes of estate duty. As the final assessment figures were in fact communicated to the executors in August 1957, the date on which distribution could have been made could properly be taken to be 31st December, 1957.

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Amendment of Pleadings—

See PLEADINGS.

Appeal and Revision—

1. *Appeal—Time limit for presenting petition of appeal—Sunday not a dies non—Holidays Act, No. 17 of 1965, s. 2 (a)—Civil Procedure Code, s. 754 (2)—Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960.*

According to section 2 (a) of the Holidays Act, No. 17 of 1965, Sunday is no more a *dies non*. Sundays, therefore, cannot be excluded now when counting the number of days within which a petition of appeal should be presented in terms of section 754 (2) of the Civil Procedure Code.

Relief granted under Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, applies only to appeals filed within the prescribed time.

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2. *Appeal—Fresh evidence—Circumstances when reception of fresh evidence may be justified.*

Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

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3. *Indictable offence—Preliminary inquiry—Opinion of Magistrate that the evidence is not sufficient to put the accused on his trial—Power of Magistrate to discharge the accused—Stage at which it may be exercised—Power of Attorney-General subsequently to direct the Magistrate to commit the accused for trial—Magistrate's refusal to comply with such direction—Right of Attorney-General then to move Supreme Court in revision—Constitutional validity of Attorney-General's power to order committal of accused—" Judicial power "—Principle of Separation of Powers—Criminal Procedure Code, ss. 5, 159 to 164, 191, 337, 356, 391—Courts Ordinance, ss. 19, 37.*

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See CRIMINAL PROCEDURE (6).

4. *See also PRIVY COUNCIL.*

Autrefois Acquit—

See CRIMINAL PROCEDURE (4).

Bail—

Courts Ordinance (Cap. 6)—Section 31—Admission to bail thereunder—Service of indictment on prisoner not a condition precedent—“ Might properly be tried ”.

The relevant part of section 31 of the Courts Ordinance is as follows :—

“ If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner.”

Held, that it is not essential that the prisoner should be served with a copy of the indictment before he can become entitled to be admitted to bail by virtue of the provisions of the Section.

Mendis v. The Queen (66 N. L. R. 502) overruled.

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Bastardy—

See MAINTENANCE.

Betting on Horse-racing Ordinance—

Unlawful betting on horse-racing—Quantum of evidence—Elements necessary to constitute a proper search by a police officer—“ Premises ”—Betting on Horse-racing Ordinance (Cap. 44), ss. 2, 3 (3), 11 (2), 17, 19 (b).

The presumption of being guilty of the offence of unlawful betting on a horse-race would not arise under section 19 (b) of the Betting on Horse-racing Ordinance unless the instruments of unlawful betting found in the possession of the accused person were found in consequence of such a search of premises as was in conformity with the requirements of section 17. The possession by a person of betting slips or other material which may be deemed to be instruments of unlawful betting does not by itself constitute an offence.

The evidence in the present case was that a police party did not set out on any information received in regard to any unlawful betting being carried on in any premises but that, while they were proceeding along a road, they came across the accused by accident and, when he was searched on suspicion, found in his possession certain instruments of unlawful betting.

Held, that there was a clear contravention of section 17 (2) of the Betting on Horse-racing Ordinance because the police officer who made the search did so without recording the grounds of his suspicion and, secondly, because there was no proof that the documents in question were contained in any “ premises ” within the meaning of that word as defined in section 2.

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Bills of Exchange Ordinance—

See NEGOTIABLE INSTRUMENTS.

Births and Deaths Registration Ordinance—

See REGISTRAR OF BIRTHS, MARRIAGES AND DEATHS.

Bribery Act—

1. *Bribery Act—Prosecution under section 19—Burden of proof—Can Court take judicial notice of certain facts?*

In a prosecution, under section 19 of the Bribery Act, against a police officer for accepting a gratification which he was not authorised by law or the terms of his employment to receive, the court cannot take judicial notice that a police officer is not authorised by law or the terms of his employment to accept a gratification for doing an act which would have the effect of interfering with the course of justice in a proceeding pending before a court of law.

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2. *Bribery Act (Cap. 26)—Sections 14 and 20—“In his capacity as a Member of Parliament”—“Procuring any grant or benefit for another person”—Meaning of words “procure”, “grant” and “benefit”.*

The accused-appellant was charged on three counts. On the first count he was charged under s. 14 of the Bribery Act with having accepted, in his capacity as a Member of Parliament, a gratification of Rs. 3,000 as an inducement or reward for doing a certain act, namely, procuring for one Dharmasena a licence for the sale of liquor. Count No. 2 charged the appellant under s. 20 of the Bribery Act with having accepted the said sum as an inducement or reward for procuring for Dharmasena a grant from the Government, namely, a grant of a licence for the sale of liquor. The third count was an alternative to count 2, that he accepted the gratification as an inducement or reward for procuring for Dharmasena a benefit from the Government, namely, a licence for the sale of liquor, in breach of s. 20 of the Bribery Act.

The evidence established the fact that the accused solicited a gratification of Rs. 3,000 from Dharmasena on a promise that he would get the licence issued to Dharmasena, and on the pretext that the money was to be given as a bribe to the Minister for Home Affairs for the issuing of the licence. The Minister, whose evidence was believed *in toto* by the trial Judge, testified that the accused, as a Member of Parliament of the Government Party, had direct access to him and often saw him in his office on various matters. He said also that Members of Parliament often mention to him such matters as applications for liquor licences, but that such matters would not be matters of record. He stated that the only reason urged by the accused in connection with the application of a man from Eheliyagoda for a liquor licence was that the man had been a strong supporter of the accused at his election. That reason had nothing to do with the accused's constituency or with the interests of good Government. Further, the Minister denied that he had requested or taken any money from the accused in connection with the matter of an application for a liquor licence.

Held, (i) that the evidence failed to establish one element required by s. 14 of the Bribery Act, viz., that the gratification was accepted as an inducement for the accused doing an act *in his capacity as a Member of Parliament*. The undertaking that the accused would get a liquor licence for Dharmasena was not an undertaking to do any act in his capacity as a Member of Parliament.

(ii) that the word “procure” in s. 20 of the Bribery Act means obtaining for another person by one's care or efforts.

(iii) that s. 20 (1) (a) (vi) of the Bribery Act does not refer only to a grant of some proprietary right or interest enjoyed by the Crown. The expression “grant or benefit” in this context must be widely construed. Further, the operative word is the word “benefit”, the ordinary wide meaning of which is not narrowed by its association with the words “grant” or “lease” which precede it.

GUNASEKARA v. THE QUEEN 457

Buddhist Ecclesiastical Law—

1. *Buddhist ecclesiastical law—Ruhunu Kataragama Maha Devale—Claim by a person to be hereditary Maha Kapurala thereof—Burden of proof.*

Plaintiff sued the Basnayake Nilame of the Ruhunu Kataragama Maha Devale for a declaration that he was a duly appointed Kapurala of the Devale on the footing that his father (added defendant) was the hereditary Maha Kapurala who, according to custom, had the right to appoint subordinate Kapuralas and in the exercise of that right appointed the plaintiff as Kapurala on May 1, 1955. He alleged that the defendant refused to recognize his appointment and prevented him from functioning as a Kapurala.

Held, that the burden of establishing that the added defendant had the right to appoint the plaintiff a Kapurala was on the plaintiff.

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2. *Privy Council—Estoppel of tenant and licensee—Applicability of English law—Evidence Ordinance ss. 100, 116—Interpretation of s. 116—Buddhist ecclesiastical law.*

See LANDLORD AND TENANT (11). .. .

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3. *Buddhist ecclesiastical law—Pudgalika property of a bhikkhu—Scope of temple's right to it after bhikkhu's death—Buddhist Temporalities Ordinance, ss. 20, 23.*

Section 23 of the Buddhist Temporalities Ordinance reads as follows :—

“ 23. All pudgalika property that is acquired by any individual bhikkhu for his exclusive personal use shall, if not alienated by such bhikkhu during his life-time, be deemed to be the property of the temple to which such bhikkhu belonged unless such property had been inherited by such bhikkhu.”

Held, that leaving a Last Will is not an alienation contemplated by Section 23.

INDRASUMANA THERO v. KALAPUGAMA UPALI .. .

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Butchers Ordinance—

Municipal Council of Colombo—By-law prohibiting sale of meat of an animal not slaughtered in the Municipal Slaughter-House—Invalidity—By-law 30 of chapter 13 of the By-laws and Regulations—Butchers Ordinance (Cap. 272), ss. 2, 13, 14, 15, 18.

By-law 30 of chapter 13 of the By-laws and Regulations of the Municipal Council of Colombo is *ultra vires* of the Butchers Ordinance in that it restricts the sale of meat to sale only of meat of animals slaughtered in the Municipal Slaughter-House and thus prohibits the sale of meat of animals slaughtered at other authorised places.

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Certiorari—

See WRIT OF CERTIORARI.

Ceylon (Constitution) Order in Council—

See CONSTITUTIONAL LAW.

Charges and Indictments—

Indictment—More than one accused—Circumstances in which they can be said to have jointly committed one and the same offence—Extent of the liability of each accused—Offence committed with common intention—No requirement that section 32 of Penal Code should be specified in the indictment—Position where one accused alone is charged when he acted jointly with others—Penal Code, ss. 8, 32, 33, 35, 293—Criminal Procedure Code, ss. 167, 168, 169, 171 to 174, 178, 184.

When two or more persons who acted with common intention are charged together with committing the same offence, a failure to refer to section 32 of the Penal Code in the charge is not a bar to the accused being convicted on the basis of individual liability for a joint offence. In such a case even the word "jointly" need not be used in the charge, and each accused is responsible for any criminal act done by any of the other accused in furtherance of the common intention. If, at the conclusion of the trial, the court finds that the offence was in fact committed by some only of the accused and that the other accused were not participants, the court would still be free by reason of the provisions of section 171 of the Criminal Procedure Code to convict the former, unless the error in stating (or implying) in the charge that they committed the offence jointly with others misled them in their defence.

Four persons were tried before a District Court on an indictment. Count 1 of the indictment alleged that all of them committed the offence of causing grievous hurt with a sword to one Alwis. The 4th accused was acquitted on the ground that he took no part in the incident. The 1st accused was convicted. The evidence throughout was that only the 1st accused used a sword. In regard to the 2nd and 3rd accused, the trial Judge found that each of them struck Alwis with a club and that they and the 1st accused acted with the common intention of causing grievous hurt to Alwis. Nevertheless he acquitted the 2nd and 3rd accused stating, as reason, that the indictment had failed to say that "the accused had acted with a common intention under section 32".

Held, that the fact that no reference was made in the indictment to the common intention set out in section 32 of the Penal Code was not an error or omission which could prevent the court from convicting the 2nd and 3rd accused on count 1 of the indictment, of the offence of causing grievous hurt.

Obiter (T. S. FERNANDO, J., dissenting): Where only one of a group of persons who have jointly committed an offence is charged and tried alone, and it is sought to make him liable for the acts of those who are not being charged at all, the charge should comply with section 169 of the Criminal Procedure Code to the extent of saying that the accused committed the offence with others unknown or named. In such a case, although it may be sometimes impracticable—particularly in cases of circumstantial evidence—to allege joint participation, the failure to do so is curable only on the rather tenuous grounds stated in section 171 of the Criminal Procedure Code.

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Cheques—

See NEGOTIABLE INSTRUMENTS.

Citizenship—

1. *Quo warranto—Member of Municipal Council—Allegation of disqualification on the ground that he is not a citizen of Ceylon—Burden of proof—Presence of a member's name in register of voters—Effect—Local Authorities Elections Ordinance (Cap. 262), ss. 8, 9 (1), 10, 18—Citizenship Act (Cap. 349), s. 2 (2).*

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See LOCAL AUTHORITIES (1).

Civil Procedure—

1. *Administration of estates—Judicial settlement of accounts—Application under Civil Procedure Code, s. 729—A legatee's objections to the accounts—Right of appeal to the Privy Council—Scope—Voluntary Settlement of future shares in a company—Death of Settlor before allotment of the shares—Rights, if any, of the Trustees of the Settlement to the ownership of the shares when they come to be allotted—Trusts Ordinance (Cap. 87), s. 6—Identity of property designated in a last will—Quantum of evidence—Article due to a legatee—Refusal by the executors to deliver it—Personal liability of the executors—Gifts under a will—Direction that they should take effect on the “date of distribution”—Meaning of expression “date of distribution”—Relevancy of date of final assessment of estate duty—Estate Duty Ordinance (Cap. 241).* 97

See ADMINISTRATION OF ESTATES.

2. *Civil Procedure Code—Section 547—Suit for recovery of property left by a testator—Failure of plaintiff to produce probate—Action not maintainable.*

Where a person sues for the recovery of immovable property and bases his title on the Last Will of a person whose estate amounted to or exceeded in value Rs. 2,500, section 547 of the Civil Procedure Code debars him from maintaining the action unless he produces the probate.

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3. *Civil Procedure Code—Section 423—Commission to examine a witness outside Ceylon—Scope of Court's discretionary power to refuse it.*

Where the evidence of a witness residing outside Ceylon is admittedly vital for the decision of an action, section 423 of the Civil Procedure Code does not give any discretionary power to the Court to refuse the issue of a commission on the ground of the absence of a reason for the witness's inability to come to Ceylon.

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4. *Interrogatories—Omission to answer them—Procedure thereafter—Civil Procedure Code, ss. 94, 98, 100, 109.* 261

See INTERROGATORIES.

5. *Action which is null and void ab initio—Subsequent amendment of plaint to include a valid claim—Effect—Civil Procedure Code, s. 93.* .. 308

See PLEADINGS (1).

6. *Amendment of pleadings—Scope—Civil Procedure Code.* .. 332

See PLEADINGS (2).

7. *Decree—Power of Court to amend it subsequently—Civil Procedure Code, ss. 187, 188, 189.* 361

See PARTITION ACTIONS (4).

8. *Civil Procedure Code—Section 218 (k)—“Contingent right”—Trust—Interest of a beneficiary—Liability to be sold in execution of a money decree against him.* 467

See EXECUTION OF DECREES.

9. Postponement—Refusal despite production of medical certificate—Duty of Court to have considered whether the medical certificate was authentic.	563
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See POSTPONEMENTS.

10. See also APPEAL AND REVISION ; CIVIL PROCEDURE CODE.

Civil Procedure Code—

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Section 109	261
Section 146	332
Section 147	169
Section 163	169
Sections 187, 188, 189	361
Section 218 (k)	467
Section 219	574
Section 423	155
Section 547	139
Section 729	97
Section 754 (2)	46
Section 776 (4)	574
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See also APPEAL AND REVISION ; CIVIL PROCEDURE.

Collective Court—

See COURTS ORDINANCE (2).

Commissions of Inquiry Act—

1. *Commission of Inquiry—Power of Commission to summon any person residing in Ceylon to give evidence—Meaning of expression “residing in Ceylon”—Ignorance of legal meaning—Mistake of law or mistake of fact?—Penal Code, s. 72—Terms of reference—Objection as to their being ultra vires—Scope—Summons to give evidence—Mode of service—Refusal to be sworn and to give evidence—Punishability as offence of contempt against authority of the Commission—Scope—Allegation of bias against Commissioner—Whether it is relevant—Incapacity of Commissioner to compel attendance of a witness—Determination of Commissioner in relation to offence of contempt—Whether it offends against principle of Separation of Powers—Constitution Order in Council, 1946, s. 4 (2)—Courts Ordinance (Cap. 6), ss. 47, 89—Commissions of Inquiry Act (Cap. 393), ss. 2, 7 (c), 10, 12, 16, 21.*

(A) The respondent, who was a citizen of Ceylon, went to England in 1949 after selling all his property and assets in Ceylon and was registered in 1959 as a citizen of the United Kingdom and Colonies. He owned properties in England. In 1955 he married a Ceylon citizen, in Ceylon, and both husband and wife lived in London until 1961. His wife lived in Ceylon since November 1961 with her five children, and since 1963 she resided in her own house in Colombo. She made regular visits to London each year, staying there with her husband for about 3 to 5 months during those visits. Since 1964 she was shareholder in a Company which was incorporated in Ceylon, and was the Chairman of that Company since 1961. The respondent himself was not a shareholder or an officer of that Company but was its Overseas Representative. He visited Ceylon twice a year, on transit visas or holiday visas, for the purpose of performing his functions as the Overseas Representative of the Company and for the purpose of discussing the affairs of the Company with his wife and

Company officers. His pattern of life was such that, while he had his permanent residence in England and many business activities there, he also regularly came to Ceylon in the ordinary course because of his business connections with the Company and of his family ties.

Held, that the respondent was a person residing in Ceylon within the meaning of section 7 (c) of the Commissions of Inquiry Act and was, therefore, liable to be summoned, while he was on a visit to Ceylon, to give evidence at a meeting of a Commission appointed under that Act.

Held further, that refusal by the respondent to be sworn or affirmed amounted to an offence of contempt against the Commission under section 12 (1) of the Commissions of Inquiry Act, although the respondent had been advised and had believed in good faith that he was not a person "residing in Ceylon". Such a mistake is a mistake of law. The provisions, therefore, of section 72 of the Penal Code relating to a mistake of fact could not provide a defence to the respondent.

(B) A commission was appointed under the Commissions of Inquiry Act for the purpose of inquiring into and reporting whether abuses of the description referred to in the Warrant had occurred in relation to or in connection with "relevant" tenders for Government contracts, and in relation to or in connection with "relevant" Government contracts, during the period commencing on 1st June 1957 and ending on 31st July 1965.

Held, that the terms of reference were not *ultra vires* of the powers conferred by section 2 (1) of the Commissions of Inquiry Act.

(C) A summons may be considered as served within the meaning of section 12 (1) of the Commissions of Inquiry Act when, even though it has not been served and executed by the Fiscal as required by section 21 of that Act, there is voluntary acceptance of it by the person concerned, when it is served or delivered by some one other than the Fiscal.

(D) The respondent who was summoned to give evidence before a Commission of Inquiry refused to be sworn and to give evidence. When he was called upon to show cause why he should not be punished under section 47 of the Courts Ordinance, read with section 10 of the Commissions of Inquiry Act, for the offence of contempt against and in disrespect of the authority of the Commission, it was contended on his behalf that section 12 (1) of the Commissions of Inquiry Act relieved him of the obligation to be sworn if he could show that he had reasonable cause for the refusal. The particular cause which he relied upon was that he had a reasonable apprehension that the Commissioner would be likely to be biased against him in his consideration of evidence given by him.

Held, (i) that a refusal to be sworn, whatever be the purpose of or the reason for the refusal, is within the scope of the first four words "refuses to be sworn" of paragraph (b) of section 12 (1) of the Commissions of Inquiry Act and constitutes the offence of contempt. The second part of paragraph (b) does not permit reasonable cause to be shown for a general refusal to give evidence; it applies only to a refusal to answer particular questions.

(ii) that apprehension of bias on the part of the Commissioner could not in law be relied on by a person for the purpose of showing cause when he is charged with contempt falling under section 12 of the Commissions of Inquiry Act, more especially if that person is only a witness. A commission appointed under that Act is only a fact-finding body and does not exercise judicial or quasi-judicial functions.

(iii) that the provisions of section 12 of the Commissions of Inquiry Act do not conflict with the principle of the Separation of Powers.

(iv) that a Commissioner has no power to compel the attendance of a witness by issuing a warrant or proclamation against him or by causing him to be detained.

2. *Commissions of Inquiry Act (Cap. 393)—Sections 10 and 12—Offences punishable as offences of contempt of the authority of the Commission—Limited number only—Courts Ordinance (Cap. 6), ss. 3, 47, 57—Civil Procedure Code, ss. 109 (2), 137 (2), 140, 294, 295, 650, 656, 682 (2), 713, 717, 718—Penal Code (Cap. 19), ss. 2, 3, 4—Industrial Disputes Act, s. 40A (1)—Applicability of maxim expressio unius exclusio alterius.*

No acts and omissions are punishable by the Supreme Court under section 10 of the Commissions of Inquiry Act as offences of contempt against or in disrespect of a Commission of Inquiry except the offences specified in section 12 (1) of that Act. Accordingly, a person who writes an article in a newspaper in disrespect of a Commission of Inquiry cannot be punished for an offence of contempt.

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Common Intention—

Indictment—More than one accused—Circumstances in which they can be said to have jointly committed one and the same offence—Extent of the liability of each accused—Offence committed with common intention—No requirement that section 32 of Penal Code should be specified in the indictment—Position where one accused alone is charged when he acted jointly with others—Penal Code, ss. 8, 32, 33, 35, 293—Criminal Procedure Code, ss. 167, 168, 169, 171 to 174, 178, 184.

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See CHARGES AND INDICTMENTS.

Company Law—

Privy Council—Voluntary Settlement of future shares in a Company—Death of Settlor before allotment of the shares—Rights, if any, of the Trustees of the Settlement to the ownership of the shares when they come to be allotted—Trusts Ordinance, s. 6.

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See ADMINISTRATION OF ESTATES.

Compensation for Improvements—

Compensation for improvements—Value of the fruits of the improvements cannot be deducted.

A bona fide possessor who is entitled to compensation for improvements effected by him is under no liability to account, to the owner of the property improved, for the value of the fruits which he derived from his own improvements.

GUNAWARDENA v. BANDARANAYAKA 524

Conciliation Boards Act—

1. *Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963—Sections 6, 14 (1) (a), 18—Dispute relating to a contract of tenancy—Jurisdiction of a civil court to hear it—Requirement of certificate from Chairman of Panel of Conciliators—Inability to serve summons on the party complained against—Effect.*

Where a Panel of Conciliators has been constituted for a Conciliation Board area, an action instituted in that area concerning a dispute as to whether or not there has been a breach of a contract of tenancy between the parties falls within the ambit of section 6 of the Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963. The action cannot therefore be instituted in, or be entertained by, a civil court without the production of a certificate from the Chairman of the Panel of Conciliators in compliance with the requirements of section 14 (1) (a) of the Act.

Where a dispute is referred to a Conciliation Board, there is no legal requirement of the presence at the inquiry of the party against whom the complaint is made. If the Board is satisfied that, despite reasonable effort, it is not possible to serve summons or otherwise secure the attendance of the party complained against, there is no legal bar to an *ex parte* inquiry and the issue of a certificate thereafter that it is not possible to effect a settlement.

SAMARASINGHE v. SAMARASINGHE 276

2. *Charges of criminal trespass and intentional insult—Jurisdiction of Magistrate's Court—Objection that alleged offences were committed in a Conciliation Board area—Burden of proof—Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963, ss. 3 (2), 3 (3), 14 (1) (b).*

Where, in a prosecution in a Magistrate's Court for an offence specified in Part I of the Schedule to the Conciliation Boards Act, it is submitted on behalf of the accused that the Court has no jurisdiction to entertain the prosecution in view of the provisions of section 14 (1) (b) of the Conciliation Boards Act, the burden is on the accused to show that the area in which the offence is alleged to have been committed has been declared to be a Conciliation Board area.

WIJEWARDHENA v. INSPECTOR OF POLICE 281

3. *Conciliation Boards—Scope of their functions—Conciliation Boards Act, No. 10 of 1958, ss. 2, 6, 14.*

The Conciliation Boards Act, No. 10 of 1958, does not apply to an action upon a contract which was made in an area prior to the date when it became a Conciliation Board area and in respect of which the dispute between the parties also arose prior to that date.

E. COATES & Co. LTD. v. A. F. JONES & Co. LTD... 359

Constitutional Law—

1. *Privy Council—Constitutional law—Imposition of Civic Disabilities (Special Provisions) Act, No. 14 of 1965, ss. 7, 10—Validity—“Judicial power”—Usurpation of judicial power by Parliament—Statute altering constitutional rights of particular persons—Mode of ascertaining the true character of such enactment—Amendment or repeal of a provision of the Constitution by inconsistent enactment—Validity thereof in the absence of an expressed intention to amend—Ceylon (Constitution) Order in Council, 1946, ss. 13 (3) (k), 24, 29 (1) and (4)—Mandamus to the Clerk and Assistant Clerk of the House of Representatives—Inappropriateness of such proceedings to question validity of the Act.*

A Commission of Inquiry constituted under section 2 of the Commissions of Inquiry Act made reports in 1959 that allegations of bribery against six persons, who were members of the Legislature, had been proved. Consequently, on 16th November 1965, the Imposition of Civic Disabilities (Special Provisions) Act was enacted imposing certain civic disabilities on those six persons, one of whom was the appellant. Section 7 of the Act is in the following terms:—“Where, on a day immediately prior to the relevant date, a person to whom this Act applies was a Senator, or a member of the House of Representatives or of any local authority, his seat as a Senator or such member, as the case may be, shall be deemed, for all purposes, to have become vacant on that date.”

The appellant, who became a member of the House of Representatives on 5th April 1965, made the present application for a writ of *mandamus* requiring the respondents, who were the Clerk and the Assistant Clerk of the House of Representatives, to recognise him as a member of Parliament and to pay him his remuneration and allowances as a member. The validity of the Imposition of Civic Disabilities (Special Provisions) Act was challenged on the ground that it was unconstitutional. It was not

disputed that the appellant's seat was vacated upon a ground not to be found in section 24 of the Constitution of Ceylon and that it was, to that extent, inconsistent with the provisions of the Constitution. Nor was it disputed that the Constitution embodies the doctrine of the separation of legislative, executive and judicial power, at least to the extent that it commits judicial power to the Courts to the exclusion of the Parliament. It was contended, however, that the Act, although it purported to have been enacted as an amendment of the Constitution in the manner provided by section 29 (4) thereof, was not an effective amendment for the reasons (1) "that the Act was not a law." Instead of being the exercise of legislative power it was the usurpation of judicial power", and (2) "that even if the Act were an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character".

Held, (i) that the impugned Act is what it purports to be, a law made by Parliament, and not a usurpation of judicial power. Its character is not that of a bill of attainder or a bill of pains and penalties because it does not condemn the appellant for any action, i.e., it contains no declaration of guilt of bribery or of any other Act. The disabilities which it imposes do not have the character of punishment for guilt. It is the finding of the Commission of Inquiry that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any findings of its own against the appellant or any other of the six persons named in the Schedule. The principal purpose which the disabilities imposed by the Act serve is not to punish particular persons against whom the findings of bribery were made but to keep public life clean for the public good.

(ii) that an Act which is inconsistent with section 24 (1) of the Constitution is not invalid merely because it does not provide expressly for the amendment or repeal of a provision of the Constitution. The words "amend or repeal" in the earlier part of section 29 (4), read with section 29 (1), of the Constitution cover and make valid an amendment or repeal by inconsistent enactment, provided that the special legislative procedure laid down in section 29 (4) is complied with.

Held further, that an application for the issue of a writ of *Mandamus* to the Clerk and the Assistant Clerk of the House of Representatives was not appropriate procedure to question the validity of the impugned Act.

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2. *Public servant—Contract of employment with the Crown—Claim for arrears of pay—Unenforceability by action in the Courts—Relationship between the Crown and its servants—Inapplicability of Roman Dutch Law—Applicability of English Law as altered or modified in Ceylon—Right of action when a public servant's terms of engagement are laid down by statute—Treasury Circular issued under compulsion of Official Language Act, No. 33 of 1956—Is it valid?—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 29, 46, 51, 57, 58, 60, 61* ..

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See PUBLIC SERVANTS (1).

3. *Indictable offence—Preliminary inquiry—Opinion of Magistrate that the evidence is not sufficient to put the accused on his trial—Power of Magistrate to discharge the accused—Stage at which it may be exercised—Power of Attorney-General subsequently to direct the Magistrate to commit the accused for trial—Magistrate's refusal to comply with such direction—Right of Attorney-General then to move Supreme Court in revision—Constitutional validity of Attorney-General's power to order committal of accused—"Judicial power"—Principle of Separation of Powers—Criminal Procedure Code, ss. 5, 159 to 164, 191, 337, 356, 391—Courts Ordinance, ss. 19, 37.*

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See CRIMINAL PROCEDURE (6).

4. *Commissions of Inquiry Act—Determination of Commissioner in relation to offence of contempt against authority of the Commission—Whether it offends against principle of Separation of Powers.* 409

See COMMISSIONS OF INQUIRY ACT (1).

5. *Registrar of Births, Marriages and Deaths—Appointment and dismissal—No right to be heard before dismissal—Marriage Registration Ordinance, s. 6—Births and Deaths Registration Ordinance—Interpretation Ordinance (Cap. 2), ss. 12, 14 (f)—Scope of principle audi alteram partem—Certiorari—Constitutional law.* 472

See REGISTRAR OF BIRTHS, MARRIAGES AND DEATHS.

6. *Public officers—Public Service Commission—Power to require a public officer to retire after the age of 55 years—Rule fixing the age of optional retirement—Validity—Should the officer be given a hearing?—Natural justice—Public Service Commission Rule 61—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 58, 60—Public and Judicial Officers (Retirement) Ordinance (Cap. 355), s. 2—Ceylon Independence Order in Council, 1947 (Cap. 377), s. 8.* 529

See PUBLIC SERVANTS (2).

Contracts—

1. (i) *Contracts—Contract of guarantee—Elements necessary—Interpretation—Separate documents relating to same obligation—Effect on issue relating to misjoinder of parties and causes of action—“Cause of action”—Civil Procedure Code, s. 5.*

(ii) *Bills of Exchange Ordinance—Section 89 (1)—Promissory note payable “at Colombo”—Requirement of presentment for payment—Effect of failure to present for payment when such presentment is necessary.*

(i) Plaintiff lent and advanced to the 1st defendant on 10th August 1956 a sum of Rs. 40,000 on a promissory note of which the 1st defendant was maker, the 2nd defendant was payee and the plaintiff was indorsee. A few days later, on 13th August 1956, the 1st defendant mortgaged to the plaintiff, as security, the crops of Oakfield Estate. On the same day, the 2nd defendant guaranteed to the plaintiff in writing P5 the repayment by the 1st defendant of the said sum of Rs. 40,000 and interest, renouncing all benefits of suretyship and making himself jointly and severally liable with the 1st defendant. This agreement, although it was described in the deed P5 as a guarantee and referred to the rights and benefits to which sureties were entitled, was in reality a contract under which the 2nd defendant became a principal debtor.

In the present action the plaintiff sued the 1st and 2nd defendants for the recovery of a restricted claim of Rs. 25,000. He based his claim against both of them on the promissory note as the first cause of action and, alternatively, on the crop bond and P5 as the second cause of action. It was contended on behalf of the defendants that, in regard to the 2nd cause of action, there was a misjoinder of parties and causes of action inasmuch as the writing P5 given by the 2nd defendant was not a guarantee but was a separate and principal obligation undertaken by the 2nd defendant to pay the debt due from the 1st defendant to the plaintiff upon the crop bond.

Held, (a) that a contract cannot be regarded as a contract of guarantee if it is such a contract only by description but is not so in reality. The mere use of a descriptive term cannot affect the reality of a transaction. Deed P5, when read as a whole, was not a guarantee of the 1st defendant's debt to the plaintiff but was, in reality, a contract whereby the 2nd defendant became a principal debtor of the plaintiff for consideration.

(b) that the term "cause of action" has been given a broad meaning in section 5 of the Civil Procedure Code. The obligation sought to be enforced from the 1st defendant on the crop bond and from the 2nd defendant on the writing P5 was one and the same. Though there were two separate documents, they were in fact one and referred to the same obligation. The promissory note, the crop bond and the writing P5 were entered into by all the parties as parts of a single transaction and with the consensus of all. In the circumstances, although P5 was not a contract of guarantee, there was no misjoinder of parties and causes of action in regard to the alternative second cause of action.

(ii) As for the first cause of action, the promissory note was drawn by the 1st defendant in favour of the 2nd defendant, who indorsed it to the plaintiff. In the body of the note it was made payable "at Colombo" to the 2nd defendant or his order. The 1st defendant lived at Hendala and the 2nd defendant at Pamunuwa. The 2nd defendant was only an accommodating party who immediately indorsed it and gave it over to the plaintiff, who then paid Rs. 25,000 out of the consideration to the 1st defendant. It was only the plaintiff who had a place of business in Colombo. It was thus clearly understood by all parties to the promissory note that payment was to be made to the plaintiff.

Held, that the court can look into the surrounding circumstances to ascertain if the place of payment designated in a promissory note is a "particular place" within the meaning of section 89 (1) of the Bills of Exchange Ordinance. In the present case a particular place of payment was mentioned in the body of the promissory note and, therefore, presentment for payment was necessary before the plaintiff could sue the defendants on the promissory note. In an action on a promissory note where presentment for payment is necessary, it is necessary to aver in the plaint filed against the maker and the indorsers that the note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants. As the plaintiff in the present case failed to make these necessary averments in the plaint and also failed to cure the defect in the plaint by raising the relevant issues at the trial, the plaint failed to disclose a cause of action against the defendants on the 1st cause of action.

CEYLON ESTATE AGENCY AND WAREHOUSE CO. LTD. v. DE ALVIS..

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2. *Contract of employment with the Crown—Claims or arrears of pay—Unenforceability by action in the Courts.*

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See PUBLIC SERVANTS.

Control of Prices Act—

1. *Offence of selling an article in excess of controlled price—Sentence of imprisonment obligatory—Control of Prices Act (Cap. 173), as amended by Act No. 44 of 1957 and Act No. 16 of 1966, s. 8 (6)—Criminal Procedure Code, s. 15B.*

Where a person contravenes any provision of the Control of Prices Act, section 8 (6) of that Act, as amended by Act No. 16 of 1966, makes the imposition of a term of imprisonment obligatory even in the case of a first offender. An order of detention till rising of Court, under section 15B of the Criminal Procedure Code, cannot be substituted in place of a sentence of imprisonment.

THE ATTORNEY-GENERAL v. GUNAWARDENE

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2. *Price controlled article—Sale at excessive price to a decoy sent by the Police—Punishability—“Sale by retail”—“Consumption and use”—Control of Prices Act (Cap. 173), ss. 4 (1), 8.*

The sale of a price-controlled article to a decoy employed by the Police for detection of offences under the Control of Prices Act is a sale by retail for the purposes of the Act and an Order made thereunder. Such a sale is a sale for “consumption and use” within the meaning of the relevant Price Order.

MARTIN v. KANDY POLICE 141

3. *Control of Prices Act—Charge of selling imported foodstuffs in excess of maximum controlled price—Inspector of Foodstuffs—Competency to give evidence as an expert.*

In a prosecution for selling Masoor Dhal Imported Split (Grade I) in excess of the maximum controlled retail price, an Inspector of Foodstuffs who has sufficient experience and practical knowledge in the examination of imported foodstuffs is competent to give evidence as an expert in order to establish that the subject of the sale was Masoor Dhal Imported Split (Grade I).

SOMALINGAM v. JAYAWARDENE 214

4. *Control of Prices Act—Food Price Order—Meaning of word “mutton”.*
The word “mutton” in Food Price Order No. C 283 includes frozen mutton.

WIJEYESINGHE v. FAROUK 474

5. *Control of Prices Act—Price control order relating to sale of Milk Maid Condensed Milk—Charge of selling a tin of 14 ozs. of such Milk at excessive price—Burden of proof relating to quantity of milk.*

In a prosecution for selling a tin of 14 ozs. of Milk Maid Condensed Milk in excess of the maximum retail price fixed by a price control order in force under the Control of Prices Act, it is incumbent on the complainant to lead evidence that the quantity of milk sold by the accused was 14 ozs. The statement on the label of the tin is hearsay and does not constitute evidence to prove the contents of the tin.

PIYADASA v. YAPATILEKE 475

6. *Control of Prices Act—Charge of selling 14 ozs. tin of Farm Brand Condensed Milk at excessive price—Proof of weight of tin unnecessary—Burden of proof—Evidence Ordinance, s. 114.*

A Price Control Order fixed the maximum retail price of a 14 ozs. tin of condensed milk. If a tin is sold bearing a label which specifies the weight of the contents as 14 ozs., the prosecution need not, in the case of an alleged contravention of the Price Order, adduce proof of the actual weight of the contents of the tin. The statement as to weight on the label constitutes an admission as to weight by the seller.

Piyadasa v. Yapatileke (70 N. L. R. 475) not followed.

JALALDEEN v. JAYAWARDANE 476

Co-operative Societies Ordinance—

Co-operative Societies Ordinance—Section 53—Dispute relating to a contract of employment—Reference to an arbitrator—Powers of the arbitrator.

Where a dispute relating to a contract of employment between a co-operative society and an officer of the society is referred by the Registrar to an arbitrator, the arbitrator can allow only a remedy or

relief due to a party under the law. Accordingly, the officer cannot be awarded any compensation if he is ordered to be retired for inefficiency on the ground of mismanagement. An arbitrator under the Co-operative Societies Ordinance does not have the same powers as a labour tribunal under the Industrial Disputes Act.

KALUTARA TOTAMUNE MULTI-PURPOSE CO-OPERATIVE SOCIETIES UNION LTD. v. H. S. PERERA

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Court of Criminal Appeal Decisions—

1. *Evidence Ordinance—Section 157—“About the time when the fact took place”—Admissibility of evidence—Question must be decided by Judge at the time when the evidence is tendered—Criminal Procedure Code, s. 244.*

In a prosecution for attempted murder, the injured person's evidence at the trial was that, after he was attacked at about 7 p.m. on the day in question and was lying injured right through the night, he made a statement to the doctor who examined him on the following day at 9.10 a.m. when he was taken to the hospital.

Held, that the injured person's statement to the doctor, although it was made about 14 hours after he was attacked, was made at the earliest opportunity and was, therefore, corroborative of his testimony at the trial. It was covered by the expression “about the time when the fact took place” in section 157 of the Evidence Ordinance.

“The corroboration that section 157 contemplates is not corroboration in the conventional sense in which that term is used in courts of law, but in the sense of consistency in the conduct of the witness tending to render his testimony more acceptable.”

Held further, that section 244 of the Criminal Procedure Code requires that the question as to the admissibility of evidence sought to be led at a trial before the Supreme Court must be decided by the Judge at the time when the evidence is tendered.

ARIYADASA 3

2. *Trial before Supreme Court—Summing-up—Misdirection—Duty of Judge to refer to points in favour of defence.*

In a trial before the Supreme Court it would be a misdirection to instruct the Jury that they must convict the accused if, in fact, the defence position in substance was that the prosecution evidence was true, but incomplete.

It is the duty of the Judge to present fairly to the Jury evidence which tended to favour the case for the defence.

JOGREST PERERA 27

3. *Evidence—Witness for the prosecution—Adverse witness—Proof of former statements made by him incriminatory of the accused—Admissibility—Evidence Ordinance, s. 154—Court of Criminal Appeal Ordinance, s. 5 (1).*

The accused-appellant was charged with the murder of his brother's wife. At the trial the father of the appellant was called as a witness for the prosecution. In the examination-in-chief he was questioned only in order to elicit from him the fact that he had identified the deceased woman at the *post mortem* examination. In cross-examination his evidence was favourable to the accused on three points (1), (2) and (3). In view of this evidence Crown Counsel, after obtaining permission from Court, put questions which might have been put in cross-examination concerning points (1), (2) and (3). Furthermore, he asked the witness questions relating to two new points (4) and (5), viz., whether he saw the appellant just after the alleged murder, and whether the appellant had a knife in his hand at that time. In view of the denials made by the witness in respect of all five points, Crown Counsel confronted him with

the statements he had made in his depositions in the Magistrate's Court. Those statements were contradictory of his evidence at the trial not only in respect of points (1), (2) and (3) but also in respect of points (4) and (5).

Held, that the prosecution should not have been permitted to prove the witness's former statements incriminatory of the accused in respect of points (4) and (5). " If at a trial a prosecution witness, voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with a statement made by him in his deposition, the discretion of the trial Judge under s. 154 of Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely some testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement incriminatory of the accused by the device of first tempting or provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more serious consequence is to cause grave prejudice to the accused. "

Held further, that, in view of other independent testimony, the conviction of the accused should be affirmed in terms of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance.

ABILINU FERNANDO 73

4. *Charge of abetment of attempted murder—Conviction for using criminal force—Validity.*

An accused person cannot be convicted of using criminal force when the only charge framed against him is that of aiding and abetting another in the offence of attempted murder.

GINIGANDARA 192

5. Trial before Supreme Court—Verdict of Jury—Duty of Judge to accept it—Autrefois convict—Criminal Procedure Code, ss. 230, 248 (2), 251.

Section 230 of the Criminal Procedure Code reads as follows :—

"The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require."

Held, that section 230 does not entitle the Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury.

Accordingly, where, after a verdict of guilty is returned by the Jury, the Judge discharges the Jury because he disagrees with that verdict, the accused is entitled to raise, in appeal, the point of *autrefois convict* if he is convicted again at a second trial on the same indictment.

ARNOLIS APPUHAMY 256

6. Trial before Supreme Court—Witness for the prosecution—Adverse evidence given by him—Proof of former inconsistent statements—Limited scope—Evidence Ordinance, ss. 154, 155 (c).

Where, at a trial before the Supreme Court, a prosecution witness gives evidence which damages the prosecution case, section 155 (c), read with section 154, of the Evidence Ordinance may permit the prosecuting Counsel to prove former inconsistent statements of the witness. In such a case, however, Crown Counsel's questions must be restricted to contradict the witness in respect only of matters concerning which the witness has already given unfavourable evidence. Section 155 cannot be utilised to prove former statements which may in advance contradict evidence which the prosecution fears that the witness may give.

The Queen v. Abilinu Fernando (70 N. L. R. 73) followed.

JAYASINGHE

7. *Evidence—Hearsay—Illegal reception—Effect—Criminal Procedure Code, s. 121.*

The accused-appellant was charged with committing murder by shooting. The first information of the widow of the deceased as recorded by the police was produced in document form as part of the case for the Crown. The complaint contained, *inter alia*, the following statement :—“ He (the accused) has on several occasions threatened to shoot us.” The widow had not, in her evidence, referred to any previous threat. The evidence of previous threats by the accused was therefore hearsay and inadmissible. There was no direction to the jury to disregard it.

Held, that, error of law having been established, the burden shifted to the Crown to satisfy the Court that a reasonable jury, had they been properly directed, would without doubt have convicted the accused.

SIRINIYAL 376

8. *Evidence—Trial before Supreme Court—Dock statement of accused—Duty of Judge to refer to it in his summing-up.*

The 1st accused, who was charged with murder, made a dock statement in which he said that before he stabbed the deceased man, the latter had struck him with a club. The cross-examination of the prosecution witnesses and the accused's statement from the dock set up defences either of self-defence or of provocation or both.

Held, that it was the duty of the Judge to have directed the Jury that the dock statement was a matter before the Court which could be taken into consideration.

ARASA 403

9. *Charge of murder—Summing-up—Non-direction.*

Where, in a prosecution for murder, the evidence showed that there was only one injury on the deceased and that it had been possibly caused by a club—

Held, that the jury should have been directed that they could convict the accused of culpable homicide not amounting to murder on the basis that he had no intention to kill but only the knowledge of likelihood of death.

ADAMBAWA 543

10. *Sentence—Previous conviction—Scope of its relevancy.*

In assessing the sentence that should be passed on an accused person when he is convicted, the Court must not take into account a conviction of the accused for an offence committed after the date of the commission of the offence in respect of which he is being sentenced.

THELIS 548

11. *Criminal procedure—Calling of fresh evidence by Court after case for defence is closed—Scope of s. 429 of Criminal Procedure Code—Misdirection—Court of Criminal Appeal Ordinance, proviso to s. 5 (2).*

Where, after the cases for the prosecution and the defence have been closed, the Court, purporting to act under section 429 of the Criminal Procedure Code, calls a fresh witness whose name appears on the list of witnesses contained in the indictment, it would be wrong to direct the jurors that the fresh evidence may be relied upon, either by itself or as corroboration of the evidence of the principal witness for the prosecution, to convict the accused.

Courts Ordinance—

1. Courts Ordinance (Cap. 6)—Section 31—Admission to bail thereunder—Services of indictment on prisoner not a condition precedent—“ Might properly be tried ”.	193
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See BAIL

2. Judicial precedent—Principle of stare dicisis—Qualifications as to the binding nature of previous decisions—Meaning of terms “ Collective Court ”, “ Full Court ”, “ Full Bench ”—Extent of the binding force of a decision of a Collective Court—Courts Ordinance, ss. 7, 38, 51.	
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A Court of five Judges constituted in terms of section 51 of the Courts Ordinance is not bound to follow a previous decision of a Collective Court upon a question of law if that decision did not duly consider the relevant law and was founded on a manifest mistake or oversight. Accordingly, the case of *Neate v. de Abrew*, even assuming that the Court which heard it was a properly constituted Collective Court, has no binding force for the reason that the Court did not duly consider the law relating to acquisition by prescription of the servitude *ne luminibus officiatur* and the *ratio decidendi* of the decision is obscure.

In regard to the terms “ Full Court ”, “ Full Bench ” or “ Collective Court ”, each term conveys the same meaning. The only proper and meaningful term is “ Collective Court ”, that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of section 7 of the Courts Ordinance or the corresponding sections in earlier enactments. A Collective Court is not bound except by a judgment of a previous Collective Court. A decision of any Bench of three Judges in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

Prior to 1901, three Judges did not constitute a Collective Court unless it was assembled to hear an appeal which had been especially reserved for the consideration of the Collective Court, either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights. Hence a Bench of two Judges sitting at the present time is not strictly bound to follow a decision rendered by a Court of all three Judges prior to 1901 if the latter Court was not especially assembled to sit as Collective Court. If therefore the correctness of such a decision is seriously doubted by a Bench of two Judges, the appropriate course is that a numerically superior Bench, i.e., of five or more Judges, should be constituted under section 51 of the Courts Ordinance, with power either to approve or overrule the doubtful decision. It is not clear whether *Neate v. de Abrew* was decided by a Collective Court properly so called.

MOOSAJEE v. CAROLIS SILVA	217
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3. Sections 19, 37.	347
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4. Sections 47, 89.	409
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5. Commissions of Inquiry Act (Cap. 393)—Sections 10 and 12—Offences punishable as offences of contempt of the authority of the Commission—Limited number only—Courts Ordinance (Cap. 6), ss. 3, 47, 57—Civil Procedure Code, ss. 109 (2), 137 (2), 140, 294, 295 650, 656, 682 (2), 713, 717, 718—Penal Code (Cap. 19), ss. 2, 4, 3—Industrial Disputes Act, s. 40A (1)—Applicability of maxim expressio unius exclusio alterius. ..	514
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See COMMISSIONS OF INQUIRY ACT (2).

Criminal Law—

1. *Indictment—More than one accused—Circumstances in which they can be said to have jointly committed one and the same offence—Extent of the liability of each accused—Offence committed with common intention—No requirement that section 32 of Penal Code should be specified in the indictment—Position where one accused alone is charged when he acted jointly with others—Penal Code, ss. 8, 32, 33, 35, 293—Criminal Procedure Code ss. 167, 168, 169, 171 to 174, 178, 184*

See CHARGES AND INDICTMENTS.

2. *Criminal trespass—Intention to annoy—Penal Code, s. 433.* .. 263

See CRIMINAL TRESPASS (1).

3. *Criminal trespass—Intention to annoy—Quantum of evidence.* 568

See CRIMINAL TRESPASS (2).

4. See also COURT OF CRIMINAL APPEAL DECISIONS; PENAL CODE.

Criminal Procedure

1. *Admissibility of evidence—Question must be decided by Judge at the time when the evidence is tendered—Criminal Procedure Code, s. 244.* .. 3

See COURT OF CRIMINAL APPEAL DECISIONS (1).

2. *Trial before Supreme Court—Withdrawal of indictment—Permissibility—Criminal Procedure Code, s. 217 (3).*

In a prosecution before the Supreme Court, there were two abortive trials. At the commencement of the third trial, Crown Counsel satisfied the Court, upon the material before it, that the trial would inevitably result in a verdict of acquittal.

Held, that it was open to the prosecuting Counsel to apply, under section 217 (3) of the Criminal Procedure Code, for the withdrawal of the indictment before the return of the verdict.

THE QUEEN *v.* MARTHENIS DE SILVA

3. *Indictment—More than one accused—Circumstances in which they can be said to have jointly committed one and the same offence—Extent of the liability of each accused—Offence committed with common intention—No requirement that section 32 of Penal Code should be specified in the indictment—Position where one accused alone is charged when he acted jointly with others—Penal Code, ss. 8, 32, 33, 35, 293—Criminal Procedure Code, ss. 167, 168, 169, 171 to 174, 178, 184.*

See CHARGES AND INDICTMENTS.

4. Trial before Supreme Court—Verdict of Jury—Duty of Judge to accept it—Autrefois convict—Criminal Procedure Code, ss. 230, 248 (2), 251.

See COURT OF CRIMINAL APPEAL DECISIONS (5).

5. *Jury—Accused persons' election to be tried by a Sinhala-speaking jury—Attorney-General's application thereafter to summon a special jury—Requirement of cogent grounds—Anachronistic nature of qualifications for special jurors—Criminal Procedure Code, ss. 165 B, 222, 224, 257 (1) (b), 267 (1) (d)*

See JURY.

6. *Indictable offence—Preliminary inquiry—Opinion of Magistrate that the evidence is not sufficient to put the accused on his trial—Power of Magistrate to discharge the accused—Stage at which it may be exercised—Power of Attorney-General subsequently to direct the Magistrate to commit the accused for trial—Magistrate's refusal to comply with such direction—Right of Attorney-General then to move Supreme Court in revision—Constitutional validity of Attorney-General's power to order committal of accused—“Judicial power”—Principle of Separation of Powers—Criminal Procedure Code, ss. 5, 159 to 164, 191, 337, 356, 391—Courts Ordinance, ss. 19, 37.*

At the preliminary inquiry under Chapter XVI of the Criminal Procedure Code, sub-section (1) of section 162 which provides that “if the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith order him to be discharged” can apply before the stage of compliance with sections 159, 160 and 161. Sub-section (1) of section 162 will apply at the close of the prosecution case if the Magistrate at that stage considers that the evidence is not sufficient to put the accused on his trial. If an order of discharge is then made by the Magistrate for the reason stated in the sub-section, it is made in exercise of the statutory power conferred by the sub-section, and not by virtue of the inherent or other power referred to in sub-section (2) of section 162. In such a case, the Attorney-General can subsequently give directions to the Magistrate in terms of section 391 to commit the accused for trial.

At the preliminary inquiry into a case of alleged murder by shooting, the Magistrate made order on 18th February, 1967, discharging the 2nd, 3rd and 4th accused (respondents to the present application) without proceeding to read the charge to them and act under sections 159, 160 and 161 of the Criminal Procedure Code. On 8th April, 1967, the Attorney-General directed the Magistrate, in terms of section 391, to comply with the provisions of sections 159, 160 and 161. The Magistrate then complied with the sections but again made order discharging the respondents. On 18th June, 1967, the Attorney-General again returned the record to the Magistrate, this time with a direction to commit the respondents for trial before the Supreme Court. On 14th August, 1967, the Magistrate refused to comply with this direction, stating as his ground of refusal that he had made his original order of discharge under his inherent power, and that the Attorney-General was not entitled to give directions under section 391 in a case where an order of discharge is made by a Magistrate under his inherent power. The Attorney-General then made the present application to the Supreme Court for the revision of the Magistrate's order of 14th August, 1967.

The Magistrate's order of 18th February, 1967, showed that he had two main grounds for deciding to discharge the three respondents: firstly, the prosecution witnesses contradicted each other, and their evidence was to some extent contradicted by their previous statements; secondly, the witnesses had failed or delayed to make statements incriminating the respondents.

Held, (i) that the order of discharge made on 18th February, 1967, was made by the Magistrate in exercise or purported exercise of the power conferred by section 162 (1) of the Criminal Procedure Code. Accordingly, the Attorney-General had the power to give his subsequent directions under section 391. The Magistrate's refusal to comply with those directions was unlawful.

(ii) that the Supreme Court had revisionary power to direct the Magistrate to comply with the Attorney-General's directions. The refusal by the Magistrate to comply with the Attorney-General's directions was an order within the meaning of section 356 of the Criminal Procedure Code and section 37 of the Courts Ordinance. Alternatively, the Magistrate had in substance made order holding that the Attorney-General had no power to give the directions which he did give; such an order could be reversed or corrected by the Supreme Court. Section 19 of the Courts Ordinance, read with section 5 of the Criminal Procedure Code, is wide enough to confer power of revision in relation to non-summary proceedings.

(iii) that the exercise by the Attorney-General of powers under section 391 of the Criminal Procedure Code is not an interference with the powers of a Court and, therefore, does not constitute an infringement of the principle of the Separation of Powers recognized in the Constitution of Ceylon. A Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial. Moreover, the powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of the system of Criminal Procedure in Ceylon.

THE ATTORNEY-GENERAL v. DON SIRISENA

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7. *Criminal procedure—Withdrawal of plea of guilt—Circumstances when it is permissible—Criminal Procedure Code, s. 188.*

A plea of guilt may be withdrawn by the accused person at any time before an order of conviction has been made.

PABILIS v. SIVANDIYEN

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8. *Criminal Procedure Code—Disposal of stolen property—Section 419 (1)—Effect of the words “entitled to the possession thereof”.*

Where a person, after discovering that stolen property has been sold to him, surrenders the property to the police, the Magistrate has power under section 419 (1) of the Criminal Procedure Code to order the property to be handed over to the true owner and not to the person from whom it was taken by the police.

Punchinona v. Hinniappuhamy (60 N. L. R. 518) not followed.

BALAGALLE v. SOMARATNE

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9. *Criminal procedure—Calling of fresh evidence by Court after case for defence is closed—Scope of s. 429 of Criminal procedure Code—Misdirection—Court of Criminal Appeal Ordinance, proviso to s. 5 (2).*

558

See COURT OF CRIMINAL APPEAL DECISIONS (11).

10. See also APPEAL AND REVISION ; COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL PROCEDURE CODE.

Criminal Procedure Code—

Section 5	347
Section 6	6
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Section 121	376
Sections 159 to 164	347
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Sections 167, 168, 169	241
Sections 171 to 174	241
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Section 257 (1) (b)	265
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Section 356	347
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Section 419 (1)	382
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See also APPEAL AND REVISION ; COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL PROCEDURE.

Criminal Trespass—

1. *Criminal trespass—Intention to annoy—Proof—Penal Code, s. 433.*

Where an estate labourer, after his services have been terminated, remains on the estate unlawfully, contumaciously and in defiance of the Superintendent, an intention to annoy must be inferred and he is guilty of criminal trespass. The fact that he has made an application to the Labour Tribunal for re-instatement does not justify his remaining on the estate pending the proceedings.

SELLIAH v. DE KRETSER	263
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2. *Criminal trespass—Intention to annoy—Quantum of evidence.*

The accused-appellant, who was a married woman working on an estate, continued to be in occupation of her lineroom after she was given notice to quit it. The evidence showed that her dominant intention was to remain with her husband and her family in the lineroom of which her husband continued to remain in occupation after his employment on the estate had been terminated.

Held, that the accused could not be convicted, upon the evidence, of the offence of criminal trespass.

MOULIN NONA v. ROUTHLEDGE	568
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Crown—

Contract of employment with the Crown—Claim for arrears of pay—Unenforceability by action in the Courts. 121

See PUBLIC SERVANTS.

Crown Lands Ordinance—

Lease of Crown land—Renewal of it after expiry—Requirement of prescribed form—Acceptance of rent without due execution of a new lease—Effect—Crown Lands Ordinance (Cap. 454), ss. 8 (1), 96, 110.

Section 8 (1) of the Crown Lands Ordinance debars the disposition of Crown land except by an instrument of disposition executed in the prescribed manner.

Accordingly, where a lease of Crown land in favour of certain co-lessees expires after the Crown Lands Ordinance came into operation, acceptance of rent by the Crown thereafter, without a renewal of the lease executed in the prescribed manner, cannot confer on the co-lessees any legal title which may form the basis of an action between them for declaration of title to the property.

ARNOLIS PERERA v. DAVID PERERA	79
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Debt Conciliation Ordinance—

1. *Debt Conciliation Ordinance (Cap. 81)—Appointment of Debt Conciliation Board—Validity.*

In so far as the Debt Conciliation Board duly exercises its lawful powers, the Board does not hold judicial office and, therefore, does not require to be appointed by the Judicial Service Commission.

KANAGASABAI v. CONRAD PERERA	78
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2. *Debt Conciliation Ordinance, as amended by Act No. 5 of 1959—Sections 30, 40, 43, 56, 64—Conditional transfer of immovable property—Limited extent to which it is deemed to be a "mortgage".—Evidence Ordinance, s. 92—Prevention of ~~Debt Conciliation~~ Ordinance, s. 92.*

A debt, in respect of which a conditional transfer of immovable property had been executed, was subsequently the subject matter of proceedings before the Debt Conciliation Board. In a settlement which was arrived at, it was agreed between the parties that the capital and interest due to the creditor should be paid by the debtors on dates fixed in the settlement and that in the event of a single default the right to redeem would be at an end. After the debtors committed default in making payments, the creditor sued them in the present action claiming declaration of title to the land described in the conditional transfer. It was submitted on behalf of the defendants that the conditional transfer was in fact a mortgage retaining title in the debtors, that the proceedings before the Debt Conciliation Board were still pending and that, therefore, the plaintiff was not entitled to maintain the action in view of the provisions of sections 43 and 56 of the Debt Conciliation Ordinance.

Held, that the action was maintainable. The amendment to the definition of "mortgage" made by Act No. 5 of 1959 has not altered the law relating to the creation of a mortgage over immovable property and has not recognized as a mode of creating a mortgage the execution of a conditional transfer. It merely permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage for the purpose of exercising jurisdiction under the Ordinance in respect of such a transaction. Accordingly, title to the property which is the subject of a conditional transfer falling within the definition is in the transferee and is not retained by the debtor-transferor.

JOHANAHAMY v. SUSIRIPALA 328

Election Petitions—

See PARLIAMENTARY ELECTIONS.

Emigrants and Immigrants—

See IMMIGRANTS AND EMIGRANTS ACT.

Employees' Provident Fund Act—

Employees' Provident Fund Act, No. 15 of 1958, ss. 34, 37, 46 (1) (k), 46 (1) (o)—Employees' Provident Fund Regulations, 1958—Validity of Regulation 65—Money overpaid to an employee—Failure to refund it after notice—Such failure is not punishable as an offence.

An employee to whom the Employees' Provident Fund Regulations of 1958 is applicable is not liable to be prosecuted and punished if he fails, after due notice, to refund any sum overpaid to him by the Commissioner as money lying to his credit in the Provident Fund. Paragraph 2 of regulation 65 of the Employees' Fund Regulations, in so far as it purports to make him so liable, is *ultra vires* of the powers conferred on the Minister to make regulations.

SELLAYAH v. SABAPATHY 187

Estate Duty Ordinance—

1. *Privy Council—Gifts under a will—Direction that they should take effect on the "date of distribution"—Meaning of expression "date of distribution"—Relevancy of the date of final assessment of estate duty.. 97*

See ADMINISTRATION OF ESTATES.

2. *Estate Duty Ordinance (Cap. 241)—Proviso 3 of s. 6 (d)—"Gift made in consideration of marriage"—Requisites necessary for such gift.*

A father donated to his daughter, seven years after her marriage, certain immovable property. He purported to make the gift in pursuance of an earlier oral "agreement" ^{Digitized by Nopibarto Fothedtime} at the time of the marriage, to convey the premises to the daughter ^{Digitized by Nopibarto Fothedtime} at her marriage by way of dowry.

Held, that the gift was not a "gift made in consideration of marriage" within the meaning of that expression in proviso (iii) of section 6 (d) of the Estate Duty Ordinance. A requisite necessary for the gift contemplated in that proviso is that it must be made on the occasion of the marriage and contingent on the marriage taking place.

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Estate Labour (Indian) Ordinance—

1. *Estate Labour (Indian) Ordinance*—Section 23 (1)—*Lawful termination of a labourer's contract of service*—*Termination of his wife's contract of service thereafter despite joint statement by husband and wife*—*Remedy of the wife*—*Power of a Labour Tribunal to grant compensation to her*—*Meaning of the word "labourer"*—*Industrial Disputes Act, s. 31 D (2)*.

Where, after the contract of service of an estate labourer has been lawfully terminated, a joint statement in terms of the proviso to section 23 (1) of the Estate Labour (Indian) Ordinance is submitted to the employer by the discharged labourer and his wife, wishing that the services of the wife, who is already under a contract of service on the estate, be continued, the employer is not bound to continue the employment of the wife. Consequently, the wife, if her services are lawfully terminated, cannot claim as a matter of right to be re-instated by a Labour Tribunal. It is, however, open to the Tribunal to grant her equitable relief by making an order for the payment of a sum of money as compensation.

The benefits of the Estate Labour (Indian) Ordinance are available to a person who is born in Ceylon of parents who are of Indian origin and who becomes a citizen of this country by registration.

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2. *Estate labourer*—*Termination of his services for misconduct*—*Termination of his wife's contract of service also*—*Belated joint statement by husband and wife*—*Remedy of the wife*—*Estate Labour (Indian) Ordinance, ss. 2, 4, 5, 23 (1)*—*Industrial Disputes Act, ss. 31 B (1) (b), 31 B (4), 31 C (1), 33 (1)*.

An estate labourer was summarily dismissed for misconduct on 16th September 1960. On the same day the services of the wife (the appellant) were also terminated under section 23 (1) of the Estate Labour (Indian) Ordinance and she was given one month's wages in lieu of notice. No joint statement was filed by the husband and wife in terms of the proviso to section 23 (1) until three years later. Nor was the question raised at the hearing before the Labour Tribunal whether compensation should be given to the appellant for her past services.

Held, (i) that no effect should be given to the belated joint statement.

(ii) that, in view of the limited powers of the Supreme Court to deal only with questions of law, the case should not be remitted again to the Labour Tribunal to decide whether any relief in the nature of compensation should be granted to the appellant.

CEYLON WORKERS' CONGRESS *v.* SUPERINTENDENT OF ROEBERRY ESTATE

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Estoppel—

See RES JUDICATA.

Evidence—

1. *Evidence Ordinance*—Section 157—"About the time when the fact took place"—*Admissibility of evidence*—*Question must be decided by Judge at the time when the evidence is tendered*—*Criminal Procedure Code, s. 244* ..

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2. Evidence—Witness for the prosecution—Adverse witness—Proof of former statements made by him incriminatory of the accused—Admissibility—Evidence Ordinance, s. 154—Court of Criminal Appeal Ordinance, s. 5 (1)	73
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See COURT OF CRIMINAL APPEAL DECISIONS (3).

3. Election petition—Corrupt practice—False statements made at an election meeting concerning the unsuccessful candidate—Police reports in proof of such statements—Admissibility in evidence—Evidence Ordinance, ss. 35, 160.	145
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See PARLIAMENTARY ELECTIONS (1).

4. Landlord and tenant—Eviction of landlord by title paramount—Quantum of evidence—Estoppel of tenant—Scope—Evidence Ordinance, s. 116—Protection of Rent Restriction Act—Burden of proof.	284
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See LANDLORD AND TENANT (9).

5. Trial before Supreme Court—Witness for the prosecution—Adverse evidence given by him—Proof of former inconsistent statements—Limited scope—Evidence Ordinance, ss. 154, 155 (c).	289
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See COURT OF CRIMINAL APPEAL DECISIONS (6).

6. Privy Council—Estoppel of tenant and licensee—Applicability of English law—Evidence Ordinance, ss. 100, 116—Interpretation of s. 116—Buddhist ecclesiastical law.	313
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7. Evidence—Hearsay—Illegal reception—Effect—Criminal Procedure Code, s. 121.	376
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8. Evidence—Trial before Supreme Court—Dock statement of accused—Duty of Judge to refer to it in his summing-up.	403
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9. See also EVIDENCE ORDINANCE.	
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Evidence Ordinance—

Section 3	169
Section 35	145
Section 92	328
Section 100	313
Section 116	284, 313
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Section 155 (c)	289
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See also EVIDENCE.

Execution of Decrees—

Civil Procedure Code—Section 218 (k)—“Contingent right”—Trust—Interest of a beneficiary—Liability to be sold in execution of a money decree against him.

Where, in a trust created by will, the legal title to the property which is the subject matter of the trust is vested in the trustees during the continuance of the trust and the beneficial interest is vested in the beneficiaries, but the enjoyment of the beneficial interest is postponed till the death of the last of the trustees, the interest of any of the beneficiaries is an assured and vested interest and is liable, during the life time of a trustee, to be seized and sold in satisfaction of a decree entered against him for payment of money. In such a case the interest of the beneficiary is not a merely contingent right within the meaning of section 218 (k) of the Civil Procedure Code.

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Executors and Administrators—

See ADMINISTRATION OF ESTATES.

Fideicommissa—

Privy Council—Fideicommissum—Will—Devise by testatrix to her sons—Presence therein of a si sine liberis decesserit clause—Death of a son leaving children—Whether his children are entitled to property alienated by him—Implied or tacit fideicommissum—Conditions necessary for inferring it.

Where a Will leaving property to the testator's sons contains in one of its paragraphs a gift of a clearly fideicommissary character in the event of any of the testator's sons dying without leaving issue, but does not have, in relation to the son's original shares, a corresponding provision which deals expressly with the event of a son dying but leaving issue, and in particular makes no gift in that event to the son's children, an implied or tacit fideicommissum in favour of the children of the deceased son should not be inferred, unless the dispositions in the Will as a whole and the circumstances in which the testator was placed when he made the Will justify such inference. When there is a reasonable doubt in regard to the actual intentions of the testator the Court will decide against a fideicommissum.

A testatrix who made her Will on 3rd June 1910 and died on 20th December 1918 devised and bequeathed property to her sons in equal shares. A clause of the Will was as follows :—

“ Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my Will.”

*Held, that, in the event of a son's death leaving children, the clause did not *per se* create a tacit fideicommissum over his original share in favour of those children. There were also strong indications elsewhere in the Will against the inference of an implied or tacit*

fideicommissum. Accordingly, a son who died leaving children took his share absolutely and any alienation of it by him during his life time was valid as against his children.

"The present law to be applied may be summarised in these propositions :—

1. Where in a Will (and *mutatis mutandis* the same would apply as regards deed of gifts), a bequest is made to a child of a testator, the mere presence of a clause, or condition, "*si sine liberis decesserit*" does not *per se* create a tacit fideicommissum in favour of that child's children.
2. Whether, in such a will, a fideicommissum is to be implied is a matter of the testator's intention to be ascertained from the dispositions in the will as a whole and from the circumstances in which the testator was placed when he made it.
3. Such an intention must be clearly established : in case of doubt the presumption is against the implication of a fideicommissum."

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Full Bench—

See COURTS ORDINANCE (2).

Guarantee—

See CONTRACTS (1).

Habeas Corpus—

See WRIT OF HABEAS CORPUS.

Heavy Oil Motor Vehicles Taxation Ordinance—

1. *Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by s. 22 of Finance (No. 2) Act, No. 2 of 1963—Section 2 (7)—Order made by Minister—Requirement that it should be laid before House of Representatives within a specified period—Effect of non-compliance—Control of Prices Act, s. 4 (3)—Holidays Act, No. 17 of 1965, ss. 11 (4), 12 (2)—Ceylon Tourist Board Act of 1966, s. 48—Interpretation of statutes—Delegated legislation—Point of time at which it becomes valid.*

An Order made by the Minister under section 2 of the Heavy Oil Motor Vehicles Taxation Ordinance, as amended by section 22 of the Finance (No. 2) Act, No. 2 of 1963, is valid even though there is no strict compliance with sub-section 7 (b) of that Section by its being laid before the House of Representatives on a date subsequent to the termination of the specified period. The provisions of section 2 (7) (b) are not mandatory. The Order, therefore, in such a case, can be utilised for the imposition of tax at the altered rate.

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2. *Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by Finance Act, No. 2 of 1963—Sections 2 (1), 2 (7), 4 (1)—Alteration of rates of tax—Order made by Minister—Requirement that it should be laid before House of Representatives within the specified period—Effect of non-compliance—Interpretation of statutes—Delegated legislation—Procedure.*

Where rates of tax prescribed in the First Schedule to the Heavy Oil Motor Vehicles Taxation Ordinance, as amended by the Finance Act, No. 2 of 1963, are varied by the Minister by Order published in the

Gazette in terms of sub-section (7) of section 2 of that Ordinance, the provisions of paragraph (b) of sub-section (7) requiring the Order to be laid before the House of Representatives within the specified period are mandatory and must be complied with in order to give validity to the Taxation Order.

Podi Appuhaṇy v. The Government Agent, Kegalla (70 N. L. R. 544) not followed.

ILLEPERUMA SONS LTD. v. GOVERNMENT AGENT, GALLE 549

Holidays—

Appeal—Time limit for presenting petition of appeal—Sunday not a dies non—Holidays Act, No. 17 of 1965, s. 2 (a)—Civil Procedure Code, s. 754 (2)—Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960 46

See APPEAL AND REVISION (1).

Horse-racing—

See BETTING ON HORSE-RACING ORDINANCE.

Housing Act—

See NATIONAL HOUSING ACT.

Immigrants and Emigrants Act—

Habeas corpus—*Immigrants and Emigrants Act, ss. 6, 27,28 (2)*—Removal orders—Persons against whom they may be made—Right of Minister to delegate his power.

There is no justification for the view that the Immigrants and Emigrants Act is wholly inapplicable to a person who had entered Ceylon before the date of its enactment. A person who had originally entered Ceylon before the Act came into operation and who does not fall within the exceptions mentioned in section 27 is a person in respect of whom a removal order may be made under section 28 (2) if paragraph (a), (b) or (c) of that sub-section applies to him.

The discretionary power vested in the Minister to make a removal order may be delegated by him to an Assistant Secretary of the Ministry in terms of section 6 of the Act.

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Import and Export (Control) Act—

Import and Export (Control) Act (Cap. 236)—Sections 2 and 3—Import (Licensing) Regulations, 1963, Regulation 2—Issue or cancellation of licences thereunder—Controller's power is purely executive and not judicial—Licensee need not be heard before his licence is cancelled—Natural justice—Certiorari.

Regulation 2 of the Import (Licensing) Regulations, 1963, made by the Minister under section 2 of the Import and Export (Control) Act, reads as follows:—

"No person shall import goods of any description into Ceylon except under the authority of a licence granted by the Controller and subject to such conditions as may be specified therein."

Held, that Regulation 2, more especially when it is read with a Notice that "the Controller may at his discretion refuse to register any application or cancel any registration already effected", confers on the Controller the widest possible powers in the matter of the issuing of licences. In issuing licences or cancelling licences already issued he is performing no more than a purely executive or administrative function answerable only to the Minister who appointed him and who in turn is answerable to Parliament in respect of the administration of the Act by officers appointed by him. As the Controller has no duty to act judicially, he is not bound to afford a person an opportunity of showing cause against the cancellation of a licence already issued to him. Accordingly, *certiorari* does not lie to quash an order made by the Controller cancelling the registration of a person as a Ceylonese Trader.

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Imposition of Civic Disabilities (Special Provisions) Act, No. 14 of 1965—

See CONSTITUTIONAL LAW (1).

Improvements—

See COMPENSATION FOR IMPROVEMENTS.

Income Tax—

1. *Income tax—Non-resident company—Remittances of such company—Imposition of 33½ per centum tax thereon—Validity—Income Tax Ordinance (Cap. 242), as amended by Act No. 13 of 1959, ss. 5, 57A, 57B, 57C—Double Taxation Agreement (Treaty Series No. 9 of 1950), Articles VI and XVIII—Double Taxation (Relief) Act, No. 26 of 1950 (Cap. 244), s. 2—Inland Revenue Act, No. 4 of 1963, s. 130 (3)—Scope of rule generalia specialibus non derogant.*

In regard to the income tax years 1958/59 to 1961/62, the imposition on any non-resident company of the tax of 33½ per centum on the remittances as set out in section 57 C (1) (a) of the Income Tax Ordinance (Cap. 242), as amended by Act No. 13 of 1959, is not in conflict with either Article VI or Article XVIII of the Double Taxation Agreement (Treaty Series No. 9 of 1950 between Ceylon and the United Kingdom), the provisions of which were given the force of law by the Double Taxation (Relief) Act, No. 26 of 1950 (Cap. 244). Even if there is any conflict, the Income Tax (Amendment) Act, No. 13 of 1959, impliedly repealed the provisions of the Double Taxation (Relief) Act, No. 26 of 1950. The rule *generalia specialibus non derogant* cannot be applied in construing the amending Act No. 13 of 1959, which prevails over all earlier provisions governing tax payable by any resident or non-resident company. The fact that the Double Taxation (Relief) Act was formally repealed by the Inland Revenue Act, No. 4 of 1963, makes no difference to the fact that the Income Tax (Amendment) Act, No. 13 of 1959, had impliedly repealed it earlier.

THE COMMISSIONER OF INLAND REVENUE v. THE WOODLAND (K. V. CEYLON) RUBBER & TEA COMPANY LTD. ..

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2. *Income Tax Ordinance—Section 6—“Profits from any employment”—“Holiday passage”.*

The value of a free air passage granted as a "favour" by Air Ceylon to an employee of that body is not part of his profits from any employment within the meaning of section 6 of the Income Tax Ordinance.

3. *Prescription—Action for recovery of money paid under a mistake of fact or mistake of law—Maintainability—Requirement of demand before institution of action—Effect of omission to make such demand—Effect of demand on a time-barred debt—Profits tax—Payment of it by executor when it was not legally due—Claim by executor for repayment—Plea of prescription raised by Crown—Permissibility—Profits Tax Act (Cap. 243), s. 14—Profits Tax (Special Provisions) Act, No. 36 of 1964, s. 2—Income Tax Ordinance (Cap. 242), s. 28—Prescription Ordinance (Cap. 68), s. 10—Trusts Ordinance (Cap. 87), s. 91.*

In an action to recover money due, prescription starts to run as from the date when the cause of action arose. The fact that the plaintiff was not aware that he had a cause of action does not affect the question at all. "An obligation (such as the one in this case) remains alive only for a particular period of time and the demand for its fulfilment must be made *within that time*. But it is not the demand itself which gives rise to the cause of action. If the plaintiff came into Court without making a demand he may have been deprived of his costs or mulcted in costs, if the defendant brought the money to Court ; for, the summons in the case would itself constitute the demand. But an obligation, which is no longer alive, cannot be revived by making a demand and eliciting a refusal, long after an action to enforce the obligation is time-barred."

Plaintiff, who was one of the executors of a deceased person's estate, sought to recover from the defendant certain sums of money paid by him on behalf of the estate as Profits Tax in respect of the years 1948 to 1951, at a time when there was no provision in law under which Profits Tax could be levied by the Commissioner of Income Tax. The payments were made between the years 1952 and 1955. The present action was instituted on 3rd May 1962 after a demand for the return of the money was made by the plaintiff in 1959 (when he discovered his mistake) and was refused by the Commissioner of Income Tax on 29th November 1961. It was conceded that a claim in such a case would be prescribed under section 10 of the Prescription Ordinance three years after the accrual of the cause of action. Further, the trial Judge found that the payment was made by the executor under a mistake of fact and without any "undue influence" on the part of the Tax Department.

Held, (i) that the plaintiff's claim was time-barred. As soon as the Commissioner of Income Tax recovered money from the plaintiff without legal authority, he was under an obligation to return it ; and the plaintiff's right to demand a return of the money accrued to him the moment he made the payment. Accordingly, the plaintiff's causes of action arose on the dates he made the payments, the last of which was on 6th April 1955. The argument that the plaintiff was not aware of his mistake, and having discovered it in 1959 made a demand, the refusal of which on 29th November 1961 gave rise to the "cause of action" was quite untenable.

(ii) that, as the action was instituted on 3rd May 1962 and decree was entered in favour of the plaintiff on 29th April 1964, the provisions of section 2 of the Profits Tax (Special Provisions) Act, No. 36 of 1964, were not applicable in the absence of any express reference therein to pending actions.

(iii) that, as it could not be said that the money was paid as the result of "undue influence" or that a fiduciary relationship had come into being between the Tax Department and the plaintiff, section 91 of the Trusts Ordinance was not applicable.

Quaere, whether the money was paid by the plaintiff under a mistake of law and, if so, whether he was entitled in law to recover what he paid.

Observations on the question whether it is proper for the Crown to resist a citizen's claim, which is otherwise than fraudulent, by resorting to a plea based on the provisions of the Prescription Ordinance.

4. *Income tax—Recovery of tax by seizure and sale of property—Procedure—Capacity of Assistant Commissioner to issue certificate to District Court—“Commissioner”—Ministerial function of Court—Income Tax Ordinance (Cap. 242), ss. 2, 6 (b), 11 (1) (a), 13 (2), 84 (3), 85 (1), 86, 87, 89.*

Where any income tax is in default, an Assistant Commissioner may, if he is specially authorised by the Commissioner to act on his behalf, issue a certificate to a District Court, in terms of section 84 (3) of the Income Tax Ordinance, for the recovery of the tax.

The Supreme Court has no power to grant relief to the assessee at the stage of proceedings for the recovery of tax.

RANAWEERA v. COMMISSIONER OF INCOME TAX

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Indian Labour—

See ESTATE LABOUR (INDIAN) ORDINANCE.

Indictments—

See CHARGES AND INDICTMENTS.

Industrial Disputes Act—

1. *Industrial Disputes Act (Cap. 131)—Section 31B (1) (b)—Effect of the words “are due”.*

When the President of a Labour Tribunal considers whether a workman should be paid any gratuity under the provisions of Section 31B (1) (b) of the Industrial Disputes Act, he is entitled to make any order which he considers just and equitable.

SEEDIN v. SAMBANDAN

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2. *Industrial Disputes Act—President of Labour Tribunal—Appointment by the Public Service Commission—Subsequent appointment by the Judicial Service Commission—Validity.*

A person appointed by the Public Service Commission as President of a Labour Tribunal continues to have valid and effectual jurisdiction under that appointment if, while that appointment remained unrevoked, the Judicial Service Commission purported to appoint him to the same office subsequently in consequence of the decision in *Walker Sons & Co. Ltd. v. Fry.*

FERNANDO v. JINADASA

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3. *Industrial dispute—Intended retrenchment of a workman—Reference to an Industrial Court for settlement of proposed retrenchment—Time within which such reference should be made—Misdirection on this point—Effect—Award wrongly invalidating retrenchment of workman—Liability of award to be set aside in certiorari proceedings—“Error of law on the face of the record”—Retrenchment of workman pending inquiry—Award of compensation on that basis—Invalidity—Time within which an award should be made—Court acting in excess of jurisdiction—Effect—Industrial Disputes Act (Cap. 131), ss. 4 (2), 16, 23, 24, 31 F, 31 G, 31 H, 33 (1) (b), 33 (1) (d), 36 (5), 36 (6).*

(i) Section 31 H of the Industrial Disputes Act enacts that where, before the expiry of two months after the date of notice given by an employer to a workman as required by section 31 F, an industrial dispute arising out of the intended retrenchment of the workman is referred for settlement, the employer shall not effect the retrenchment within a period of two months after the date of reference of such dispute

for settlement. Therefore, if the reference for settlement is made after and not before the expiry of the two months after the date of notice given to the workman under section 31 F, section 31 H does not operate so as to prohibit the employer effecting retrenchment of the workman within two months after the reference for settlement. If, on account of misdirection on this point by an Industrial Court to which the reference for settlement is made in terms of section 4 (2) of the Industrial Disputes Act, the retrenchment of the workman is wrongly held in the award of the court to have been invalid, the award is liable to be quashed by way of *certiorari* on the ground of error of law on the face of the record, if such error goes to the very root of the determination of the court.

(ii) Where the Minister, acting under sections 31 H and 4 (2) of the Industrial Disputes Act, refers to an industrial court for settlement an intended retrenchment of a workman by his employer, and the only question for determination is whether the proposed retrenchment is justified and to what relief the workman is entitled, the court would be acting in excess of its jurisdiction if it awards relief by way of compensation to the workman on the basis of his actual retrenchment, if such retrenchment is effected during the pendency of the inquiry. In such a case, the award is not one in respect of any "other matter" as contemplated in section 24. The actual retrenchment of the workman after the commencement of the inquiry is an entirely new industrial dispute and is not a matter relating to the original dispute over the proposed retrenchment. The actual retrenchment is not a "fresh matter relating to the dispute" within the meaning of that expression in section 36 (5) of the Industrial Disputes Act.

Obiter : "The inference is somewhat strong that, where a reference of an industrial dispute for settlement as contemplated in section 31 H of the Act has been made, the award must itself be made before the expiry of the two months specified in the said section which is the period of time during which the employer's common law right to retrench is suspended."

SHALL COMPANY OF CEYLON LTD. v. H. D. PERERA

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4. *Estate Labour (Indian) Ordinance*—Section 23 (1)—*Lawful termination of a labourer's contract of service—Termination of his wife's contract of service thereafter despite joint statement by husband and wife—Remedy of the wife—Power of a Labour Tribunal to grant compensation to her—Meaning of the word "labourer"—Industrial Disputes Act, s. 31 D (2)* .. 161

See ESTATE LABOUR (INDIAN) ORDINANCE (1).

5. *Estate labourer—Termination of his services for misconduct—Termination of his wife's contract of service also—Belated joint statement by husband and wife—Remedy of the wife—Estate Labour (Indian) Ordinance, ss. 2, 4, 5, 23 (1)—Industrial Disputes Act, ss. 31 B (1) (b), 31 B (4), 31 C (1), 33 (1).*

See ESTATE LABOUR (INDIAN) ORDINANCE (2).

6. *Industrial Disputes Act—Section 33 (1) (d)—Dismissal of workman on ground of inefficiency—Proof, by employer, of absence of malice not necessary—Compensation to dismissed workman—Circumstances when award would be an error of law.*

When a workman's services are terminated by the employer on the ground of inefficiency, there is no burden on the employer to prove that he acted without malice in dismissing the workman. In such a case, if there was neither illegality nor any finding that the dismissal for inefficiency was an unfair labour practice, it is an error of law to award any compensation to the workman under section 33 (1) (d) of the Industrial Disputes Act.

WATARAKA MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD. v.
WICKREMA CHANDRA

7. *Labour Tribunal—Order made by it—Requirement that it should be against a natural or legal person—Industrial Disputes Act, s. 33 (2).*

Under the Industrial Disputes Act the party against whom a Labour Tribunal is empowered to make an order must be a natural or legal person, for it is only against such a person that the order can be enforced.

A Labour Tribunal made order against "The Superintendent, Deeside Estate, Maskeliya", directing him to re-instate a labourer, whose services had been summarily terminated, and to pay him "back wages".

Held, that the order was unenforceable, because the office of "The Superintendent of Deeside Estate" was not a legal person. A Corporation Sole must be expressly created by legislative enactment.

THE SUPERINTENDENT, DEESIDE ESTATE, MASKELIYA v. ILANKAI THOZHILAR KAZHAKAM

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8. *Labour Tribunal—Misdirection on facts—Right of appeal—"Question of law"—Industrial Disputes Act, s. 31D (2).*

Where the President of a Labour Tribunal misdirects himself on the facts, such misdirection amounts to a question of law within the meaning of section 31D (2) of the Industrial Disputes Act.

CEYLON TRANSPORT BOARD v. ABDEEN

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9. *Industrial dispute—Termination of a workman's services—Dispute arising therefrom between the employer and the dismissed workman—Whether it is an "industrial dispute"—"Dispute or difference between an employer and a workman"—"Employer"—"Workman"—Interpretation Ordinance s. 2—Industrial Disputes Act (Cap. 131), as amended by Acts Nos. 25 of 1956, 14 and 62 of 1957, 4 of 1962, ss. 2, 3, 4, 17, 31A (1), 31B (1), 31B (2) (b), 32 (2), 33 (1) (b), 33 (1) (c), 33 (1) (d), 33 (3), 33 (5), 33 (6), 47C, 48, 49.*

The 2nd respondent was employed by the petitioner-Company as an Assistant. On or about 5th April 1965 his services were summarily terminated on the ground that he had been "guilty of gross insolence, rudeness, disobedience, defiance of authority and disrespect". Subsequently he disputed the legality and propriety of his dismissal by the Company and brought his dispute with the Company to the notice of the Commissioner of Labour and, through him, to the Minister of Labour. The Minister then, claiming to act under section 4 (1) of the Industrial Disputes Act, referred the matter in dispute to a Labour Tribunal (the 5th respondent). The matter in dispute was whether the termination of the services of the 2nd respondent was justified and to what relief he was entitled.

It was contended on behalf of the petitioner-Company that after the services of the 2nd respondent were terminated by the Company, the employer-workman relationship between them had ceased to exist at the date of the reference and that a dispute arising between the ex-employer and the ex-workman as to whether the dismissal was justified was not a dispute between an employer and a workman and could not fall within the definition of "industrial dispute" in s. 48 of the Industrial Disputes Act unless it was raised by another workman who was still in the employ of the petitioner or by a trade union.

Held, by T. S. FERNANDO, G. P. A. SILVA, SIVA SUPRAMANIAM and SAMERAWICKRAME, JJ. (H. N. G. FERNANDO, C.J., ABEYESUNDERE and TENNEKOON, JJ., dissenting), that the dispute between the petitioner-Company and the 2nd respondent was an "industrial dispute" within the meaning of s. 48 of the Industrial Disputes Act and the Minister had the power to refer it for settlement by arbitration under s. 4 (1) of the Act. The 5th respondent, therefore, had jurisdiction to hear and determine the dispute.

Infants—

See MINORS.

Interpretation of Statutes—

1. *Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by s. 22 of Finance (No. 2) Act No. 2 of 1963—Section 2 (7)—Order made by Minister—Requirement that it should be laid before House of Representatives within a specified period—Effect of non-compliance—Control of Prices Act, s. 4 (3)—Holidays Act No. 17 of 1965, ss. 11 (4), 12 (2)—Ceylon Tourist Board Act of 1966, s. 48—Interpretation of statutes—Delegated legislation—Point of time at which it becomes valid.* 544

See HEAVY OIL MOTOR VEHICLES TAXATION ORDINANCE (1).

2. *Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by Finance Act, No. 2 of 1963—Sections 2 (1), 2 (7), 4 (1)—Alteration of rates of tax—Order made by Minister—Requirement that it should be laid before House of Representatives within the specified period—Effect of non-compliance—Interpretation of statutes—Delegated legislation—Procedure.* 549

See HEAVY OIL MOTOR VEHICLES TAXATION ORDINANCE (2).

Interpretation Ordinance—

Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956—Section 39 (1) (2)—Inapplicability thereof to a proceeding in respect of an earlier decree of Court resulting in a Muslim Charitable Trust—Interpretation Ordinance (Cap. 2), s. 6 (3) (c). 159

See MUSLIM LAW (1).

Interrogatories—

Interrogatories—Omission to answer them—Procedure thereafter—Civil Procedure Code, ss. 94, 98, 100, 109.

A party who omits to answer interrogatories served on him is entitled to be heard before the Court makes an order requiring him to answer under section 100 of the Civil Procedure Code. The party sought to be interrogated should therefore have notice of the application under section 100, so that he may show cause, if any, against an adverse order being made against him.

CEYLON INSURANCE CO. LTD. v. SUDU BANDA 261

Judicial Precedent—

Judicial precedents—Principle of stare decisis—Qualifications as to the binding nature of previous decisions—Meaning of terms “Collective Court”, “Full Court”, “Full Bench”—Extent of the binding force of a decision of a Collective Court—Courts Ordinance, ss. 7, 38, 51. 217

See COURTS ORDINANCE (2).

Jury—

Jury—Accused persons’ election to be tried by a Sinhala-speaking jury—Attorney-General’s application thereafter to summon a special jury—Requirement of cogent grounds—Anachronistic nature of qualifications for special jurors—Criminal Procedure Code, ss. 165B, 222, 224, 257 (1) (b), 267 (1) (d).

Where accused persons elect, under section 165 B of the Criminal Procedure Code, to be tried by a Sinhala-speaking jury from the list of persons referred to in section 257 (1) (b), the Court will not override such election otherwise than on cogent grounds if the Attorney-General makes an application thereafter to the Supreme Court under section 222 for an order requiring a special jury to be summoned to try the case against the accused. The language and income qualifications presently set out in section 257 (1) (d) for the special panel of jurors are anachronic and merit re-consideration by the Legislature.

THE QUEEN v. GNANASEEHA THERO ..

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Kandyan Law—

1. *Kandyan law—Deed of gift executed prior to 1939—Clause stating that it shall not be revoked—No other conditions imposed—Irrevocability of such deed.*

If a Kandyan deed of gift is not governed by the provisions of the Kandyan Law Declaration and Amendment Act and it states expressly that it is irrevocable, and the clause relating to irrevocability is not dependent on any other condition, then such a deed cannot be revoked.

TIKIRI BANDARA v. GUNAWARDENA ..

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2. *Kandyan law—Illegitimate son—Death intestate and issueless—Devolution of his acquired property—Respective shares of his wife and the legitimate children of his deceased mother—Kandyan Law Declaration and Amendment Ordinance, s. 11.*

Under the Kandyan Law, where, after his mother has predeceased him, an illegitimate son dies intestate and issueless, leaving him surviving his wife and no relations other than the legitimate children of his mother, the dominium in respect of his acquired property devolves on his mother's legitimate children, and his wife is entitled only to a life interest in such property.

LYDIYA v. KIRIUKKUWA ..

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3. *Kandyan law—Donation—Revocability—“Voluntary transfer”—Kandyan Law Declaration and Amendment Ordinance (Cap. 59), ss. 2, 5 (1).*

A Kandyan deed of gift executed after the Kandyan Law Declaration and Amendment Ordinance came into operation is irrevocable if the donor has expressly renounced his right to revoke and, although an undertaking was given by the donee to give succour and assistance to the donor during the donor's life-time, the undertaking was not one of the conditions on which the grant was made to the donee by the donor.

TAMMITTA v. PALIPANE ..

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Labour Tribunals—

See INDUSTRIAL DISPUTES ACT.

Land Acquisition Act—

Compulsory acquisition of land—Cannot be of an indeterminate corpus—Description of the land must be precise as to location and extent—Land Acquisition Act, as amended by Act No. 28 of 1964, ss. 2, 4, 4A, 5, 38.

In proceedings under the Land Acquisition Act, the notice under section 4, the declaration under section 5 and the Order under section 38 must each set out the particular land to be acquired. The acquisition cannot be of an indeterminate corpus.

The land sought to be acquired from the plaintiff-appellant was described as follows :—" A portion in extent about 1A. 1R. 16P. out of the land called Hambu Ela Watta and bounded as follows :—North and East by the remaining portion of the same land and V. C. road ; South and West by Polwatta Ganga and the remaining portion of the same land."

Held, that there was uncertainty as to the precise location of the land. The plaintiff was therefore entitled to an interim injunction restraining the acquisition.

KARUNANAYAKE v. DE SILVA 398

Landlord and Tenant—

1. *Rent Restriction (Amendment) Act No. 12 of 1966—Scope of sections 2 and 4 (1) (c)—Ejectment of tenant on ground of rent being in arrears for over 3 months—Decree entered on 12th March 1965—Enforceability—How long can an action be regarded as pending ?—Civil Procedure Code, s. 6.*

A decree for ejectment entered in favour of a landlord against his tenant between 20th July 1962 and the date when the Rent Restriction (Amendment) Act No. 12 of 1966 came into operation, in respect of an action instituted during that time, is not rendered null and void and unenforceable by section 4 (1) (c) of the amending Act, if the judgment was obtained on the ground that rent was in arrears for three months or more.

An action must be considered as pending within the meaning of section 4 (1) (a) of Act No. 12 of 1966 if, after judgment is entered, the judgment-creditor has still to come to Court to obtain reliefs.

MARTIN SILVA v. MAHASOON 6

2. *Rent-controlled premises—Tenant in arrears of rent for more than 3 months after it was due—Failure of landlord to give 3 months' notice of termination of tenancy—Action in ejectment—Maintainability—Scope of s. 4 (1) of Rent Restriction (Amendment) Act, No. 12 of 1966—Rent Restriction Act, as amended by Act No. 10 of 1961 and Act No. 12 of 1966, ss. 12 A (1), 13 (1A)—Civil Procedure Code, s. 46 (2) (i).*

Plaintiff sought ejectment of the defendant, his tenant, on the ground that the latter had failed to pay rent for five months and was continuing to remain in unlawful occupation in spite of one month's notice given to him to leave the premises. The action was filed on the 6th July 1965. The premises were governed by the Rent Restriction Act and their standard rent was below Rs. 100.

Held, that the plaintiff's action was not maintainable for the reason that although the plaintiff averred as a fact that rent had been in arrears for more than three months after it was due, three months' notice of termination of tenancy in conformity with the requirement of section 13 (1A) of the Rent Restriction Act, as amended by Act No. 10 of 1961, had not been given. The action could not be said to have been brought on a ground on which an action is now permitted to be brought by section 12A of the Rent Restriction Act, as amended by Act, No. 12 of 1966. The plaintiff should have been rejected *in limine* in terms of section 46 (2) (i) of the Civil Procedure Code.

RATNAM v. DHEEN 21

3. *Rent Restriction (Amendment) Act No. 12 of 1966—Applicability of its provisions at stage of execution of decree—Inapplicability if tenant is in arrears of rent for 3 months—Rent Restriction Act, s. 12 A (1) (a).*

Where execution proceedings for the enforcement of a decree obtained by a landlord for the ejectment of his tenant had begun but were not completed on the date when the Rent Restriction (Amendment) Act

No. 12 of 1966 came into operation, the tenant is entitled to take shelter under the provisions of the Amending Act, even if he had gained time by unsuccessful applications for stay of execution of writ and by preferring an appeal to the Supreme Court. But he is liable to be ejected under section 12 A (1) (a) of the Rent Restriction Act (as amended by Act No. 12 of 1966) if he was in arrears of rent for three months at the time of the institution of the action.

ABDUL SAMAD v. SIRINAYAKE

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4. *Rent Restriction (Amendment) Act, No. 12 of 1966—Section 4 (1) (c)—Eviction of tenant in contravention thereof—Right of the tenant to be restored to possession.*

The defendant-appellant, a tenant, was illegally ejected by the execution of writ in contravention of the provisions of section 4 (1) (c) of the Rent Restriction (Amendment) Act, No. 12 of 1966.

Held, that the appellant should be restored to possession of the premises let.

HEWAGE v. BANDARANAYAKE

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5. *Rent Restriction Act—Inapplicability to lease of a business carried on at any premises.*

Plaintiff leased to the defendant for a period of 3 years the business of a hotel carried on at certain premises, together with goodwill, shop fittings, furniture, utensils and implements of trade. At the expiry of the period of 3 years the defendant was to yield up peaceful possession of the business and premises to the plaintiff.

The defendant claimed that what was leased to him was a furnished apartment and that it was governed by the Rent Restriction Act.

Held, that the transaction between the parties was not a lease of a building but of a business. The defendant's position while he was in occupation of the premises was no more than that of a licensee. The Rent Restriction Act, therefore, had no application to the case.

SEDIRIS SINGHO v. WIJESINGHE

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6. *Landlord and tenant—Monthly tenancy—Notice to quit—Computation of time.*

Where, in a monthly tenancy of premises commencing on the first day and ending on the last day of a calendar month, the landlord gave the tenant a notice before the end of August 1964 requiring him to quit the premises on or before 1st December 1964—

Held, that the notice given by the landlord was a valid notice to quit at the end of November 1964, i.e. at midnight on 30th November/1st December—with an offer by the landlord to the tenant to accept a termination of the tenancy at the latter's option at any time before the end of November.

Ismail v. Sheriff (68 N. L. R. 19) and *Robert v. Fernando* (69 N. L. R. 572) not followed.

HANIFFA v. SELLAMUTHU

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7. *Rent Restriction (Amendment) Act, No. 12 of 1966—Sections 2 and 4—Scope of retrospective effect of section 4 (1)—Sub-letting—Rent Restriction Act, s. 12 A (1) (b).*

The retrospective operation of the provisions of section 4 (1) of the Rent Restriction (Amendment) Act, No. 12 of 1966, is not applicable to a pending action in which a landlord claims the right to eject his tenant on the ground of sub-letting.

JAMALDEEN v. MANAFF

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8. *Rent Restriction Act—Section 9—Sub-letting—Quantum of evidence.*

The question was whether the defendant had, in contravention of section 9 of the Rent Restriction Act, sub-let a part of the premises rented to him by the plaintiff. The evidence disclosed that one A. C. was in sole and exclusive occupation of a room of the premises and that he carried on business in that room. The defendant took up the position that no rent was paid to him by A. C. and that the latter had been let into occupation of the room before the defendant became the tenant of the premises.

Held, that, in the absence of acceptable evidence to explain A. C.'s occupation, the only inference was that A. C. was in occupation as a sub-tenant paying rent to the defendant.

Held further, that, where sub-letting is continued, there is a continued breach by the tenant of the statutory provision against sub-letting.

SEYED MOHAMED v. MEERA PILLAI

.. .. 237

9. *Landlord and tenant—Eviction of landlord by title paramount—Quantum of evidence—Estoppel of tenant—Scope—Evidence Ordinance, s. 116—Protection of Rent Restriction Act—Burden of proof.*

A lessee sublet the leased premises to a person who was already a tenant under the owner at the time of the commencement of the lease. After his rights under the lease bond had come to an end and the sub-tenant had been asked by the owner to pay rent to a third person, the lessee instituted the present action for recovery of arrears of rent and for the ejectment of the subtenant.

Held, that the lessee was entitled to judgment for arrears of rent till the date of the termination of the lease but not to an order of ejectment of the sub-tenant. In such a case, the lessee has been evicted by title paramount, and the provisions of section 116 of the Evidence Ordinance are not applicable. If he relies on the protection of the Rent Restriction Act, the burden is on him to prove that the leasehold rights are still available to him despite the expiration of the period specified in the lease bond.

MARGARET NONA v. BAZEER

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10. *Rent-controlled premises—Sub-letting—Sale of premises thereafter by landlord—Purchaser has no right to eject the tenant on the ground of the prior sub-letting—Action which is null and void ab initio—Subsequent amendment of plaint to include a valid claim—Effect—Rent Restriction Act (Cap. 274), s. 9 (1) (2)—Rent Restriction (Amendment) Act, No. 12 of 1966, ss. 2, 4 (1)—Civil Procedure Code, s. 93—Sub-letting—Quantum of evidence.*

Where a tenant sublets rent-controlled premises without the permission of his landlord, a person who subsequently purchases the premises from the landlord is not entitled to eject the tenant on the ground of the sub-letting which had been done when he was not the landlord.

Ratnasingham v. Catheraswamy (58 N. L. R. 476) not followed.

An action which is declared by law to be null and void *ab initio* cannot be given validity by a subsequent amendment of the plaint so as to include a valid claim. Accordingly, where prior to the date when the Rent Restriction (Amendment) Act No. 12 of 1966 came into operation, a landlord instituted action for ejectment of his tenant on the ground that the rented premises were reasonably required for his own use, he is not entitled to give validity to the action after the amending Act was passed, by amendment of the plaint alleging that the defendant had sublet the premises.

A landlord who seeks to show that his tenant had sublet part of the rented premises must establish that the alleged sub-tenant had exclusive occupation of an identifiable entity to the exclusion of the tenant.

WALLES v. HECTOR SILVA

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11. *Privy Council—Estoppel of tenant and licensee—Applicability of English law—Evidence Ordinance, ss. 100, 116—Interpretation of s. 116—Buddhist ecclesiastical law.*

Section 116 of the Evidence Ordinance reads as follows :—

“ No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property ; and

no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.”

Held, (i) that it is legitimate, when applying s. 116, to consult and give effect to the English cases, even if they appear to go further than the language of the section ; and specific authority for so doing is given by s. 100 of the Evidence Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

(ii) that, where a person entered into possession of immovable property by the licence of the person in possession thereof, it is unnecessary, and indeed irrelevant, for the purposes of an argument on estoppel, to consider what the licensor's title truly was. The question is what was the title which the licensee was apparently recognizing, and this depends on the title which the licensor was apparently claiming.

(iii) that the construction put on s. 116 that under it the estoppel operates only in favour of the first landlord of a tenancy or the original grantor of the licence, and that it cannot operate in favour of their successors in title, truncates the English doctrine. The scope of the first and second paragraphs of s. 116 must by virtue of s. 100 be expanded to give full effect to the English law of estoppel.

(iv) that a revocable licence is automatically determined by the death of the licensor or by the assignment of the land over which the licence is exercised. If the licence is then renewed, and the licensee continues to remain on the land, there is no moment at which the tenant or licensee physically leaves the land and re-enters it. There is none the less a new taking of possession in law, and it cannot be contended by the licensee that he did not “ come upon ” the land by virtue of the new licence but by virtue of that which had expired.

G was the Viharadhipathi of a Buddhist temple. In 1942 the defendant-respondent, who was a bhikku belonging to that temple, entered into possession of a land of the temple as licensee under G and paid his dues in the form of crops or cash to G's agent, the plaintiff-appellant. After G's death in 1944 the respondent continued to pay the dues to the appellant who claimed them in his own right as the person whom G had appointed as Viharadhipathi by a deed executed in 1930. Until 1953 the respondent acknowledged the appellant's title of Viharadhipathi. After that year he refused to pay the dues because he claimed that he, as senior pupil of the deceased G, succeeded G as Viharadhipathi upon G's death in 1944. In the present action, which commenced on 20th September 1954, the appellant asked for a declaration that he was entitled to the land and for an order of ejection of the respondent from the land. There was also a specific issue on the basis of estoppel. The Supreme Court held that the appellant's action failed because he could not establish his title as Viharadhipathi.

Held, that the English law relating to estoppel of tenant and licensee is wholly applicable in Ceylon. Whether or not the appellant was the lawful Viharadhipathi, the respondent was estopped from challenging the appellant's title to possession of the land in dispute. Not even the

most limited construction of the second paragraph of s. 116 of the Evidence Ordinance would avail the respondent. The licence which was granted to him in 1942 was clearly a revocable one. If the licence was not originally granted in 1942 by the appellant in his own right, after the death of G the grant of a new licence must be implied.

MEERUPPE SUMANATISSA TERUNNANSE v. WARAKAPITIYA
PANGNANANDA TERUNNANSE

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12. *Rent-Restriction (Amendment) Act, No. 12 of 1966—Scope of s. 4 of Rent Restriction Act, as amended by Act No. 12 of 1966, s. 12A.*

Section 4 of the Rent Restriction (Amendment) Act No. 12 of 1966 must be interpreted as not applying to an action instituted on any of the excepted grounds specified in section 12A of the Rent Restriction Act, as amended by Act No. 12 of 1966. Accordingly it is not applicable to an action seeking to eject a tenant on the ground of his being in arrears of rent for a period of more than three months.

DEEN v. HALIM 401

13. *Rent Restriction (Amendment) Act, No. 12 of 1966—Scope of section 4 (1) (c)—Averments of arrears of rent for more than 3 months and “reasonable requirement”—Consent decree—Interpretation—Rent Restriction Act, s. 12A.*

In this action falling under section 12A of the Rent Restriction Act (as amended by section 2 of Act No. 12 of 1966), consent decree was entered recognizing the fact that the tenant was in arrears of rent for more than three months. Another ground averred in the plaint was that the premises were “reasonably required” by the landlord. The terms of settlement provided for the payment of the amount of the arrears of rent by setting off against it the sum of Rs. 1000 deposited as security by the tenant and the amount of the taxes paid by him.

Held, that section 4 (1) (c) of the Rent Restriction (Amendment) Act No. 12 of 1966 could not prevent proceedings from being taken to enforce the decree for ejectment of the tenant.

NAVAS v. MOHAMED 570

14. *National Housing Act (Cap. 401)—Section 31—“Occupier”—Ejectment of a sub-tenant or third party—Procedure. 573*

See NATIONAL HOUSING ACT.

15. *See also CROWN LANDS ORDINANCE.*

Last Will—

See WILLS.

Lease—

See CROWN LANDS ORDINANCE ; LANDLORD AND TENANT.

Limitation of Actions—

See PRESCRIPTION.

Local Authorities—

1. *Quo warranto—Member of Municipal Council—Allegation of disqualification on the ground that he is not a citizen of Ceylon—Burden of proof—Presence of a member's name in register of voters—Effect—Local Authorities Elections Ordinance (Cap. 262), ss. 8, 9 (1), 10, 18—Citizenship Act (Cap. 349), s. 2 (2).*

The applicant applied for a writ of *quo warranto* against the respondent on the ground that the latter, who was elected to represent a Ward of the Colombo Municipal Council to sit and vote as a member thereof, was disqualified under section 9 (1) of the Local Authorities Elections Ordinance for membership of the Council in that he was not a citizen of Ceylon.

Held, (i) that the onus of satisfying the Court that the respondent was not a citizen of Ceylon was on the applicant.

(ii) that the fact that the respondent's name was on the register of voters was not a bar to the present application. The right to be elected to membership of the Council and the right to sit and vote as a member thereof are not one and the same thing.

RAZEEM v. NAZEEER

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2. *Municipal Council—General meeting for transaction of business—Notice of motion given by member—Scope of Mayor's power to refuse to place the motion on the agenda—Remedy of member—Mandamus—By-law 12 (1) (2)—Municipal Councils Ordinance (Cap. 252), ss. 17, 19, 20, 40 (1) (r).*

Prior to the date when a statutory monthly general meeting of the Municipal Council of Kandy was due to be held on 30th April 1967, the applicant, who was a member of the Council, gave notice in writing to the Commissioner that he would then move the following motion :—

“ In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967.”

The notice of the motion was given as required by by-law 12 (1) of the Council's by-laws. By-law 12 (2) reads as follows :—

“ All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda.”

The applicant's motion was not included in the agenda for the meeting of 30th April 1967 for the reason that before the agenda was prepared the Mayor (the 1st respondent) had ruled the motion out of order. On the present application for *mandamus* to compel the inclusion of the motion in the agenda, it was claimed on behalf of the Mayor that he had an absolute power of ruling any motion out of order.

Held, that, inasmuch as the motion was one raising a general question of financial policy, section 40 (1) (r) of the Municipal Councils Ordinance conferred on the applicant the right to give notice of the motion. Where a member has a right to give notice of a motion, by-law 12 (2) cannot be construed so as to frustrate the exercise of the power conferred by the statute itself. By-law 12 (2) does not vest in the Mayor an absolute power or discretion to rule out motions. By making the ruling complained of in the present case, the Mayor failed or refused to perform his statutory duty, and *mandamus* was the appropriate remedy. The remedy could be granted although the date of the meeting had already passed, if the motion could be brought forward at a subsequent meeting of the Council and could still serve some purpose.

Held further, that section 20 of the Municipal Councils Ordinance did not provide an alternative remedy.

DE SILVA v. SENANAYAKE 320

3. *Municipal Council of Colombo—By-law prohibiting sale of meat of an animal not slaughtered in the Municipal Slaughter-House—Invalidity—By-law 30 of chapter 13 of the By-laws and Regulations—Butchers Ordinance (Cap. 272), ss. 2, 13, 14, 15, 18.*

By-law 30 of chapter 13 of the By-laws and Regulations of the Municipal Council of Colombo is *ultra vires* of the Butchers Ordinance in that it restricts the sale of meat to sale only of meat of animals slaughtered in the Municipal Slaughter-House and thus prohibits the sale of meat of animals slaughtered at other authorised places.

LAFIER v. EDIRIWEERA 334

Local Government—

See LOCAL AUTHORITIES.

Maintenance—

Maintenance—Provisional maintenance order made in the United Kingdom—Enforcement of it in Ceylon—Scope—Maintenance Orders (Facilities for Enforcement) Ordinance (Cap. 92), s. 6.

Where a court in England has made against a father residing in Ceylon a provisional order concerning the maintenance and custody of his children, that part of the order concerning maintenance may be enforced in Ceylon in accordance with the provisions of section 6 of the Maintenance Orders (Facilities for Enforcement) Ordinance.

MACK v. MACK 157

Mandamus—

See WRIT OF MANDAMUS.

Marriage—

1. *Marriage of a minor—Registration without father's consent—Subsequent action for declaration that the marriage was invalid—Not maintainable—Marriage Registration Ordinance (Cap. 112), ss. 42, 46.*

A wife, who was 18 years old at the time of her marriage, which was registered, sued her husband subsequently praying for a declaration that the marriage was null and void on the ground that her father's consent to the marriage had not been obtained.

Held, that sections 42 and 46 of the Marriage Registration Ordinance (Cap. 112) debarred the marriage from being declared invalid.

DAYAWATHIE v. GUNARATNE 260

2. *Putative marriage—Children born of such marriage—Interim custody of them pending action for annulment of marriage*

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See WRIT OF HABEAS CORPUS (3).

Maxims—

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Minors—

Marriage of a minor—Registration without father's consent—Subsequent action for declaration that the marriage was invalid—Not maintainable—Marriage Registration Ordinance (Cap. 112), ss. 42, 46. .. 260

See MARRIAGE.

Mortgage—

Debt Conciliation Ordinance, as amended by Act No. 5 of 1959—Sections 30, 40, 43, 56, 64—Conditional transfer of immovable property—Limited extent to which it is deemed to be a "mortgage"—Evidence Ordinance, s. 92—Prevention of Frauds Ordinance, s. 2. .. 328

See DEBT CONCILIATION ORDINANCE (2).

Motor Traffic Act—

Motor Traffic Act (Cap. 203)—Sections 102 (4) and 109—Insurance policy covering 3rd party risks—"Excluded drivers"—Action by insurer for declaration of non-liability for breach of condition—Quantum of evidence.

An insurer is entitled to obtain a declaration of non-liability under section 109 of the Motor Traffic Act if he establishes that the accident in question was caused by the motor vehicle when it was being driven by the owner (the insured) in breach of a specific condition in the policy of insurance that it should not be driven by any person who is not the holder of a driving licence. In such a case, the inclusion of another condition in the policy that the vehicle should not be driven by any person other than the insured is not material.

EMJAY INSURANCE CO. LTD. v. WILLIAM 566

Motor Vehicles—

See MOTOR TRAFFIC ACT.

Muhammadan Law—

See MUSLIM LAW.

Municipal Councils—

See LOCAL AUTHORITIES.

Murder—

See COURT OF CRIMINAL APPEAL DECISIONS.

Muslim Law—

1. *Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956—Section 39 (1) (2)—Inapplicability thereof to a proceeding in respect of an earlier decree of Court resulting in a Muslim Charitable Trust—Interpretation Ordinance (Cap. 2), s. 6 (3) (c).*

Where, after the Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956, came into force, an application is made to a Court to fill a vacancy in the office of trustee in terms of a scheme of management drawn up and approved by that Court earlier under the repealed Muslim Intestate Succession and Wakfs Act, No. 10 of 1931, in respect of a

Muslim Charitable Trust, section 6 (3) (c) of the Interpretation Ordinance renders it unnecessary to commence proceedings in a new action with a certificate from the Commissioner appointed under the new Act No. 51 of 1956. Sub-sections (1) and (2) of section 39 of the new Act were meant to apply to a proceeding relating to a Muslim Charitable Trust which has commenced when there has been no order or decree made by a Court earlier relating to such a trust.

ISSADEEN v. ATHEEK 159

2. *Muslim Marriage and Divorce Act (Cap. 115)—Sections 16, 17, 24, 29—Validity of divorce despite non-registration—Second or subsequent marriage—Duty of registrar to register it.*

If a Muslim divorces his wife, section 16 of the Muslim Marriage and Divorce Act makes the divorce valid even if it is not registered. He is, therefore, entitled to contract a second marriage on the basis that he does not have a wife of another marriage. The registrar has no power then to refuse to register the second marriage on the ground that the notices required by section 24 of the Act have not been given.

ABDUL CADER v. WEERAMAN 190

3. *Muslim law—Dissolution of marriage—Mother's right to the custody of her child—Forfeiture thereof if she re-marries—Habeas corpus.*

In Muslim law (Shafei sect) a woman, whose marriage has been dissolved, forfeits her right to the custody of a male child of that marriage if she marries subsequently a person who is not related to the child, unless special circumstances are shown which require that the child should continue to remain in the mother's custody.

HAMEEN v. MALIHA BABY 405

National Housing Act—

National Housing Act (Cap. 401)—Section 31—“ Occupier ”—Ejectment of a sub-tenant or third party—Procedure.

Part V of the National Housing Act as originally enacted does not authorise the special procedure for ejectment to be utilised against a person who is not an “ occupier ” in the strict sense referred to in Section 31 of the Act. Such procedure therefore is not available in a case where the original occupier holding under the Commissioner sub-lets the premises or permits some other person (not being a dependant) to occupy the premises.

SILVA v. COMMISSIONER FOR NATIONAL HOUSING 573

Natural Justice—

1. *Import and Export (Control) Act (Cap. 236)—Sections 2 and 3—Import (Licensing) Regulations, 1963, Regulation 2—Issue or cancellation of licences thereunder—Controller's power is purely executive and not judicial—Licensee need not be heard before his licence is cancelled—Natural justice—Certiorari.* 149

See IMPORT AND EXPORT (CONTROL) ACT.

2. *Public officer—Compulsory retirement after age of 55 years—Should the officer be given a hearing ?—Natural justice.* 529

See PUBLIC SERVANTS (2).

Negotiable Instruments—

1. *Bills of Exchange Ordinance*—Section 89 (1)—*Promissory note payable at Colombo*—*Requirement of presentment for payment*—*Effect of failure to present for payment when such presentment is necessary* .. 31

• *See CONTRACTS (1).*

2. *Cheque*—*Notice of dishonour*—*Circumstances when it can and cannot be dispensed with*—*Bills of Exchange Ordinance (Cap. 82)*, ss. 49 (12), 50, (2) (c) (v).

Where a cheque when presented for payment is dishonoured because “ effects were not cleared ”, an indorser of the cheque must be given due notice of dishonour before he can be sued. In such a case section 50 (2) (c) (v) does not dispense with notice of dishonour.

WIJESUNDERA v. KUNJIMOOSA & Co. 64

Official Language Act—

1. *Public servant*—*Contract of employment with the Crown*—*Claim for arrears of pay*—*Unenforceability by action in the Courts*—*Relationship between the Crown and its servants*—*Inapplicability of Roman Dutch Law*—*Applicability of English Law as altered or modified in Ceylon*—*Right of action when a public servant's terms of engagement are laid down by statute*—*Treasury Circular issued under compulsion of Official Language Act, No. 33 of 1956*—*Is it valid?*—*Ceylon (Constitution) Order in Council, 1946 (Cap. 379)*, ss. 29, 46, 51, 57, 58, 60, 61. .. 121

See PUBLIC SERVANTS.

2. *See also SINHALESE AND TAMIL.*

Paddy Lands Act—

Paddy Lands Act—Section 63—*Meaning of term “ tenant-cultivator ”.*

The protection conferred by the Paddy Lands Act to an individual is enjoyed only by a person who by his own labour and that of members of his family cultivates a paddy land. A person is not a “ tenant-cultivator ” within the meaning of the definition of that term in section 63 of the Paddy Lands Act if he employs hired labour for any two of the three different kinds of work contemplated in the definition, viz., ploughing, sowing and reaping ; and in regard to the watching and tending of crops, this must be done only by the tenant himself or members of his family.

VISUVANATHAN v. THURAIRAJAH 83

Parliamentary Elections—

1. *Election petition*—*Corrupt practice*—*False statements made at an election meeting concerning the unsuccessful candidate*—*Police reports in proof of such statements*—*Admissibility in evidence*—*Evidence Ordinance, ss. 35, 160*—*Amendment of particulars*—*Discretion of Court to allow it*—*Scope*—*Election Petition Rules, Rule 5.*

(i) A police officer took down at an election meeting rough notes of the speeches made at the meeting and subsequently prepared from those notes a report for transmission to the Officer-in-Charge of the Station. After the report was prepared the rough notes were destroyed.

Held, that the Police report was not admissible in evidence under Section 35 of the Evidence Ordinance in proof of statements made by the speakers at the meeting. Such a report is not a “ book, register or record ” within the meaning of that Section.

Wimalasara Banda v. Yalegama (69 N. L. R. 361) followed.

(ii) Towards the close of the case for the petitioners-respondents, after some 10 dates of trial, Counsel appearing for them moved, in consequence of a statement made by the respondent-appellant during his cross-examination, to amend the particulars by adding a new charge of making a false statement concerning the character of the opposing candidate. This amendment was allowed by the Election Judge without appreciating the gravity of the prejudice to the appellant which arose upon his being required to face a new charge of which he had no warning earlier.

Held, that Rule 5 of the Election Petition Rules which provides that particulars may be ordered "to prevent surprise and unnecessary expense, and to secure a fair and effectual trial" does not permit the Election Judge to admit a new particular which is substantially a new charge never contemplated in the original petition.

Semble : Leave to amend particulars may be allowed only if it appears upon affidavit that the failure to furnish the particulars in due time had been *bona fide*. In practice the existence of good faith must be established by affidavit.

HERATH v. SENAVIRATNE 145

2. *Election petition—Status of petitioner to present petition—Standard of proof required—Same as in a civil action—Burden of proof—Factum probandum—Petitioner's evidence thereon uncontradicted—Duty of Court to take that circumstance into account—Criminal Procedure Code, ss. 162, 191, 234 (1)—Civil Procedure Code, ss. 147, 163—Evidence Ordinance, s. 3—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 79.*

In an election petition, where the only question to be determined was whether in terms of section 79 of the Ceylon (Parliamentary Elections) Order in Council the person who presented the petition had a right to vote at the election to which the petition related, or in other words whether the name of that person was entered on the register of electors for Electoral District No. 55 in operation under the Order in Council at the time of the holding of the General Election in March 1965—

Held : When it is necessary to adduce proof of the status of a petitioner in an election petition, the standard of proof is the same as that required under our law in civil actions. Principles of the criminal law as to proof of guilt, which are reinforced by provisions such as sections 162, 191 and 234 (1) of the Criminal Procedure Code, are not applicable.

A petitioner need not adduce proof of status unless and until such proof is demanded by objection taken by the respondent. Such proof may be demanded before the close, or at the close, of the petitioner's case.

The objection as to proof of status constitutes a formal submission to the Court that there has not been evidence to prove the petitioner's qualification as such, plus a motion that the petition be dismissed if such proof is not adduced. But where there is evidence on record which, if believed, is ample proof of the petitioner's qualification to present the election petition, the burden would shift to the respondent if he challenges the evidence of status.

Where the petitioner has led evidence sufficient in law to prove his status, i.e., a *factum probandum*, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner. There is then an additional "matter before the Court", which the definition in section 3 of the Evidence Ordinance requires the Court to take into account, namely, that the evidence led by the petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law.

The petitioner's name in the caption of his petition was given as "Luwisdura Edrick de Silva". The petition purported to be signed by the petitioner, but the signature was written as "L. Adrich de Silva". The evidence of certain witnesses called for the petitioner showed that the person whose signature appeared in the petition was the person named in the caption, and that that person was "Luwisdura Edrick de Silva" who was registered in the Electoral List as a voter. The evidence of those witnesses was not contradicted. After the close of the petitioner's case, Counsel for the respondent raised an objection to the continuance of the hearing of the petition on the ground that the petitioner had not proved his status to maintain the petition. The Election Judge upheld the objection and dismissed the petition.

Held, that the failure of the Election Judge to take account of the uncontradicted evidence of the aforementioned witnesses was a non-direction amounting to a misdirection in law which vitiated the conclusion of fact reached ultimately by the Judge.

Obiter : "Section 147 of the Civil Procedure Code permits an issue of law to be disposed of as a preliminary issue, but it does not permit the same issue to be decided more than once. Hence, even if it was permissible for respondent's Counsel in this case to request a determination on the matter of status at the stage when he made it, that request disentitles him from leading any further evidence to disprove the status."

EDRICK DE SILVA v. CHANDRADASA DE SILVA .. .

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3. *Election petition—Execution proceedings for recovery of costs—Jurisdiction of any single Judge of the Supreme Court—Civil Procedure Code, ss. 219, 776 (4), 777—Parliamentary Elections Order in Council, ss. 78B, 82A (5), 82B (1) (4)—Parliamentary Election Petition Rules 2, 33 (1).*

Where the Judge who heard an election petition is *functus officio*, proceedings for the recovery of costs awarded by him, and by the Supreme Court on appeal, in favour of the petitioner may be taken before any single Judge of the Supreme Court notwithstanding that such Judge does not happen to be the Election Judge who was nominated to hear the election petition. Execution proceedings in relation to an order for costs are interlocutory matters within the meaning of section 78B of the Parliamentary Elections Order in Council.

SENEVIRATNE v. MUTHUBANDA .. .

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Partition Actions—

1. *Partition action—Interlocutory decree—Omission to serve summons on a party previously—Circumstances when relief will not be granted by way of revision or restitutio in integrum—Partition Act, s. 22.*

In this application for Revision or *Restitutio in integrum*, the petitioner sought to have the interlocutory decree entered in a partition action set aside. The main ground urged was that although the petitioner was disclosed as a claimant in the Surveyor's report, no notice or summons was thereafter served on him as required by section 22 of the Partition Act. The 8th defendant-respondent also supported the application on the ground that, although he was named as 8th defendant in the plaint, he never received any summons or notice.

The facts showed that the petitioner had tried to pass off as, and usurp the place of, the 8th defendant-respondent and that, long before the interlocutory decree was entered, he could have sought to have himself added as a party instead of taking the inexplicable course he did. Further, even when his application to intervene was dismissed by the District Court, the petitioner did nothing for 8 months.

Held, that it was not the function of the Supreme Court, in the exercise of the jurisdiction now invoked, to relieve parties of the consequences of their own folly, negligence and laches. The maxim *vigilantibus, non dormientibus, jura subveniunt* provided a sufficient answer to the petitioner's application. Further, the petitioner did not display the honesty and frankness expected of a person seeking the extraordinary powers of the Court. *Digitized by Noolaham Foundation.*
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Held further, that the right of a party in a partition action to be served summons may be lost by acquiescence on his part. In the present case the 8th defendant had not only been allotted his due share but had also failed to take steps for nearly one year to have the interlocutory decree set aside after he became aware of it. He was not entitled, therefore, to any relief.

DON LEWIS v. DISSANAYAKE 8

2. *Partition action—Mortgage by a party pendente lite of the interest that will be allotted to him in the final decree—Mortgage not specified in subsequent final decree—Right of the mortgagee to sue on the bond—“Encumbrance”—Partition Act (Cap. 69), ss. 5, 12, 19, 48, 67, 70.*

Section 67 of the Partition Act has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending a partition action does not prevent a party from disposing, during the pendency of the action, of the interest that will be ultimately allotted to him in the final decree.

An interest which vests only upon entry of the final decree is not contemplated in the term “encumbrance” in section 48 of the Partition Act. Accordingly, where, after interlocutory decree has been entered in a pending partition action and before the final decree, a party mortgages the interest that will be allotted to him under the final decree, the mortgagee will be entitled to sue on the mortgage bond after the final decree is entered, even if the interest mortgaged is not conserved in the final decree. In such a case, it cannot be contended that the final decree is free from the “encumbrance” of the mortgage.

JAYATILLAKE v. SOMADASA 25

3. *Privy Council—Partition action—Interlocutory decree—Order for sale of land—Reservation therein of encumbrances—Validity—Meaning of the terms “the land” and “the title”—Partition Act (Cap. 69), ss. 2, 4, 5, 16 (2), 18, 25, 26, 46, 47, 48, 50, 51, 54.*

In proceedings under the Partition Act (Cap. 69) the Court has power, when ordering a sale of land held in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land sold. It cannot be contended that such sale must be made so as to pass a title free from the life interest.

Almost the whole of the corpus in the present partition action was occupied by a building and no physical partition of the property was practicable. Plaintiff, 1st defendant and 3rd defendant were entitled respectively to undivided 11/18, 5/18 and 2/18 shares, of which 3/18, 2/18 and 1/18 shares, totalling 1/3 share, were subject to the life interest in favour of the 2nd defendant. The life interest of the 2nd defendant arose by way of usufruct and was confined to an interest in the income of the property. It was subject to forfeiture on remarriage.

Held, that an interlocutory decree for the sale of the property, subject to the life interest in favour of the 2nd defendant in respect of 1/3 share of the soil and 1/3 share of the buildings, was in conformity with the provisions of the Partition Act, more especially of sections 25, 26, 46, 47 and 48. In such a case it cannot be contended that a sale under the Partition Ordinance must be free from all encumbrances.

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4. *Partition action—Erroneous interlocutory and final decrees—Power of Court to amend them subsequently—Finding in judgment that a share is subject to a mortgage—Omission to reserve in the interlocutory and final decrees the rights of the mortgagee—Sale of the share prior to amendment of the decrees—Effect—Scope of final and conclusive effect of interlocutory and final decrees—Civil Procedure Code, ss. 5, 187, 188, 189—Partition Act (Cap. 69), ss. 6 to 9, 26, 36, 48 (1), 48 (2), 51, 59.*

*Held by TAMBIAH, J., and SIVA SUPRAMANIAM, J. (H. N. G. FERNANDO, C.J., dissenting) :—*Where, in an action governed by the Partition Act, the decree which the Court purports to enter under s. 26 of the Act is not in accordance with the findings in the judgment, such decree is not an interlocutory decree which has a final and conclusive effect under s. 48 (1). If the interlocutory decree is not such a decree as the Judge is empowered to sign under s. 26, the final decree for partition entered in pursuance of that decree is also not a valid “ final decree under s. 36 ” having the final and conclusive effect under s. 48. In such a case the Court has the power, by virtue of the provisions of s. 189 of the Civil Procedure Code read with s. 79 of the Partition Act, to amend on a subsequent date the erroneous interlocutory and final decrees so as to bring them into conformity with the findings in the judgment, even though a divided share as described erroneously in the unamended decrees has already been sold and the purchaser’s rights under the sale would be adversely affected by the subsequent amendment of the decrees.

In partition action No. 4417 the trial Judge found in his judgment that an undivided one-half share of the corpus was subject to a mortgage bond executed on 30th November 1954. Nevertheless the rights of the mortgagee, who was a party to the action, were not reserved either in the interlocutory decree or in the final decree entered on 11th October 1956 and 11th September 1958 respectively. Both decrees were registered. Thereafter, the person who was allotted the mortgaged share sold it “ free from any encumbrance ” on 24th June 1960. On 14th October 1960, upon the joint consent motion of the parties’ Proctors seeking amendment of the decrees, the Court brought the decrees into conformity with the finding in the judgment by declaring that the divided share that had been allotted in lieu of the mortgaged undivided half-share was subject to the mortgage. The present action was subsequently brought by the mortgagee to enforce her rights on the mortgage.

Held (H. N. G. FERNANDO, C.J., dissenting), that the interlocutory decree and the final decree that were originally entered on 11th October 1956 and 11th September 1958 respectively did not have the final and conclusive effect contemplated in s. 48 of the Partition Act, and the Court had the power, under s. 189 of the Civil Procedure Code, to effect the amendments made subsequently on 14th October 1960. Accordingly, the divided share which had been sold on 24th June 1960 “ free from any encumbrance ” was subject to the mortgage executed in favour of the present plaintiff on 30th November 1954. The plaintiff was, therefore, entitled to a hypothecary decree.

NAVARATNAM v. SIRIWARDENA

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5. *Partition action—Inclusion, in plaint, of a land possessed dividedly by prescriptive possession—Alienation of that land pending the partition action—Validity—Partition Act, s. 67.*

Where, in a partition action, a particular portion of land is excluded from the partition on the ground that some person or persons have title to it as a separate land, whether by prescriptive possession or otherwise, section 67 of the Partition Act does not render void dealings with that portion during the pendency of that action.

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Penal Code—

Section 8	241
Sections 32, 33, 35	241
Section 72	409
Section 293	241
Section 433	263

See also COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL LAW.

Pleadings—

1. *Action which is null and void ab initio—Subsequent amendment of plaint to include a valid claim—Effect—Civil Procedure Code, s. 93.*

An action which is declared by law to be null and void *ab initio* cannot be given validity by a subsequent amendment of the plaint so as to include a valid claim. Accordingly, where, prior to the date when the Rent Restriction (Amendment) Act, No. 12 of 1966, came into operation, a landlord instituted action for ejectment of his tenant on the ground that the rented premises were reasonably required for his own use, he is not entitled to give validity to the action after the amending Act was passed, by amendment of the plaint alleging that the defendant had sublet the premises.

WALLES v. HECTOR SILVA 308

2. *Amendment of pleadings—Scope—Civil Procedure Code, ss. 93, 146.*

Pleadings may be amended after issues which do not strictly arise from the pleadings are permitted to be framed.

MARTIN v. THENUWARA 332

Postponements—

Postponement—Refusal despite production of medical certificate—Duty of Court to have considered whether the medical certificate was authentic.

On the first date of trial, despite the production of a medical certificate stating that the 1st defendant was unfit to attend Court, an application made on his behalf for postponement was refused and the Court proceeded to trial and to judgment without the 1st defendant having any chance to establish that the request for postponement was made on proper grounds.

Held, that there should be a fresh trial.

PERERA v. AMBALAVANAR 563

Prescription—

1. *Vendor and purchaser—Sale of different lands in one transaction—Is it a sale of an incertum juris?—Failure of purchaser to obtain possession of some of the lands—Right to recover proportionate share of purchase price—Period of prescription—Prescription Ordinance, ss. 6, 10.* 379

See VENDOR AND PURCHASER.

2. *Prescription—Action for recovery of money paid under a mistake of fact or a mistake of law—Maintainability—Requirement of demand before institution of action—Effect of omission to make such demand—Effect of demand on a time-barred debt—Profits tax—Payment of it by executor when it was not legally due—Claim by executor for repayment—Plea of prescription raised by Crown—Permissibility—Profits Tax Act (Cap. 243), s. 14—Profits Tax (Special Provisions) Act, No. 36 of 1964, s. 2—Income Tax Ordinance (Cap. 242), s. 28—Prescription Ordinance (Cap. 68), s. 10—Trusts Ordinance (Cap. 87), s. 91.* 447

See INCOME TAX (3).

Price Control—

See CONTROL OF PRICES ACT.

Privy Council—

1. *Privy Council—Execution of decree pending appeal thereto—Application to District Court in the first instance—Permissibility—Civil Procedure Code, s. 777—Appeals (Privy Council) Ordinance, Schedule, Rule 7.*

In an action for declaration of title to a land and ejectment of the defendant therefrom, the plaintiffs obtained judgment and decree in their favour. After the decree was executed and the plaintiffs were put in possession of the land, the Supreme Court allowed the defendant's appeal against the judgment and dismissed the plaintiff's action. On the next day the plaintiffs gave notice of their intention to appeal to the Privy Council.

Held, that, while the application for leave to appeal to the Privy Council was still pending in the Supreme Court, the defendant was entitled to apply to the District Court under section 777 of the Civil Procedure Code that he be restored to possession of the land. The defendant was not bound by Rule 7 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance to apply to the Supreme Court in the first instance.

LAIRIS APPU v. PIERIS 1

2. See also PRIVY COUNCIL DECISIONS.

Privy Council Decisions—

1. Constitutional law—*Imposition of Civic Disabilities (Special Provisions) Act, No. 14 of 1965, ss. 7, 10—Validity—“ Judicial power ”—Usurpation of judicial power by Parliament—Statute altering constitutional rights of particular persons—Mode of ascertaining the true character of such enactment—Amendment or repeal of a provision of the Constitution by inconsistent enactment—Validity thereof in the absence of an expressed intention to amend—Ceylon (Constitution) Order in Council, ss. 13 (3) (k), 24, 29 (1) and (4)—Mandamus to the Clerk and Assistant Clerk of the House of Representatives—Inappropriateness of such proceedings to question validity of the Act.*

KARIAPPER v. WIJESINHA 49

See CONSTITUTIONAL LAW (1).

2. Administration of estates—*Judicial settlement of accounts—Civil Procedure Code, s. 729—A legatee’s objection to the accounts—Right of appeal to Privy Council—Scope—Voluntary Settlement of future shares in a company—Death of Settlor before allotment of the shares—Rights, if any, of the Trustees of the Settlement to the ownership of the shares when they come to be allotted—Trusts Ordinance, s. 6—Identity of property designated in a last will—Quantum of evidence—Article due to a legatee—Refusal by the executors to deliver it—Personal liability of the executors—Gifts under a will—Direction that they should take effect on the “ date of distribution ”—Meaning of expression “ date of distribution ”—Relevancy of date of final assessment of estate duty—Estate Duty Ordinance.*

WIJEWARDENE v. GOMES 97

See ADMINISTRATION OF ESTATES

3. *Estoppel of tenant and licensee—Applicability of English law—Evidence Ordinance, ss. 100, 116—Interpretation of s. 116—Buddhist ecclesiastical law.*

MEERUPPE SUMANATISSA TERUNNANSE v. WARAKAPITIYA
PANGNANANDA TERUNNANSE 313

See LANDLORD AND TENANT (11).

4. *Partition action—Interlocutory decree—Order for sale of land—Reservation therein of encumbrances—Validity—Meaning of the terms “ the land ” and “ the title ”—Partition Act, ss. 2, 4, 5, 16 (2), 18, 25, 26, 46, 47, 48, 50, 51, 54.*

CEYLON THEATRES LTD. v. CINEMAS LTD. 337

See PARTITION ACTIONS (3).

5. *Fideicommissum—Will—Devise by testatrix to her sons—Presence therein of a si sine liberis decosserit clause—Death of a son leaving children—Whether his children are entitled to property alienated by him—Implied or tacit fideicommissum—Conditions necessary for inferring it.*

PEIRIS v. LAVIRIS APPU 385

See FIDEICOMISSA.

6. See also PRIVY COUNCIL.

Profits Tax—*See INCOME TAX (3).***Prohibition—***See WRIT OF PROHIBITION.***Promissory Notes—***See NEGOTIABLE INSTRUMENTS.***Public Servants—**

1. *Public servant—Contract of employment with the Crown—Claim for arrears of pay—Unenforceability by action in the Courts—Relationship between the Crown and its servants—Inapplicability of Roman-Dutch Law—Applicability of English Law as altered or modified in Ceylon—Right of action when a public servant's terms of engagement are laid down by statute—Treasury Circular issued under compulsion of Official Language Act, No. 33 of 1956—Is it valid?—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 29, 46, 51, 57, 58, 60, 61.*

A public servant in Ceylon has no right of redress by action in the Courts for a breach of any of the covenants and rules governing the salaries and conditions of service of public officers. This principle is operative except in respect of terms laid down by statute, and is unaffected, either expressly or by implication, by the provisions of the Ceylon Constitution.

“ The right to sue the Crown in Ceylon upon a contract is not founded on Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply to Ceylon. It follows that the question whether the plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon.”

Plaintiff, who was appointed an officer of the General Clerical Service on 1st November 1952, was promoted on 1st October 1959 to the Executive Clerical Class on the results of a competitive examination, in which Sinhala or, in the alternative, Tamil was a compulsory subject. The plaintiff, who is Tamil by race, chose Tamil as his language subject. According to the Minutes applicable, the salary scales, cadre, and conditions of service were liable to alteration from time to time. On 4th November 1961, a new Treasury Circular No. 560 provided, on pain of suspension of increment falling due, that officers of the category to which the plaintiff belonged must pass a proficiency test in Sinhala.

The plaintiff did not present himself for the requisite examination, and the suspension of the increment which fell due on 1st April 1962 was ordered. He sought in the present action a declaration that the Treasury Circular No. 560 of 4th November 1961 was unreasonable and/or illegal and not binding on him, and that he was entitled to the payment of the increment. It was contended that the Circular was issued under the compulsion of the Official Language Act No. 33 of 1956 and that, inasmuch as the latter Act was *ultra vires* because it transgressed the prohibitions against discrimination contained in Section 29 of the Constitution, the Circular too was invalid.

Held, that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denied to the present plaintiff a right to sue for the

increment alleged to be due to him under the Minutes. It was not necessary to consider the submissions as to the invalidity of the Official Language Act, because the plaintiff was not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant minutes and regulations provided for such a payment.

ATTORNEY-GENERAL *v.* KODESWARAN .. 121

2. *Public officers—Public Service Commission—Power to require a public officer to retire after the age of 55 years—Rule fixing the age of optional retirement—Validity—Should the officer be given a hearing?—Natural justice—Public Service Commission Rule 61—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 58, 60—Public and Judicial Officers (Retirement) Ordinance (Cap. 355), s. 2—Ceylon Independence Order in Council, 1947 (Cap. 377), s. 8.*

Section 60 of the Ceylon (Constitution) Order in Council, 1946, read with the rules passed under section 2 of the Public and Judicial Officers (Retirement) Ordinance and with the Proclamation made under section 8 of the Ceylon (Independence) Order in Council, 1947, empowers the Public Service Commission to require a public officer to retire from the public service upon his completing the age of fifty-five years or at any time thereafter.

Quaere, whether the public officer should be given a hearing before he is required to retire.

HERAT *v.* NUGAWELA 529

Punishment—

See SENTENCE.

Racing—

See BETTING ON HORSE-RACING ORDINANCE.

Registrar of Births, Marriages and Deaths—

Registrar of Births, Marriages and Deaths—Appointment and dismissal—No right to be heard before dismissal—Marriage Registration Ordinance, s. 6—Births and Deaths Registration Ordinance—Interpretation Ordinance (Cap. 2), ss. 12, 14 (f)—Scope of principle audi alteram partem—Certiorari—Constitutional law.

A person who has been appointed by the Registrar-General to be a Registrar of Births and Deaths under the Births and Deaths Registration Ordinance, and a Registrar of Marriages under section 6 of the Marriage Registration Ordinance, holds office at the pleasure of the appointing authority. He may therefore be dismissed from both offices by the Registrar-General without being given an opportunity to appear and lead evidence to vindicate his innocence.

The Births and Deaths Registration Ordinance does not contain any provision specifying the appointing authority in the case of an appointment to the office of Registrar of Births and Deaths. Therefore section 12 of the Interpretation Ordinance applies and the appointment may be made by the Minister or an officer authorised in that behalf by the Minister.

By virtue of section 14 (f) of the Interpretation Ordinance the Registrar-General, as the authority empowered to appoint a Registrar of Births and Deaths, has the unfettered power to dismiss such a Registrar appointed by him.

The principle *audi alteram partem* does not apply in the case of dismissal from an office where the grounds of dismissal are not specified or where there is no procedure prescribed which should be followed before dismissal.

THENABANDU v. SAMARASEKERA 472

Rent Restriction—

See LANDLORD AND TENANT.

Res Judicata—

Res judicata—*Opinion thereon of Judge who heard the earlier action—Irrelevancy.*

If a party to an action sets out a claim of title, and if a finding as to his title has to be reached, and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion to the contrary expressed by the trial Judge.

GIRAN APPUHAMY v. ARIYASINGHE 553

Revision—

See APPEAL AND REVISION.

Right of Way—

See SERVITUDES (1).

Rural Courts Ordinance—

Rural Court—Order of acquittal entered by it—Appeal therefrom to District Judge—Reversal of acquittal then—Remedy of complainant—Rural Courts Ordinance (Cap. 8), ss. 26 (1), 41 (1), 41 (5)—Courts Ordinance (Cap. 6), s. 3.

Where a District Judge, purporting to act in the appellate jurisdiction conferred on him by section 42 of the Rural Courts Ordinance, sets aside an order of acquittal in contravention of the proviso to section 41 (1) and returns the record of the case to the Rural Court with a direction to the President to impose a lawful sentence, the sentence imposed thereafter by the President may be quashed in revision by the Supreme Court notwithstanding the provisions of section 41 (5) which debars an appeal to the Supreme Court from an order of the District Judge on appeal.

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Sale of Immovable Property—

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Servitudes—

1. Servitudes—Right of way of necessity—Alternative route—Effect.

A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road.

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2. *Servitude of light and air—Window light—Negative servitude—Bare enjoyment cannot create prescriptive title—Prescription Ordinance (Cap. 68), s. 3.*

Under the law of Ceylon mere long enjoyment, for ten years, of the free access of light and air through a window of a building does not entitle the owner of the window to the servitude *ne luminibus officiat*, i.e., the right to prohibit a neighbour from obstructing the window light by erecting a higher building on his adjoining land. This servitude cannot be acquired by the mere fact that the neighbour has not built on his land for a long period so as to cause such obstruction of light and air.

Neate v. de Abrew (1883) 5 S. C. C. 126, *Goonawardana v. Mohideen Koya & Co.* (1910) 13 N. L. R. 264, and *Pillai v. Fernando* (1905) 14 N. L. R. 138, overruled.

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Sinhalese and Tamil—

1. *Jury—Accused persons' election to be tried by a Sinhala-speaking jury—Attorney-General's application thereafter to summon a special jury—Requirement of cogent grounds—Anachronistic nature of qualifications for special jurors—Criminal Procedure Code, ss. 165B, 222, 224, 257 (1) (b), 267 (1) (d).* 265

See JURY.

2. *See also OFFICIAL LANGUAGE ACT.*

Stamp Ordinance—

Stamp duty—Death of a person outside Ceylon leaving property within Ceylon—Application to Supreme Court to appoint court to exercise sole testamentary jurisdiction—Mode of computing stamp duty leviable on the documents filed by the applicant in the Supreme Court—Relevancy of gross value, and not the nett value, of the deceased's estate—Stamp Ordinance, Schedule A, Part III, paragraph 5—Estate Duty Ordinance, s. 21.

In an application to the Supreme Court for the conferment of sole testamentary jurisdiction on a District Court in respect of the estate of a deceased person, the stamp duty leviable on the documents filed by the applicant must be determined by reference to the probable market value, at the time of the death of the deceased, of all the property of the estate of the deceased. In determining that value no deduction shall be made in respect of any liabilities of the estate.

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Stare Decisis—

See COURTS ORDINANCE (2).

Tamil—

See SINHALESE AND TAMIL.

Thesavalamai—

1. *Thesavalamai—Sale by co-owner—Notice to the other co-owners—Can it be waived?—Release of right to pre-empt—Requirement of notarial execution—Thesawalamai Pre-emption Ordinance (Cap. 64), ss. 2 (1), 5, 8, 10.*

In an action to set aside a deed of transfer on the ground that the notice prescribed by section 5 of the Thesawalamai Pre-emption Ordinance was not given, defences of estoppel, waiver and acquiescence, assuming that they are applicable, must be proved by clear and unequivocal evidence.

Such defences, however, are inapplicable, in view of the prescribed formalities which have to be followed prior to a sale by a co-owner.

Furthermore, a right of pre-emption being a right in land, a release of a right to pre-empt must be notarially executed to be of any force or avail in law.

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2. *Thesavalamai—Thediatheddam—Immovable property purchased by husband in his favour—Consideration paid out of loan raised by husband and wife jointly—Death of wife thereafter intestate—Devolution of the acquired property—Jaffna Matrimonial Rights and Inheritance Ordinance, ss. 23, 26.*

A person, who was subject to the Thesavalamai, married in 1949. In 1957, during the subsistence of the marriage, he purchased a land in his favour out of monies raised by way of a loan in respect of which he and his wife were jointly and severally liable. As security for the loan, he mortgaged the property which he purchased and the wife mortgaged certain lands which she had received by way of dowry at the time of her marriage. The wife died in 1959, intestate and issueless, leaving behind as her heirs her father, two brothers and a sister.

Held, that the property bought in 1957 fell under the category of Thediatheddam and both spouses were equally entitled to it.

“Where a property is purchased during the subsistence of marriage by a spouse subject to the Thesavalamai out of a loan raised jointly by both spouses, the property so acquired will fall under the category of Thediatheddam and both spouses will be equally entitled thereto. The fact that the security granted for the loan is a mortgage of the separate property of either spouse will not render the loan so raised the separate property of that spouse. Nor will the property purchased become the separate property of that spouse. If the property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse.”

Held further, that one half of the half share of the acquired property which belonged to the deceased wife as her Thediatheddam devolved on the surviving spouse while the remaining half of that half share devolved on the heirs of the deceased. Under section 23 of the Jaffna Matrimonial Rights and Inheritance Ordinance one half of the remaining half share devolved on the father of the deceased, and under section 26 the balance half share devolved equally on the brothers and sister of the deceased.

“Ordinance No. 58 of 1947, however, effected a vital change when it repealed the provision that Thediatheddam was property common to the two spouses and that on the death of either spouse one half remained with the survivor and the other half vested in the heirs of the deceased and introduced instead a new concept of the Thediatheddam of each spouse and provided that one-half of the Thediatheddam which belonged to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. The Thediatheddam which belonged to the surviving spouse remained unaffected by the death of the other spouse.”

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Vendor and Purchaser—

Vendor and purchaser—Sale of different lands in one transaction—Is it a sale of an incertum juris?—Failure of purchaser to obtain possession of some of the lands—Right to recover proportionate share of purchase price—Period of prescription—Prescription Ordinance, ss. 6. 10.

A purchaser of different lands under the same deed of sale is entitled to recover such part of the purchase price paid by him as is proportionate to the value of the lands of which he has been unsuccessful in obtaining vacant possession.

The vendor's obligation to deliver vacant possession to the vendee is in law an implied part of the written contract of sale and therefore the period of prescription should be determined by reference to section 6 of the Prescription Ordinance, which specifies a period of six years.

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1. *Industrial dispute—Intended retrenchment of a workman—Reference to an Industrial Court for settlement of proposed retrenchment—Time within which such reference should be made—Misdirection on this point—Effect—Award wrongly invalidating retrenchment of workman—Liability of award to be set aside in certiorari proceedings—“Error of law on the face of the record”—Retrenchment of workman pending inquiry—Award of compensation on that basis—Invalidity—Time within which an award should be made—Court acting in excess of jurisdiction—Effect—Industrial Disputes Act (Cap. 131), ss. 4 (2), 16, 23, 24, 31F, 31G, 31H, 33 (1) (b), 33 (1) (d), 36 (5), 36 (6).* 108

See INDUSTRIAL DISPUTES ACT (3).

2. *Import and Export (Control) Act (Cap. 236)—Sections 2 and 3—Import (Licensing) Regulations, 1963, Regulation 2—Issue or cancellation of licences thereunder—Controller's power is purely executive and not judicial—Licensee need not be heard before his licence is cancelled—Natural justice—Certiorari.* 149

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3. *Certiorari—Prohibition—Application made prematurely—Effect.*

An application for Writs of Certiorari and Prohibition should not be made prematurely.

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Writ of Habeas Corpus—

1. Habeas corpus—*Custody of child—Father's preferential right.*

In an application made by a wife for the issue of a writ of *habeas corpus* against her husband for the custody of their daughter who was 5 years and 9 months old—

Held, that, so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right.

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2. *Muslim law—Dissolution of marriage—Mother's right to the custody of her child—Forfeiture thereof if she re-marries—Habeas corpus.*

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See MUSLIM LAW (3).

3. Habeas corpus—*Custody of children—Rival claims of father and mother—Considerations applicable—Putative marriage—Children born of such marriage—Interim custody of them pending action for annulment of marriage—Which spouse is entitled to such custody?*

In all questions of custody of children the interests of the children stand paramount. Questions of matrimonial guilt or innocence of a parent would not therefore be the sole determining factors in questions of custody, though they are not factors which will be ignored. The interests of the children being paramount, the rule that the custody of very young children ought ordinarily to be given to their mother ought not to be lightly departed from.

A marriage is null and void *ab initio* if it was contracted in consequence of a fraudulent misrepresentation by the wife that she was unmarried, when in fact she was already married. Assuming, however, that the husband is entitled to the custody of children born of the putative marriage, the Supreme Court will not necessarily grant him the custody in *habeas corpus* proceedings during the pendency of an action instituted by him in the District Court for the annulment of the marriage. In such a case, if the children are of tender years (e.g. 3 or 4 years old), their mother will be entitled to interim custody so long as she is shown to be fit to care for them. If she happens to be employed in England, an undertaking given by her that she will not leave Ceylon or remove the children pending the matrimonial action is sufficient.

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1. *Constitutional law—Imposition of Civic Disabilities (Special Provisions) Act, No. 14 of 1965, ss. 7, 10—Validity—“Judicial power”—Usurpation of judicial power by Parliament—Statute altering constitutional rights of particular persons—Mode of ascertaining the true character of such enactment—Amendment or repeal of a provision of the Constitution by inconsistent enactment—Validity thereof in the absence of an expressed intention to amend—Ceylon (Constitution) Order in Council, 1946, ss. 13 (3) (k), 24, 29 (1) and (4)—Mandamus to the Clerk and Assistant Clerk of the House of Representatives—Inappropriateness of such proceedings to question validity of the Act.*

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See CONSTITUTIONAL LAW (1).

2. *Municipal Council—General meeting for transaction of business—Notice of motion given by member—Scope of Mayor's power to refuse to place the motion on the agenda—Remedy of member—Mandamus—By-law 12 (1) (2)—Municipal Councils Ordinance (Cap. 252), ss. 17, 19, 20, 40 (1) (r).*

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Writ of Prohibition—

Certiorari—Prohibition—Applications made prematurely—Effect.

An application for Writs of *Certiorari* and *Prohibition* should not be made prematurely.

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THE
NEW LAW REPORTS
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VOLUME LXX

1966 Present : H. N. G. Fernando, S.P.J., and C. P. A. Silva, J.

A. M. LAIRIS APPU, Petitioner, and D. PIERIS and others,
Respondents

S. C. 7/66—Application in Revision in D. C. Kurunegala, 403/L

Privy Council—Execution of decree pending appeal thereto—Application to District Court in the first instance—Permissibility—Civil Procedure Code, s. 777—Appeals (Privy Council) Ordinance, Schedule, Rule 7.

In an action for declaration of title to a land and ejectment of the defendant therefrom, the plaintiffs obtained judgment and decree in their favour. After the decree was executed and the plaintiffs were put in possession of the land, the Supreme Court allowed the defendant's appeal against the judgment and dismissed the plaintiff's action. On the next day the plaintiffs gave notice of their intention to appeal to the Privy Council.

Held, that, while the application for leave to appeal to the Privy Council was still pending in the Supreme Court, the defendant was entitled to apply to the District Court under section 777 of the Civil Procedure Code that he be restored to possession of the land. The defendant was not bound by Rule 7 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance to apply to the Supreme Court in the first instance.

APPLICATION to revise an order of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with L. C. Seneviratne and S. Munasinghe,
for the defendant-petitioner.

A. C. Gooneratne, Q.C., with R. C. Gooneratne, for the plaintiffs-respondents.

Cur. adv. vult.

July 11, 1966. H. N. G. FERNANDO, S.P.J.—

This was an action for declaration of title to a land and ejectment of the defendant therefrom. The District Court in January 1962 upheld the claim of the plaintiffs, granted a declaration of title and ordered the ejectment of the defendant from the land. Thereafter, the plaintiffs applied for a writ of possession which was issued, and possession was delivered under the Writ to the plaintiffs on 30th March 1962. On 25th August 1965 the Supreme Court allowed the defendant's appeal against the decree, set aside the decree and dismissed the plaintiffs' action. On the next day the plaintiffs gave notice of their intention to appeal to the Privy Council against the judgment of the Supreme Court, and the application for leave to appeal is still pending in this court.

In September 1965, the defendant made an application under Section 777 of the Civil Procedure Code to the District Court asking that he be restored to possession of the land. After inquiry the District Judge made order on 5th October 1965 refusing the defendant's application for restoration of possession, on the ground that because an appeal to the Privy Council is pending the defendant had no right to apply to the District Court for execution of the decree of the Supreme Court.

The opinion of the learned District Judge is based upon a decision of this Court in *Silva v. King*¹. In that case decree had been entered in favour of the plaintiff for a certain sum of money and an appeal to the Supreme Court against that decree had been dismissed. The defendant thereupon applied for leave to appeal to the Privy Council against the judgment of the Supreme Court and while that application was pending, the plaintiffs sought and obtained from the District Court a writ of execution for the recovery of the decreed amounts. On appeal being taken from the refusal of the District Judge to stay execution of the writ, this court held that the power to direct that the judgment of the Supreme Court be carried into execution is vested in the Supreme Court under Rule 7 of the rules in schedule 1 of the Privy Council (Appeals) Ordinance, and that therefore a District Court had no power while an application for conditional leave is pending to grant execution of the decree.

I respectfully agree with the decision in *Silva v. King*. But the situation in the present case is not the same as was the situation dealt with in that decision. There what the plaintiffs sought from the District Court was an order which would enable him to recover the money decreed to him in a decree of the Supreme Court against which an appeal was pending or probable. In the present case however, the order which the defendant sought from the District Court was not an order to execute the Supreme Court decree. That decree did not direct the defendant to be placed in possession of the land. What the defendant in reality

sought from the District Court in this case was an order which would restore him to the *status quo* which had prevailed before the District Court on 30th March 1962, by virtue of its writ of possession, placed the plaintiffs in possession of the land. It does not at first sight appear that the Privy Council Appeal rules provide for such a situation, so that the making of an order by the District Court of the nature required in this case does not appear to be in conflict with the Privy Council Appeal rules. Accordingly, the ground on which it was held in *Silva v. King* that the execution could not be granted by the District Court does not affect the circumstances of this case.

It was held in *Asiriwathan v. Mudalihamy*¹ that Section 777 of our code like the corresponding Section 583 of the Indian code was in terms inadequate to meet all the cases where a party sought restitution of his rights after a decree had been passed in the Supreme Court. But following judgments in India construing Section 583, it was held that Section 777 authorised a District Court "to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the court of first instance." It is precisely that restitution for which the defendant applied to the District Court, after he obtained from this court a decree dismissing the plaintiffs' action. For these reasons we made order on 21st June 1966 directing the issue by the District Judge of a writ of possession.

G. P. A. SILVA, J.—I agree.

Application allowed.

— [COURT OF CRIMINAL APPEAL]

1967 *Present : T. S. Fernando, J. (President), Sirimane, J., and Alles, J.*

U. A. ARIYADASA, Appellant, and THE QUEEN, Respondent

C. C. A. APPEAL No. 86 of 1966, WITH APPLICATION 138

S. C. 117—M. C. Hambantota, 47546

Evidence Ordinance—Section 157—“About the time when the fact took place”—Admissibility of evidence—Question must be decided by Judge at the time when the evidence is tendered—Criminal Procedure Code, s. 244.

In a prosecution for attempted murder, the injured person's evidence at the trial was that, after he was attacked at about 7 p.m. on the day in question and was lying injured right through the night, he made a statement to the doctor who examined him on the following day at 9.10 a.m. when he was taken to the hospital.

Held, that the injured person's statement to the doctor, although it was made about 14 hours after he was attacked, was made at the earliest opportunity and was, therefore, corroborative of his testimony at the trial. It was covered by the expression "about the time when the fact took place" in section 157 of the Evidence Ordinance.

"The corroboration that section 157 contemplates is not corroboration in the conventional sense in which that term is used in courts of law, but in the sense of consistency in the conduct of the witness tending to render his testimony more acceptable."

Held further, that section 244 of the Criminal Procedure Code requires that the question as to the admissibility of evidence sought to be led at a trial before the Supreme Court must be decided by the Judge at the time when the evidence is tendered.

APPEAL against a conviction at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *Anil Obeyesekere* and *M. Kanakaratnam*, for the accused-appellant.

T. A. de S. Wijesundera, Crown Counsel, for the Crown.

Cur. adv. vult.

January 15, 1967. T. S. FERNANDO, J.—

The appellant as the 2nd accused, along with another man as the 1st accused, stood his trial on an indictment consisting of two counts, both alleging the commission of the offence of attempt to murder. The first count related to injuries inflicted on a man by the name of Heenmahattaya, while the second related to injuries inflicted on his wife Magihamy. The jury returned a six to one divided verdict finding both accused guilty of attempt to murder on the first count, and the first accused alone guilty of attempt to commit culpable homicide not amounting to murder on the second count. The appellant was found not guilty on the second count. In respect of his conviction on the first count the appellant was sentenced to a term of 5 years' rigorous imprisonment. The first accused has not appealed either against his conviction or against the sentence of imprisonment imposed on him.

Of the points raised on behalf of the appellant the only one requiring any serious consideration is that contained in the additional ground of appeal, viz., that the statement made by the injured Heenmahattaya to the doctor who examined him on the morning following the night of the attack upon him was wrongly received in evidence. There was no dispute between counsel that the only section of the Evidence Ordinance under which this statement could have been admitted at the trial is section 157.

Heenmahattaya's evidence at the trial was that he was attacked some time between 6.30 and 7 p.m. on the evening of the 12th November, 1964, that his cries brought to the scene his wife who was herself then attacked

by the 1st accused, and that he and his wife lay injured and bleeding until next morning when they succeeded in drawing the attention of some persons to their plight. The police reached the scene shortly thereafter, and Heenmahattaya and his wife were then taken to hospital. The statement, the admission of which has been questioned on this appeal, was made by Heenmahattaya to the doctor at 9.10 a.m. on the 13th November. His wife, who was examined for injuries immediately thereafter, also made a statement to the same doctor as to the person who attacked her. The appellant was acquitted on the count laid in the indictment in respect of injuries caused to the wife, and, it may be added, the latter did not in her statement to the doctor or in her evidence implicate the appellant as her attacker. Her position throughout was that it was the 1st accused alone who attacked her.

Mr. Chitty has argued before us that the statement in dispute, clearly not having been made "at the time" of the attack on Heenmahattaya, was also not made "about the time" of that attack. We do not think a hard and fast rule can be laid down as to when a statement relied on as corroboration within the meaning of section 157 falls outside the period covered by the expression "about the time when the fact took place". The question must necessarily depend on the circumstances of each particular case. In the case under review here the fact took place about 7 p.m. on the 12th November and, as Heenmahattaya's evidence was apparently believed by the jury, we are correct in assuming that Heenmahattaya lay injured right through the night. The first person to observe his plight did so at about 7 a.m. the next morning, and he was thereafter taken by some conveyance to the hospital, and on admission thereto made the statement in question at 9.10 a.m. Although about 14 hours had then elapsed after the fact took place (excluding any statement he may have made to the police which is shut out by section 122(3) of the Criminal Procedure Code), we think the statement to the doctor was made at the first reasonable opportunity that presented itself to Heenmahattaya.

The corroboration that section 157 contemplates is not corroboration in the conventional sense in which that term is used in courts of law, but in the sense of consistency in the conduct of the witness tending to render his testimony more acceptable.

While we have expressed above our own opinion as to whether the statement in dispute fell within section 157 of the Evidence Ordinance, it is necessary here to point out that, in terms of section 244 of the Criminal Procedure Code, in a trial before a judge and jury, it is the duty of the judge to decide all questions as to the admissibility of evidence sought to be led. Where he has so decided such a question, and it cannot be shown that he has in doing so acted contrary to principle, there can be no interference by this Court. Learned Crown Counsel has brought to our notice the decision of the English Court of Criminal Appeal in *R. v. Cummings*¹ where Lord Goddard C.J. observed—(see page 552)—"Who

¹ (1948) 1 A. E. R. 551.

is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must therefore be a matter for him to decide and a matter for his discretion if he applies the right principle. He had clearly in mind that there must be an early complaint. If a judge has such facts before him, applies the right principle and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable, this court cannot interfere". *R. v. Cummings* was a case relating to the commission of a sexual offence, but the dictum quoted above is nevertheless applicable to a case such as that now before us. We must assume that the judge directed his mind to the question at the time the evidence was tendered. That is the only proper assumption in the absence of anything contra.

We dismiss the appeal.

Appeal dismissed.

1967

Present : Tambiah, J.

G. V. MARTIN SILVA, Appellant, and MAHASOON and another, Respondents

S. C. 370/1966—D. C. Matara, 1999/L

Rent Restriction (Amendment) Act No. 12 of 1966—Scope of sections 2 and 4 (1) (c)—Ejectment of tenant on ground of rent being in arrears for over 3 months—Decree entered on 12th March 1965—Enforceability—How long can an action be regarded as pending?—Civil Procedure Code, s. 6.

A decree for ejectment entered in favour of a landlord against his tenant between 20th July 1962 and the date when the Rent Restriction (Amendment) Act No. 12 of 1966 came into operation, in respect of an action instituted during that time, is not rendered null and void and unenforceable by section 4 (1) (c) of the amending Act, if the judgment was obtained on the ground that rent was in arrears for three months or more.

An action must be considered as pending within the meaning of section 4 (1) (a) of Act No. 12 of 1966 if, after judgment is entered, the judgment-creditor has still to come to Court to obtain reliefs.

APPEAL from a judgment of the District Court, Matara.

A. K. Premadasa, with F. C. Perera, for the Defendant-Appellant.

H. Rodrigo, for the Plaintiffs-Respondents.

August 22, 1967. TAMBIAH, J.—

The plaintiffs brought this action on 13.3.64 against their tenant in respect of premises to which the Rent Restriction Act applied. They alleged that the tenant was in arrears of rent from 1st July 1962 and

prayed for ejectment of the tenant on this ground. On 12.3.65 the parties arrived at a settlement and judgment was entered as prayed for and decree was entered on 12.3.65.

The Rent Restriction (Amendment) Act No. 12 of 1966 came into operation on the 10th May 1966. The plaintiffs applied for ejectment of their tenant in terms of the decree but their application was resisted on the ground that the decree was null and void under the provisions of Section 4 of the Rent Restriction (Amendment) Act No. 12 of 1966. The learned Commissioner, however, held that the decree was executable.

The Counsel for the appellant contends that under Section 4 (1) (c) of the Amendment Act No. 12 of 1966, all decrees entered between the 20th July 1962 and the date this Act came into operation are null and void. It may be noted that Section 4 of this Amending Act makes the Act retrospective as from 20th July 1962. Counsel for the appellant concedes that had this action been brought after the Amending Act came into operation the decree would not have been null and void. I am unable to accept the argument of Counsel for the appellant that the decree is void because it was entered prior to the coming into operation of the Amending Act. If such a view is tenable then it will lead to the result that all actions filed by a landlord after this Act came into operation on the ground that his tenant was in arrears for 3 months are permissible and decrees entered are valid whereas actions brought on the same ground during the preceding period, namely between 20th July 1962 and 10th May 1966 are null and void.

Section 4 (1) (c) of the Amendment Act enacts “proceedings shall not be taken for the enforcement of any judgment or decree in any such action *as is referred to in paragraph (a)*, and where such proceedings have begun before the date of commencement of this Act, but have not been completed on the date of commencement of this Act, such proceedings shall not be continued.” A distinction, therefore, is made between decrees in such actions as are referred to by Section 4 (1) (a) and other decrees.

Before the Rent Act was passed a landlord could terminate the tenant’s contract and bring an action to eject him. The Rent Act does not take away the rights of a landlord but only operates as a bar to his action. The Rent Act, before the Rent (Amendment) Act No. 12 of 1966 came into operation, permitted a landlord to bring an action to eject the tenant on certain grounds set out in Section 13 of that Act. Under that Act, a landlord need not have waited for a tenant to be in arrears for a month. He could also have brought an action if he reasonably required the premises for his own use and also on other grounds set out in that Section. The Rent Restriction (Amendment) Act No. 12 of 1966 was enacted to protect tenants who occupied premises the rent of which was less than Rs. 100. At the same time it also gave a right of action to a landlord in certain circumstances set out in Section 2 of the Amending Act. Although the rental may be less than Rs. 100 a landlord is entitled to institute action for ejectment where

the rent of the premises had been in arrears for 3 months or more. In my opinion Section 4 (1) (a) only renders null and void, actions which are in contravention of Section 2 of the Amending Act No. 12 of 1966. In the instant case the landlord is permitted to bring an action for ejectment since the tenant was in arrears for over 3 months and therefore the decree entered is not null and void.

It was further contended by Counsel for the appellant that the action was not pending. If his argument is carried to its logical conclusion, then Section 4 (1) (a) has no application. But it suffices to state that when a judgment is entered the action is pending if the judgment creditor still has to come to Court to obtain reliefs. In *Salt v. Cooper*,¹ Jessel M. R. said, "A cause is till pending, even had there been a final judgment given, and the Court has very large powers in dealing with a judgment until it is fully satisfied. It may stay proceedings on the judgment, either wholly or partially, and the cause is still pending, therefore, for this purpose, as it appears to me, must be considered as pending although there may have been a final judgment given in the action, provided that judgment has not been satisfied."

It is true no doubt that the plaintiffs had obtained judgment in this case, but they have not realised the fruits of their litigation. Under Section 6 of the Civil Procedure Code they could make an application for relief or remedy for ejectment as well as for the recovery of damages. This is an action within the meaning of Section 6 of the Civil Procedure Code, vide also the judgment of Sansoni, C.J., in *Abeysinghe v. Gunasekara*². In *Charles Fernando v. T. P. D. Costa*³, a bench of two judges gave a similar interpretation to Section 4 (1) (c) of the Rent (Amendment) Act of 1966 and with respect I agree with that view.

For these reasons I affirm the order of the learned District Judge and dismiss the appeal with costs.

SIVA SUPRAMANIAM, J.—I agree.

Appeal dismissed.

1967

Present : Manicavasagar, J., and Tennekoon, J.

M. A. DON LEWIS, Petitioner, and D. W. S. DISSANAYAKE and others, Respondents

*S. C. 483/66—Application for Revision or Restitutio in Integrum in
D. C. Colombo, 8862/P*

Partition action—Interlocutory decree—Omission to serve summons on a party previously—Circumstances when relief will not be granted by way of revision or restitutio in integrum—Partition Act, s. 22.

¹ (1880) *Law Reports*, Volume 16, Chancery Division, Page 551.

² (1962) 64 N. L. R. 427.

³ (1967) 69 N. L. R. 381.

In this application for Revision or *Restitutio in integrum*, the petitioner sought to have the interlocutory decree entered in a partition action set aside. The main ground urged was that although the petitioner was disclosed as a claimant in the Surveyor's report, no notice or summons was thereafter served on him as required by section 22 of the Partition Act. The 8th defendant-respondent also supported the application on the ground that, although he was named as 8th defendant in the plaint, he never received any summons or notice.

The facts showed that the petitioner had tried to pass off as, and usurp the place of, the 8th defendant-respondent and that, long before the interlocutory decree was entered, he could have sought to have himself added as a party instead of taking the inexplicable course he did. Further, even when his application to intervene was dismissed by the District Court, the petitioner did nothing for 8 months.

Held, that it was not the function of the Supreme Court, in the exercise of the jurisdiction now invoked, to relieve parties of the consequences of their own folly, negligence and laches. The maxim *vigilantibus, non dormientibus, jura subveniunt* provided a sufficient answer to the petitioner's application. Further, the petitioner did not display the honesty and frankness expected of a person seeking the extraordinary powers of the Court.

Held further, that the right of a party in a partition action to be served summons may be lost by acquiescence on his part. In the present case the 8th defendant had not only been allotted his due share but had also failed to take steps for nearly one year to have the interlocutory decree set aside after he became aware of it. He was not entitled, therefore, to any relief.

APPLICATION to revise an order of the District Court, Colombo.

W. S. S. Jayawardena, for the Petitioner.

J. G. Jayatileke, for the Plaintiff-Respondent.

W. D. Gunasekera, for the 7th Defendant-Respondent.

D. R. P. Goonetilleke, for the 8th Defendant-Respondent.

Cur. adv. vult.

March 12, 1967. TENNEKOON, J.—

The petitioner, one Munasinghe Aratchige Don Luwis of Talangama, seeks to have this court, in the exercise of its powers of Revision or Restitution, set aside the judgment and Interlocutory Decree entered in this case. The main ground urged is that the petitioner was disclosed as a claimant in the Surveyor's Report, but no notice or summons was thereafter served on him.

Upon the notice of the present application being served on H. Carolis Caldera whose name appears as 8th defendant-respondent, a statement of objections has been filed by him, in which far from objecting to the application he himself prays that the Interlocutory Decree entered in this case be set aside by this court, on the ground, among others, that although he was named as 8th defendant in the plaint, he has not since the institution of the action received any summons or notice. He

pleads that he has consequently had no opportunity of filing his statement of claim and that he has lost certain rights to the land under the Interlocutory Decree.

The examination of some of the factual questions involved in this application is rendered more difficult by reason of fact that the District Court Record of the case has been lost ; what is now used as the record is one of the type-written briefs prepared in the course of an appeal that had been taken to this court against the Interlocutory Decree by the 1st defendant-respondent. That appeal incidentally was dismissed sometime in March 1965. None of the proxies filed by the parties or the fiscal's report on service of summonses in the early stages of the case are available. These might have been of some assistance in resolving the questions that now arise for consideration.

The claim of the petitioner to have been entitled to notice under section 22 of the Partition Act as a claimant before the surveyor and the claim of Carolis Caldera the 8th defendant-respondent that no summons had been served on him since the institution of the action have necessarily to be considered together for reasons that will become apparent on the facts as stated hereafter.

The plaint in this case was filed in July 1959. There were eight defendants named in the plaint, the 8th being captioned thus :—

“ 8. Carolis Caldera of Talangama.”

The commission to survey was issued on 18th September, 1959, and summons on the eight defendants shortly thereafter. The journal entry of 25th November 1959 reads :—

“

- (a) Notice to V. H. served.
- (b) Notice to Fiscal published.
- (c) SS served on 1-7 defdts.

Proxy of 7 D filed.

Proxy of 1-6 and 8 Defts filed.

Not served on 8th deft.

Vide Supra.

- (d) Return to Commission due filed with plan No. 623, Report, copy of field notes and memo.

- (3) Add parties disclosed in the Surveyor's Report.

“

The Surveyor's report reads (in its relevant portions) as follows :—

“ The plaintiff was represented by her husband but all the other parties were present in person.

Makanduwage William Gomis c/o. M. W. Appuhamy of Bostal, Veyangoda was present at the time I surveyed and stated his claim. The 8th defendant stated that his name should be Munasinghe Aratchige Don Lewis and not Carolis Caldera. He is from Talangama.

“

The first sentence quoted seems to suggest that Carolis Caldera the 8th defendant was present before the surveyor. But it can be gathered from the latter part of the report quoted that this was not the case. Apparently a person appeared before the surveyor and stated that he was the 8th defendant but that his name was Munasinghe Aratchige Don Luwis. I cannot understand how a person, who does not claim to have a name given in the caption to a plaint, can attach himself to a mere numeral in the caption while totally disclaiming the name against that numeral. The court itself upon reading the Surveyor's report merely ordered that “parties disclosed be added”. In pursuance of this order only the name of Makanduwage William Gomis was added as 9th defendant and summons issued and duly served on him. Munasinghe Aratchige Don Luwis was not added. What happened subsequently is that right up to the Interlocutory Decree Carolis Caldera was completely ignored. Apparently all notices went to the person who had said that he was the 8th defendant though he was not Carolis Caldera. The record shows that on 30th of March, 1960, a Proctor had filed answer on behalf of the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th defendants. Paragraph six of that answer reads as follows:—

“The 8th defendant abovenamed further states that his name as given in the caption is incorrect and should be amended to read as Munasinghe Aratchige Don Lewis.”

Later an amended answer was filed by the same Proctor on the 21st February, 1962, on behalf of “8th defendant abovenamed Munasinghe Aratchige Don Luwis, wrongly stated as H. Carolis Caldera”. It is strange that this Proctor also encouraged the person calling himself Munasinghe Aratchige Don Luwis and having no claims to the name of Carolis Caldera to file answer as 8th defendant.

The record thereafter shows that on numerous dates the “8th defendant” was either present or was represented by lawyers. There is no doubt in my mind that Carolis Caldera was never present or represented on any of these occasions. There is also no doubt in my mind that the person who appeared before the surveyor and claimed to be the 8th defendant and who later filed answer and amended answer as 8th defendant and continued to appear as such was none other than the present petitioner Munasinghe Aratchige Don Luwis.

The case went to trial on the 13th of March 1963. The 1st, 2nd, 3rd 4th, 5th, 9th and 10th defendants were present. The 7th defendant was represented by counsel. The record also says that counsel appeared

for 1st to 6th, and 8th defendants. Only the plaintiff gave evidence. And in the course of which she said that the 3rd defendant—

“ transferred all her rights upon deed No. 6087 of 1957 marked P 12 to the 8th defendant Don Lewis ”.

A reference to the document P 12 shows that the transferee there was H. Carolis Caldera and not Don Lewis. The caption of the case still referred to the 8th defendant as H. Carolis Caldera and accordingly when the judgment and the Interlocutory Decree (as amended) proceeded to award the rights under P 12 to the 8th defendant it must be taken to be an adjudication, in terms of the deed, in favour of H. Carolis Caldera and not in favour of Munasinghe Aratchige Don Luwis.

There was thereafter an appeal by the 1st defendant against the Interlocutory Decree. This was ultimately dismissed on 31st March, 1965. The record was lost at this stage. The next event of note is an application dated 9th September, 1965, by the present petitioner Munasinghe Aratchige Don Luwis to the District Court praying that the Interlocutory Decree be set aside. He is at this stage represented by a different proctor. In the caption he has named himself as “ Munasinghe Aratchige Don Luwis of Talangama petitioner ” ; he has omitted the name of Carolis Caldera from among the defendant-respondents ; and the first paragraph of his petition (as also of the affidavit which accompanied it) is to the effect he “ is the 8th defendant in this case ”. He further goes on to say even if he is not the 8th defendant he was a party entitled to notice under s. 22 (1) (a) of the Partition Act.

The court inquired into this application on 9th February 1966 and 9th March 1966, and dismissed the application on the latter date with the remark that the petitioner's remedy, if any, was by way of revision. It is of importance to note that the record of the proceedings of the 9th February 1966 gives clear and categorical proof of the fact that Carolis Caldera was present in court on that date. The court makes a special note of the fact in the following terms :—

“ The parties present are the plaintiff ; the 8th defendant H. Carolis Caldera, the petitioner Munasinghe Aratchige Don Luwis and the 3rd and 4th defendants.”

After this application was dismissed the petitioner waited another 8 months before making the present application to this court, a delay which the petitioner has not sought to explain at all. It is significant that unlike in his application to the District Court the present application names the Carolis Caldera as 8th defendant-respondent, thereby for the first time abandoning his attempt which he persisted in for about $7\frac{1}{2}$ years to dislodge the 8th defendant and occupy his room in the caption.

These being the facts the first question that arises for consideration is whether this court should exercise its extraordinary powers of revision or by way of *Restitutio in Integrum* in favour of the applicant. There is no doubt in my mind that the petitioner was aware of the partition action from the date the Surveyor first went on the land. Petitioner has only himself to blame if he pursued the ill-advised course of trying to usurp the place of the 8th defendant-respondent. Petitioner could, long before the Interlocutory Decree, have sought to have himself added instead of taking the inexplicable course he did. Even after the Interlocutory Decree was entered the petitioner in seeking to intervene persisted in trying to persuade the District Court that he and Carolis Caldera were one and the same person. Further when his application to intervene was dismissed by the District Court (which in its order explicitly stated that the petitioner's remedy if any was by way of an application for revision to this court) the petitioner did nothing for 8 months. It is not the function of this court in the exercise of the jurisdiction now being invoked to relieve parties of the consequences of their own folly, negligence and laches. The maxim *Vigilantibus, non dormientibus, jura subveniunt* provides a sufficient answer to the petitioner's application on the ground now under consideration.

Further even in his present application to this court the petitioner does not display the honesty and frankness which is expected of a person seeking to invoke the extraordinary powers of this court. Instead he tries to make out that the person who had, as Munasinghe Aratchige Don Luwis appeared before the surveyor, filed answer as "8th Defdt" and otherwise sought to pass off as 8th defdt, was not himself but an unknown third person—a story which I find extraordinarily difficult to accept.

To take now the case of Carolis Caldera the 8th defendant-respondent : I am satisfied that this respondent did not receive any summons or notice since the institution of the action until at least the Interlocutory Decree was entered. Such a failure to comply with the *audi alteram partem* rule would ordinarily be sufficient for this court to set aside the decision of a tribunal. But it is equally true that the right to impugn the decision of a tribunal for a breach of the *audi alteram partem* rule may, even in cases where the necessity for compliance with the rule is not a matter of inference but of statutory provision, be lost by acquiescence ; there can also be cases in which a party may be found to have approved the defective proceedings or where, having regard to the applicant's conduct, the court will not in its discretion set aside the impugned proceedings. It is therefore necessary to examine the matter further.

It is to be noted as mentioned earlier in this judgment that on 9th February 1965, the date on which petitioner's application for intervention was being inquired into by the District Court, Carolis Caldera was undoubtedly present in court. It is evident that on that date he would

have become aware, if he had not done so earlier, of the existence of the Partition Action and that the judgment of the District Court had already awarded a 1/18th share of the land to him on the basis of the Deed P 12. In the statement of objections filed in these proceedings the 8th defendant states that—

“The 8th defendant-respondent claims certain rights to the said land sought to be Partition on Deed No. 6087, of 1957, marked P 12 in the said Deed and the learned Trial Judge has not given him those share in the Interlocutory Decree. Thus the 8th defendant-respondent has completely lost his rights on the said Deed No. 6087 of 1957.”

The allegation that he has completely lost his rights on P 12 proceeds on the supposition that when the judgment declared the “8th defendant” entitled to a 1/18th share, it meant that Munasinghe Aratchige Don Luwis was entitled to a 1/18th share. That is a wrong assumption. As mentioned earlier, the caption of the case has never been altered by court and any reference in the judgment or the Interlocutory Decree to “the 8th defendant” must be taken and read, as it necessarily must, to be a reference to H. Carolis Caldera and not to the present petitioner Munasinghe Aratchige Don Luwis. In this view of the matter there is an award of 1/18th share to the 8th defendant-respondent Carolis Caldera in the Interlocutory Decree. Counsel for the 8th defendant-respondent did not at the hearing before this court seek to satisfy us that a larger share than 1/18 could be claimed by his client on P 12 or that he had any other claims to agitate as owner of any plantations or buildings or in any other capacity whatsoever. In the result this court is satisfied that the allegation of the 8th defendant-respondent that the omission to serve summons on him has resulted in an Interlocutory Decree which deprives him of his rights in the land is unfounded.

There is also the further fact that having become aware of the judgment and Interlocutory Decree by the 9th February 1965 at the latest he took no steps whatsoever to seek the assistance of this court to have these supposedly damaging adjudications set aside. This inactivity is only explicable—and no other has been offered by the 8th defendant-respondent himself—on the basis that he was quite satisfied with the rights given to him in the judgment and was content to leave it undisturbed. It was only on the 3rd February 1966, about a year later, that he thought of making an endeavour to have the proceedings in the partition case set aside; and he does not by initiating proceedings to that end himself but only by taking advantage of the fortuitous circumstance of the petitioner having made this application to this court.

Having regard to what has been said above in regard to the conduct of the 8th defendant-respondent I am of the opinion that he has disentitled himself to obtain relief from this court on the ground of omission to serve summons on him.

The petitioner and the 8th defendant-respondent also seek to support their applications on the ground that there has been an insufficient investigation of title in the court below. The appeal (referred to earlier in this judgment) taken by the 1st defendant against the Interlocutory Decree was based on substantially the same ground of insufficient investigation of title. That appeal having been dismissed by this court (in March 1965) I see no reason for this court to re-examine that question.

In the result the application of the petitioner is dismissed with costs payable to the plaintiff-respondent and the 7th defendant-respondent ; the application of the 8th defendant-respondent is also dismissed.

MANICAVASAGAR, J.—I agree.

Applications of the petitioner and the 8th defendant-respondent dismissed.

1965 *Present : T. S. Fernando, J., and Tambiah, J.*

CHANDRASIRI and another, Appellants, and WICKRAMASINGHE, Respondent

S. C.15/1962—D. C. Kandy, 4862/L

Servitudes—Right of way of necessity—Alternative route—Effect.

A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road.

APPEAL from a judgment of the District Court, Kandy.

A. C. Gooneratne, Q.C., with R. Gooneratne, for Defendant-Appellant.

C. Ranganathan, Q.C., with K. Nadarajah, for Plaintiff-Respondent.

Cur. adv. vult.

December 15, 1965. TAMBIAH, J.—

The plaintiff, who is the owner of the northern three pelas of a land called Diddeniya Kumbure, depicted in plan No. 1903 of 12.1.1961 and marked X in the course of the proceedings, claimed a right of way over the defendant's land along the path ABCD on two causes of action, namely by right of prescriptive user and by way of necessity. After trial the

learned District Judge held that the plaintiff respondent had not prescribed to this path but granted a servitude by way of necessity. The defendant has appealed from this order.

It transpired in the course of the evidence that there is another path EF along which the plaintiff could have access to the public road. Mr. De La Motte, the surveyor who prepared the plan X, testified that the road marked EF in plan X appeared to be a well used path and that it is possible to go along this path to the abandoned brick kiln marked 2 and the well No. 3 which are situated in the plaintiff's land. The plaintiff who gave evidence stated that he had only used AB and not the path EF but he admitted under cross-examination that about 50 or 60 people use the road EF to get on to this land for the purpose of going to another well in his land which is marked No. 4 in the plan referred to earlier. He stated that seven to eight house holders come along the Village Committee path to this well using the path marked EFGH. He also admitted that this path had been in existence for at least 20 years.

The second defendant stated that about 60 to 70 people use the path EF to go to the plaintiff's land from the public road and that this was an old path. He also added that there are other paths, apart from this path claimed, to go to the plaintiff's land from the public road to the West. The plaintiff was forced to admit that there are other paths to have access to his land from the public road but he said that they were not convenient. The road EF runs through Kiri Ukku's land. The plaintiff-respondent has led no satisfactory evidence to show that he cannot use this path. When he was asked why he could not use this road he stated that the road EFGH is only limited to seven or eight houses and that he has not used it. He has led no evidence to show that he would be prevented if he attempts to use the path EF along which sixty to seventy people pass daily to go to the well of the plaintiff.

Mr. A. C. Gooneratne, Q.C., who appeared for the appellant, submitted that a right of way of necessity cannot be granted when there is another equally convenient path. It is my view that the path EF can be used by the plaintiff if he chooses to do so, to have access to the public road.

Mr. C. Ranganathan, Q.C., submitted that every person who owns a land-locked land has got the right to obtain a right of way of necessity if he proves that he has no other path which he has acquired either by grant or prescription. In support of this contention he relied on a passage from Maasdorp, which is as follows: (vide *The Institutes of South African Law*, Vol. II 6th Edition p. 218).

“ In addition to the above rights of passage, which have their origin, like all other servitudes, in express or implied grant, we have to consider another kind of right of way which falls under the class of servitudes of necessity, to which allusion has already been made above, namely, necessary way or way of necessity. It is based on the right which every

owner of land has to communication with the world at large outside his ground, and, with this object in view (whenever no definite path or road has been allotted to him, by way of grant or acquired for his land by prescription), to claim some means of access to the public roads of the country, without which his land would be useless to him. ”

The authorities cited in support of this proposition by Maasdorp are *Kimberly Mining Board v. Stamford*¹, and a passage from Grotius (G. 2.35.7). I have examined these authorities and they do not support the contention of Mr. Ranganathan. Hall and Kellaway, in their well-known work on Servitudes, state as follows : (vide Servitudes by Hall and Kellaway p. 68) :

“ Nor may a person claim a road *ex necessitate* over his neighbour’s land on the ground that this property alone intervenes between his land and a public road, whereas he has the use of a road giving access to another public road, but one which passes over a number of intervening properties whose owners may in the future object to his using it. (*Lentz v. Mullin*)² ”.

It is clear law that such an owner is not entitled to claim a right of way on the grounds of necessity, if there is another though less convenient road.

The onus lies on a person who claims a right of way of necessity to show that it is necessary for him to claim this right and when there is an alternative convenient route he cannot make this claim. In *Lentz v. Mullin*³ Graham J. P. said :

“ The onus of proving a claim of this character is upon the person alleging it, and the claimant alleging it, to succeed, must show that he has no reasonable or sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry out his farming operations. If he had an alternative route to the one claimed, although such a route may be less convenient and involve a longer and more arduous journey, so long as the existing route gives reasonable access to the public road, he must be content and cannot insist upon a more direct approach over his neighbour’s property. ”

The plaintiff has not discharged this onus.

In this case although a feeble attempt was made by the plaintiff to show that this path EF in plan X was not allowed to be used, he has not led satisfactory evidence to show that the owner of the land over which the path passes had any serious objection if the plaintiff wanted to use it. Kiri Ukku, the owner of the land through which EF passes, has not objected to 60 to 70 people using this path. No reason has been given as to why he should object if the plaintiff also uses this path.

¹ *Buch. App. C. 129.*

² (1921) *E. D. L. 268.*

³ 1921 *E. D. L. 268* at 270.

The plaintiff stated that he made a complaint to the police when he was refused this path. But he has not called any police officer to prove that he made such a complaint. Further he stated that he only used the path AB. For these reasons I set aside the order of the learned District Judge granting a right of way of necessity over the path ABCD in plan X and dismiss the plaintiff's action with costs in both courts.

T. S. FERNANDO, J.—I agree.

Appeal allowed.

1967

Present : Alles, J.

M. S. SEEDIN, Appellant and N. SAMBANDAN, Respondent

S. C. 29/66—Labour Tribunal, 2/25052

Industrial Disputes Act (Cap.131)—Section 31B (1) (b)—Effect of the words “ are due ”.

When the President of a Labour Tribunal considers whether a workman should be paid any gratuity under the provisions of section 31B (1) (b) of the Industrial Disputes Act, he is entitled to make any order which he considers just and equitable.

APPEAL from an order of a Labour Tribunal.

Lakshman Kadirgamar, for applicant-appellant.

No appearance for employer-respondent.

Cur. adv. vult.

June 16, 1967. ALLES, J.—

The question of law which arises for consideration in this case under section 31B (2) of the Industrial Disputes Act (Chapter 131) is whether the President of the Labour Tribunal should have disallowed the applicant's claim to the payment of a gratuity, in view of the decision of the Privy Council in *United Engineering Workers Union v. Devanayagam*.¹

In not entertaining the applicant's claim for gratuity, the learned President has followed the decision of the Supreme Court in *Richard Peiris & Co. v. Wijesiriwardene*², where T. S. Fernando, J. in construing the words, “ the question whether any gratuity or other benefits are due ” held that the words “ are due ” in the above section meant “ are legally due ”. The Privy Council in the above-mentioned case has held that the decision in *Richard Peiris & Co. v. Wijesiriwardene* was

¹ (1967) 69 N. L. R. 289 at p. 300.

² (1960) 62 N. L. R. 233.

wrong. In view of the Privy Council decision, in construing the words "are due" in section 31B (1) (b) as not being "are legally due" the President of the Labour Tribunal is entitled to make any order which he considers just and equitable on the question of gratuity.

I, therefore, remit this case for a decision by the President, W. E. M. Abeysekera, for the limited purpose of deciding whether in the circumstances of this case any gratuity should be paid to the applicant under the provisions of section 31B (1) (b) of the Industrial Disputes Act. There will be no costs of this application.

Case sent back for further proceedings.

1967 Present : G. P. A. Silva, J., and Siva Supramaniam, J.

A. M. A. HAMEED and another, Appellants, and THE QUEEN,
Respondent

S. C. 3-4/66—D. C. Gampaha (Bribery), 1/B.

Bribery Act—Prosecution under section 19—Burden of proof—Can Court take judicial notice of certain facts ?

In a prosecution, under section 19 of the Bribery Act, against a police officer for accepting a gratification which he was not authorised by law or the terms of his employment to receive, the court cannot take judicial notice that a police officer is not authorised by law or the terms of his employment to accept a gratification for doing an act which would have the effect of interfering with the course of justice in a proceeding pending before a court of law.

APPEAL from a judgment of the District Court, Gampaha.

G. E. Chitty, Q.C. with E. H. C. Jayetileke, for the Accused-Appellant.

Kenneth Seneviratne, Crown Counsel, for the Attorney-General.

May 10, 1967. G. P. A. SILVA, J.—

In this case the 1st accused-appellant was charged with the following offence, namely, that while being a Public Servant, to wit, Police Sergeant No. 1775, Meegahawatta Police, did accept from one B. P. Seiman a gratification of a sum of Rs. 25 which gratification he was not authorised by law or the terms of his employment to receive, and that he thereby committed an offence punishable under section 19 read with section 89 (b) of the Bribery Act. The 2nd accused-appellant was charged with having, as a Public Servant, to wit, Police Constable No. 26, Meegahawatta Police, abetted the 1st accused in the commission of the said offences. Both the accused were convicted of the said charges.

It was contended by learned Counsel for the appellants, and this is not contradicted by Crown Counsel, that there was no evidence in the case that the 1st accused was not authorised by law or the terms of his employment to receive the said gratification. In the absence of such evidence, he submitted, the conviction could not be sustained, and for this submission he relied on the recent Divisional Bench decision in *Mohamed Auf v. The Queen*¹ in which it was held that the burden of proving that the acceptance of a gratification was not authorised by the terms of the employment lay on the prosecution and that in the absence of such evidence the prosecution could not maintain this charge. Counsel for the Crown however sought to distinguish the present case from the Divisional Bench case on the footing that the facts of this case were different and that, on the facts that were established, the court could take judicial notice that a police officer was not authorised by law or the terms of his employment to accept a gratification for doing an act which would have the effect of interfering with the course of justice in a proceeding pending before a court of law. He based this argument not on any particular provision of law but on the principle that there were certain notorious facts which were so well known that any court could take judicial notice of them and that one such instance was that a police officer was debarred from accepting a gratification for the purpose for which he accepted it in this case. Acceptance of this submission would be tantamount to a decision that the burden that is cast on the prosecution of proving certain essential ingredients of an offence would depend on the facts of each case. The pronouncement made in the Divisional Bench decision referred to leaves no room for such a conclusion.

Mr. Chitty raised a further argument which appeared to have much substance, namely, that even if this Court was prepared to take judicial notice of the aforementioned fact, it would not affirm the conviction unless it was clear that the trial Judge was invited to consider this question without evidence and that he decided to take judicial notice of that fact and that the conviction was based on such a decision. Admittedly in this case, the trial Judge was not invited to consider this matter at all nor did he do so *proprio motu*. It must, therefore, be assumed that the decision to convict the accused was arrived at without proof of one of the necessary ingredients of the offence, namely, that the acceptance of the gratification was not authorised by law or the terms of employment of the 1st accused. I do not therefore find sufficient reason to distinguish the principle involved in this case from that of the Divisional Bench case referred to in regard to the proof of the essential ingredients of the offence.

For these reasons I set aside the conviction and sentence and acquit the accused-appellants.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

1967

Present : Samerawickrane, J.

S. RATNAM, Appellant, and S. M. K. DHEEN, Respondent

S. C. 72/66—C. R. Matale, 14982/RE

Rent-controlled premises—Tenant in arrears of rent for more than 3 months after it was due—Failure of landlord to give 3 months' notice of termination of tenancy—Action in ejectment—Maintainability—Scope of s. 4 (1) of Rent Restriction (Amendment) Act, No. 12 of 1966—Rent Restriction Act, as amended by Act No. 10 of 1961 and Act No. 12 of 1966, ss. 12 A (1), 13 (1A)—Civil Procedure Code, s. 46 (2) (i).

Plaintiff sought ejectment of the defendant, his tenant, on the ground that the latter had failed to pay rent for five months and was continuing to remain in unlawful occupation in spite of one month's notice given to him to leave the premises. The action was filed on the 6th July 1965. The premises were governed by the Rent Restriction Act and their standard rent was below Rs. 100.

*Held, that the plaintiff's action was not maintainable for the reason that although the plaintiff averred as a fact that rent had been in arrears for more than three months after it was due, three months' notice of termination of tenancy in conformity with the requirement of section 13 (1A) of the Rent Restriction Act, as amended by Act No. 10 of 1961, had not been given. The action could not be said to have been brought on a ground on which an action is now permitted to be brought by section 12A of the Rent Restriction Act, as amended by Act No. 12 of 1966. The plaintiff should have been rejected in *limine* in terms of section 46 (2) (i) of the Civil Procedure Code.*

APPEAL from a judgment of the Court of Requests, Matale.

Siva Rajaratnam, for Plaintiff-Appellant.

N. R. M. Daluwatte, for Defendant-Respondent.

Cur. adv. vult.

August 23, 1967. SAMERAWICKRAME, J.—

The plaintiff-appellant instituted this action for the ejectment of the defendant-respondent, his tenant, on the ground that the latter had failed to pay rent for five months and was continuing to remain in unlawful occupation in spite of the notice given to him to leave the premises. The action was filed on the 6th July, 1965. The premises were governed by the Rent Restriction Act and the standard rent thereof was below Rs. 100.

At the trial, learned counsel for the defendant-respondent raised one issue only and stated that he was not raising any other issues for the present. The issue he raised was as follows :—

Can the plaintiff have and maintain this action in view of the provisions of Section 4 (1) of the Rent Restriction Act as amended by Act No. 12 of 1966 ?

He submitted that as the action was instituted after the 20th July, 1962, and was pending at the time of the date of the commencement of Act

No. 12 of 1966, the action was void. The learned Commissioner has answered the issue in favour of the defendant-respondent, apparently, on the footing that all actions for the ejectment of the tenant of any premises to which the Rent Restriction Act as amended by Act No. 12 of 1966 applied were void.

This Court has taken the view that Section 4 (1) of Act No. 12 of 1966 does not have the effect of invalidating all actions filed after the 20th July, 1962, and pending at the date of the commencement of that Act—vide *K. P. C. Moosa v. Mrs. S. R. Amir*,¹ and *Charles Fernando v. T. P. de Costa*². It is necessary, therefore, to consider whether this action is one which is void in terms of Section 4 (1) of Act No. 12 of 1966.

In his plaint, the plaintiff alleged that the defendant was in arrears of rent for a period of five months to the 30th April, 1965; that by notice dated 7th May, 1965 the plaintiff required the defendant to quit and vacate the premises on or before the 30th June, 1965; that the defendant failed to comply with the notice and was continuing in unlawful occupation of the premises. By reason of Section 13 (1)A of the Rent Restriction Act as amended by Act No. 10 of 1961, a landlord was not entitled to institute action on the ground that rent had been in arrears unless he had given the tenant three months' notice of the termination of the tenancy and the tenant had failed before the date of the termination of the tenancy specified in the notice to tender to the landlord all arrears of rent. The Rent Restriction Act as amended by Act No. 10 of 1961 was the law actually in force at the date of the institution of the action. According to the averments of the plaint, the plaintiff had failed to give three months' notice of the termination of the tenancy and had thus failed to give the defendant, his tenant, an opportunity of tendering to him arrears of rent before the date of the termination of the tenancy specified in the notice. In terms of the law in force at the date of the action, the plaintiff's action would accordingly have failed.

Act No. 12 of 1966 came into operation on the 10th May, 1966 and by Section 2 introduced a new Section, 12A, which set out grounds upon which a landlord could ask for ejectment of the tenant of premises of which the standard rent did not exceed Rs. 100. One of the grounds is that the rent of the premises has been in arrears for three months or more after it has become due. There is no requirement that three months' notice of termination of tenancy should be given to the tenant or that he should have an opportunity of paying the arrears during such period. Section 4 (1) of Act No. 12 of 1966 stated:—

“The Provisions of Sections 2 and 3 of this Act shall be deemed to have come into operation on the twentieth day of July 1962, and accordingly—

(a) any action which was instituted on or after that date and before the date of commencement of this Act for the ejectment of a tenant from any premises to which the principal Act as

¹ (1966) 69 N. L. R. 44. ² (1967) 69 N. L. R. 381.
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amended by this Act applies shall, if such action is pending on the date of commencement of this Act, be deemed at all times to have been and to be null and void".

This Court has taken the view that Section 4 of Act No. 12 of 1966 does not apply to make void a pending action in which ejectment of the tenant was claimed on a ground set out in Section 12A (1) of the principal Act as, for example, the ground that rent has been in arrears for three months or more after it has become due. If that principle is applicable to this case and the action is maintainable and the provisions of Act No. 12 of 1966 are applicable in determining this action, then the result will be that the plaintiff can maintain an action which he could not have maintained in accordance with the law actually in force at the date of action and the defendant would be deprived of the defence that he had not been given three months' notice of the termination of the tenancy and had not been afforded an opportunity of tendering arrears of rent to the plaintiff during that period. Mr. Daluwatte appearing for the defendant-respondent submitted that it could not have been the intention of the Legislature to deprive a tenant who is the defendant to an action of a defence that was available to him in law by the retrospective operation of Act No. 12 of 1966.

Where the Legislature makes an Act retrospective, it generally makes some provision in regard to pending actions. In Section 4 (1) the Legislature has provided that an action instituted after the 20th July, 1962 and before the date of the commencement of the Act and pending on that day should be deemed to be void. Upon an interpretation of that provision, this Court has taken the view in two cases that that provision would not apply to render void an action where it had been brought upon a ground upon which an action is permitted under Section 12A of the Rent Restriction Act introduced by Section 2 of the said amending Act.

The case of *K. P. C. Moosa v. S. R. Amir* dealt with premises, the standard rent of which were over Rs. 100 and the action was brought under the provisions of Section 9 of the principal Act No. 29 of 1948 which the learned Judge held were unaffected by Sections 2 and 3 of the amending Act. Further, in that case, the plaintiff-respondent had obtained a decree for ejectment of the defendant on the basis of the law as it stood before the amendment. In *Charles Fernando v. T. P. de Costa*, the action was one brought, as in this case, on the ground that rent had been in arrears for a period of over three months, but the plaintiff had obtained a decree for ejectment on the basis of the law as it then stood and the provisions of the amending Act were pleaded in appeal in order to defeat his rights. It will thus be seen that the Court in that case did not have to deal with the situation where the plaintiff claimed that by reason of the retrospective operation of the amending Act he was entitled to have and maintain an action which would have failed under the law which was actually in force at the date of the action

and where if the plaintiff's claim were allowed, the defendant tenant would have been deprived of the defence that he had not been given notice of termination and an opportunity of paying arrears of rent to the plaintiff. The application of the principle laid down in that case to the present case where the facts are different would be wrong as it would have a result that is both unfair and unjust.

It also appears that upon the averments in the plaint, the plaintiff's action was one which he was not entitled to institute in view of the terms of Section 13 (1) A which was the law actually in force and applicable at the date of action. Under that law, the landlord of any premises to which the Act applied was not entitled to institute action or proceedings for the ejectment of a tenant on the ground that rent was in arrears unless he had given three months' notice of termination of the tenancy and unless the tenant had failed to tender to him the arrears. The action, accordingly, was one which appeared from the statement in the plaint to be barred by a positive rule of law and, in terms of Section 46 (2) (i) of the Civil Procedure Code, the plaint should have been rejected.

Does this action fall within the principle applied in the decisions of this Court to which I have referred? It is true that the plaint in this action averred as a fact that rent had been in arrears for more than three months after it was due, but at the time the plaint was filed that fact did not constitute a ground for bringing an action for ejectment in the absence of three months' notice of termination of tenancy. The action was accordingly not in law brought on any ground. *A fortiori* it cannot be said that it was brought on a ground on which an action is now permitted to be brought by Section 12A of the Rent Restriction Act.

I am of the view that the ruling made in those decisions, namely, that Section 4 of Act No. 12 of 1966 does not operate to render void an action for ejectment brought upon one of the grounds for which an action is permitted under Section 12A, does not extend to this case as its application to it is negatived by the matters I have set out. Accordingly, I hold that the finding of the learned Commissioner that the action was void can be supported for the reasons given by me and I dismiss the appeal with costs.

Appeal dismissed.

1967 *Present : H. N. G. Fernando, C.J., and Sirimane, J.*

M. W. A. P. JAYATILLAKE, Appellant, and P. G. SOMADASA, Respondent

S. C. 83/65—D. C. Badulla, 3304/M.B.

Partition action—Mortgage by a party pendente lite of the interest that will be allotted to him in the final decree—Mortgage not specified in subsequent final decree—Right of the mortgagee to sue on the bond—“ Encumbrance ”—Partition Act (Cap. 69), ss. 5, 12, 19, 48, 67, 70.

Section 67 of the Partition Act has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending a partition action does not prevent a party from disposing, during the pendency of the action, of the interest that will be ultimately allotted to him in the final decree.

An interest which vests only upon entry of the final decree is not contemplated in the term “ encumbrance ” in section 48 of the Partition Act. Accordingly, where, after interlocutory decree has been entered in a pending partition action and before the final decree, a party mortgages the interest that will be allotted to him under the final decree, the mortgagee will be entitled to sue on the mortgage bond after the final decree is entered, even if the interest mortgaged is not conserved in the final decree. In such a case, it cannot be contended that the final decree is free from the “ encumbrance ” of the mortgage.

APPEAL from a judgment of the District Court, Badulla.

Nimal Senanayake, for Plaintiff-Appellant.

Bala Nadarajah, with *N. J. Abeysekera*, for Defendant-Respondent.

Cur. adv. vult.

June 20, 1967. H. N. G. FERNANDO, C.J.—

This is an action for a hypothecary decree upon a mortgage bond by which the defendant had mortgaged to the plaintiff “ all my right, title, interest claim, demand advantages and disadvantages whatsoever that I would be declared entitled to by virtue of the Final Partition Decree in case No. 13026 of the District Court of Badulla in to from, and out of all that and those the contiguous lands called and known as ‘ Kadewatte ’ ”. The bond was executed after interlocutory decree for partition had been entered in the pending partition action, but before the final decree.

The defendant took two defences. One was that the mortgage was void under s. 67 of the Partition Act (Cap. 69) as having been executed during the pendency of the partition action. This defence was rightly rejected by the learned District Judge. Section 67 has not altered the position which prevailed under the former Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing or disposing of the interest to be ultimately allotted to a party in the pending action (*Kahan Bhai v. Perera*)¹.

¹ (1923) 26 N. L. R. 204.

The other defence taken in this case was that (in terms of s. 48 of the Partition Act) the right awarded to the defendant in the partition action is free of all encumbrances and that a mortgage executed in the interval between the entry of the interlocutory decree and the entry of the final decree is an “encumbrance” within the meaning of s. 48. The learned District Judge has upheld this contention and has held that, since the mortgage was not specified in the final decree, the right of the defendant as declared in the final decree is free of this encumbrance.

In *Karunaratne v. Perera*¹ this Court rejected the argument that a donation pending partition of the interests to be allotted to the donor in a partition action will be wiped out by the final decree if the interest donated is not conserved in the final decree. Sansoni, C.J. stated succinctly his opinion:—

“ We are unable to accept this submission, because we take the view that the interests referred to in s. 48 of the Partition Act are interests which are presently vested in the grantee, and do not include interests which have not already vested even in the grantor. We see no difference in this respect between the provisions of the old Partition Ordinance and the new Partition Act. ”

I agree entirely with that opinion, but the arguments of Counsel in this appeal render it desirable to state my reasons for so agreeing.

Section 5 of the Partition Act requires the plaintiff in a partition action to include in the action, as parties, all persons who to his knowledge are entitled or claim to be entitled “to any right, share, or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, fideicommissum, life interest, or otherwise, or.....”. Section 12 of the Act provides for the joinder in the action (by an amended plaint) of persons disclosed upon inspection of the land register to be persons who should have been, but were not, joined as parties in the original plaint. Section 19 requires every defendant to disclose the names of every person who to his knowledge has any right, share or interest in the land, but who has not been joined as a party. Section 70 permits the Court, at any time before the entry of the interlocutory decree, to join persons as parties to the action.

The provisions of the Act which I have just mentioned afford ample scope for the joinder or intervention of persons who might have interests in the corpus of a partition action, and for the determination or declaration of such interests by the Court; and the justification for the provision in s. 48, which “wipes out” certain interests unless they are specified in the decree, is that by and large those provisions give the holders of such interests adequate means to protect themselves by participation or intervention in the action.

But since intervention is not permissible *after interlocutory decree* has been entered, a person (like the plaintiff in this case) who acquires some interest after that stage cannot intervene in order to have that interest specified in the final decree. And if an interest so acquired must be regarded as an "encumbrance" within the meaning of that term in s. 48 of the Act, the holder of the interest will be quite powerless to prevent the extinction of the interest. I cannot ascribe to the Legislature an intention so harsh and unreasonable.

Where there is a dealing by a party with "the divided lot to be allotted to him" in a pending partition action, the transaction becomes effective to vest rights in the alienee only after the interest is in law allotted to the party, i.e., only at the stage when the final decree is entered; at that stage the lot allotted to the party becomes for the first time subject to the rights arising by virtue of the transaction. Hence I respectfully agree with Sansoni, C.J., that an interest which vests only upon entry of the final decree is not contemplated in the term "encumbrance" in s. 48.

I should add that this construction does not affect the finality of a final partition decree. The law as to the registration of interests affecting land secures that a person like the mortgagee in the present case must duly register his mortgage if it is to prevail against persons who in the faith of the final decree acquire interests from those to whom divided lots are allotted in the final decree.

The appeal is allowed with costs. The District Judge will enter hypothecary decree as prayed for in the plaint.

SIRIMANE, J.—I agree.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

1967 Present : H. N. G. Fernando, C.J. (President), Abeyesundere, J., and Alles, J.

THE QUEEN *v.* S. A. JOGREST PERERA

APPEAL No. 31 OF 1967, WITH APPLICATION No. 41

S. C. 141—M. C. Polonnaruwa, 15137

Trial before Supreme Court—Summing-up—Misdirection—Duty of Judge to refer to points in favour of defence.

In a trial before the Supreme Court it would be a misdirection to instruct the Jury that they must convict the accused if, in fact, the defence position in substance was that the prosecution evidence was true, but incomplete.

It is the duty of the Judge to present fairly to the Jury evidence which tended to favour the case for the defence.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *A. S. Mohamed, Gemunu Seneviratne* and *F. C. Perera* (Assigned), for the accused-appellant.

J. G. T. Weeraratne, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 1, 1967. H. N. G. FERNANDO, C.J.—

It was common ground in this case that the Appellant caused the death of one Jayakody by striking him on the head with an axe. The Appellant's defence to the charge of murder, that he acted in the exercise of the right of private defence, was obviously rejected by the Jury when they returned a verdict of murder.

Two prosecution witnesses deposed to the incident. One of them stated that on his return after a morning's work on a bicycle he stopped near a boutique with the idea of reading the morning newspaper and sat for sometime on the luggage-carrier of the bicycle. He saw that Jayakody was seated on a bench in the verandah of the boutique reading a newspaper. He also saw the Appellant come out of the boutique with an axe in his hand, and the Appellant assaulted Jayakody once with the axe. The Appellant thereafter went inside the boutique and made his exit from the rear of the boutique. The second witness stated that he was reading a newspaper under a tree near the boutique when he heard the sound of a thud. He then looked towards the boutique and saw Jayakody fall to the ground with his head bleeding; he also saw the Appellant going inside the boutique with an axe in his hand.

The Appellant admitted this assault on Jayakody. But he gave in evidence a version of events preceding the assault. He himself had come to the boutique and had a cup of tea; he thereafter sat down on a chair in front of Jayakody, who having read a newspaper, folded it and placed it on the bench. He then spoke to Jayakody in a low tone about certain things which Jayakody had previously done to him, and finally asked whether Jayakody intended to send him back to his village. Jayakody then replied "I do not propose to send you to your village; I will send you to the moon". Jayakody then pulled out a knife. The Appellant then, in fear for his life, rushed into the boutique and seized an axe. At this stage Jayakody was near the door-way of the boutique with knife in hand, and the Appellant struck him with the axe.

In cross-examination of the two prosecution witnesses, assigned Counsel suggested to them that there had been before the assault a loud and angry exchange of words between the Appellant and Jayakody. This the witness denied. It is unfortunate that Counsel had apparently misunderstood his instructions, for the Appellant's evidence was that

the conversation had been in a low tone. That being so, there was no real conflict between the prosecution and defence versions as to this matter ; in the case of the second witness in particular, who was reading a newspaper before he heard a thud, his evidence in no way conflicts with the Appellant's version of the events which preceded the assault with an axe.

The two prosecution witnesses denied that they saw a knife in the hands of Jayakody. But the defence called one Weerasekera who had been a prosecution witness at the non-summary inquiry. This witness stated that when Jayakody's body was lifted from the floor of the verandah, he saw a knife which had been lying under the body. The learned Commissioner was apparently aware that Weerasekera had given similar evidence about the knife in his deposition. Nevertheless he commended to the Jury a prosecution suggestion that Weerasekera gave false evidence "to help" the Appellant. Now this suggestion was not put to Weerasekera by Crown Counsel, nor was there any evidence whatsoever of any friendship between the witness and the Appellant. Hence the idea that Weerasekera was trying to help the Appellant was a mere conjecture, and it was unjust and unfair to invite the Jury to act upon it.

The Appellant gave uncontradicted evidence that Jayakody had previously acted in a most aggressive manner towards the Appellant. The Appellant had made several complaints to the police against Jayakody :—that Jayakody had brought a gun, threatened to kill him, and up-rooted fence sticks in his garden ; that Jayakody had taken away his bull and branded it ; that Jayakody had cut the barbed wire on his fence. The learned Commissioner referred to these matters but only as a preface to the following observations :—

" Eventually he (Appellant) realises that he could not get the police to act in these matters and, the suggestion for the prosecution is, that on this day after the incident of a couple of days earlier when he met this man for the first time he decided to punish him in this fashion, that is the suggestion for the Crown ; that is the motive that the Crown says that impelled the man to act in this fashion. "

This evidence of Jayakody's previous aggression and acrimony towards the Appellant supported the defence version that on this morning also Jayakody had been threatening and aggressive. The summing-up does not contain even a bare statement of the mode in which this evidence might assist the defence. Instead, the evidence was presented to the Jury only as being hostile to the defence case, and it was unfair thus to present it.

An important point in the Appellant's evidence was that on the spur of the moment he seized an axe which he found inside the boutique.

This fact, if true, negatived the Commissioner's theory that the Appellant had "decided to punish Jayakody", but its proper significance was not mentioned in the summing-up. Here again the Commissioner failed to sum up adequately evidence on which the defence relied. In appeal, the Crown has conceded that the axe had in fact been in the boutique.

The evidence established that the Appellant went of his own accord to the Police Station after the incident, and his statement was recorded quite soon thereafter. He had in the statement alleged that Jayakody had made the same remark "I will send you to the moon". Thereafter (according to the statement) Jayakody had tried to take something from his waist and the Appellant thought that Jayakody was trying to stab him, and out of fear the Appellant then went into the boutique and brought the axe with which he hit Jayakody. The learned Commissioner quite properly told the Jury that this statement had not referred to Jayakody having a knife in his hand and thus contradicted the Appellant's evidence on the point. But the Jury were not directed that the statement generally corroborated the Appellant's evidence, and that it contained the substance of the version that the Appellant acted in self-defence. Nor were they directed that Weerasekera's evidence concerning a knife could suffice to explain that the Appellant's omission to mention the knife in his statement had been inadvertent.

The Jury were, on the whole case, directed that "if what the accused says is the truth, the version the three witnesses speak to is not true". The prosecution witnesses did not claim to have seen or heard everything; their evidence did not render improbable the defence version of a conversation in low tones before the assault. It was only the first witness who actually saw the assault by the Appellant, and this witness did not claim to have been continuously watching the verandah in which Jayakody had been seated; the truth of his evidence was not contested by the defence, which only relied on an incident a few moments earlier which may not have been noticed by the witness. In these circumstances, it was a misdirection to instruct the Jury that they must convict if the prosecution evidence was true. In fact, the defence position in substance was that the prosecution evidence was true, but incomplete.

In view of this misdirection, and the omission of the learned Commissioner to present fairly to the Jury evidence which tended to favour the case for the defence, we set aside the verdict and sentence and acquit the Appellant. We did not consider this a fit case to exercise our discretion to order a new trial.

Accused acquitted.

1966 Present : L. B. de Silva, J., and G. P. A. Silva, J.

CEYLON ESTATE AGENCY AND WAREHOUSING CO., LTD., Appellant, and N. ST. C. H. DE ALVIS and another, Respondents

S. C. 515/1962—D. C. Colombo, 20896/S

(i) *Contracts—Contract of guarantee—Elements necessary—Interpretation—Separate documents relating to same obligation—Effect on issue relating to misjoinder of parties and causes of action—“Cause of action”—Civil Procedure Code, s. 5.*

(ii) *Bills of Exchange Ordinance—Section 89 (1)—Promissory note payable “at Colombo”—Requirement of presentment for payment—Effect of failure to present for payment when such presentment is necessary.*

(i) Plaintiff lent and advanced to the 1st defendant on 10th August 1956 a sum of Rs. 40,000 on a promissory note of which the 1st defendant was maker, the 2nd defendant was payee and the plaintiff was indorsee. A few days later, on 13th August 1956, the 1st defendant mortgaged to the plaintiff, as security, the crops of Oakfield Estate. On the same day, the 2nd defendant guaranteed to the plaintiff in writing P5 the repayment by the 1st defendant of the said sum of Rs. 40,000 and interest, renouncing all benefits of suretyship and making himself jointly and severally liable with the 1st defendant. This agreement, although it was described in the deed P5 as a guarantee and referred to the rights and benefits to which sureties were entitled, was in reality a contract under which the 2nd defendant became a principal debtor.

In the present action the plaintiff sued the 1st and 2nd defendants for the recovery of a restricted claim of Rs. 25,000. He based his claim against both of them on the promissory note as the first cause of action and, alternatively, on the crop bond and P5 as the second cause of action. It was contended on behalf of the defendants that, in regard to the 2nd cause of action, there was a misjoinder of parties and causes of action inasmuch as the writing P5 given by the 2nd defendant was not a guarantee but was a separate and principal obligation undertaken by the 2nd defendant to pay the debt due from the 1st defendant to the plaintiff upon the crop bond.

Held, (a) that a contract cannot be regarded as a contract of guarantee if it is such a contract only by description but is not so in reality. The mere use of a descriptive term cannot affect the reality of a transaction. Deed P5, when read as a whole, was not a guarantee of the 1st defendant's debt to the plaintiff but was, in reality, a contract whereby the 2nd defendant became a principal debtor of the plaintiff for consideration.

(b) that the term “cause of action” has been given a broad meaning in section 5 of the Civil Procedure Code. The obligation sought to be enforced from the 1st defendant on the crop bond and from the 2nd defendant on the writing P5 was one and the same. Though there were two separate documents, they were in fact one and referred to the same obligation. The promissory note, the crop bond and the writing P5 were entered into by all the parties as parts of a single transaction and with the consensus of all. In the circumstances, although P5 was not a contract of guarantee, there was no misjoinder of parties and causes of action in regard to the alternative second cause of action.

(ii) As for the first cause of action, the promissory note was drawn by the 1st defendant in favour of the 2nd defendant, who indorsed it to the plaintiff. In the body of the note it was made payable "at Colombo" to the 2nd defendant or his order. The 1st defendant lived at Hendala and the 2nd defendant at Pamunuwa. The 2nd defendant was only an accommodating party who immediately indorsed it and gave it over to the plaintiff, who then paid Rs. 25,000 out of the consideration to the 1st defendant. It was only the plaintiff who had a place of business in Colombo. It was thus clearly understood by all parties to the promissory note that payment was to be made to the plaintiff.

Held, that the court can look into the surrounding circumstances to ascertain if the place of payment designated in a promissory note is a "particular place" within the meaning of section 89 (1) of the Bills of Exchange Ordinance. In the present case a particular place of payment was mentioned in the body of the promissory note and, therefore, presentment for payment was necessary before the plaintiff could sue the defendants on the promissory note. In an action on a promissory note where presentment for payment is necessary, it is necessary to aver in the plaint filed against the maker and the indorsers that the note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants. As the plaintiff in the present case failed to make these necessary averments in the plaint and also failed to cure the defect in the plaint by raising the relevant issues at the trial, the plaint failed to disclose a cause of action against the defendants on the 1st cause of action.

APPEAL from a judgment of the District Court, Colombo.

D. R. P. Goonetilleke, with *D. S. Wijewardene*, for the plaintiff-appellant.

H. W. Jayawardene, Q.C., with *N. S. A. Goonetilleke* and *C. A. Amarasinghe*, for the 1st defendant-respondent.

N. S. A. Goonetilleke, for the 2nd defendant-respondent.

Cur. adv. vult.

March 30, 1966. L. B. DE SILVA, J.—

The Ceylon Estate Agency and Warehousing Company, Ltd. (hereinafter called the plaintiff) sued Norvin St. Clair Hilarion de Alvis and Gamamedaliyanage John Paris Perera (hereinafter called the 1st and 2nd defendants respectively) for the recovery of the restricted claim of Rs. 25,000 on two alternate causes of action. The 1st cause of action is on a promissory note marked A and P2 dated 10.8.1956, executed by the 1st defendant in favour of the 2nd defendant and endorsed by him to the plaintiff, for Rs. 40,000.

On the 2nd cause of action, the plaintiff alleged that on or about 13th August, 1956 he lent and advanced to the 1st defendant a sum of Rs. 40,000 and as security for the repayment of the said sum and interest at 7% per annum the 1st defendant, by deed No. 943 (1D2) dated 13th August, 1956, mortgaged and hypothecated with the plaintiff the crops of Oakfield Estate.

The 2nd defendant by a writing (P5) dated 13th August, 1956 guaranteed the repayment by the 1st defendant of the said sum of Rs. 40,000 and interest, renouncing all the benefits of the suretyship and making himself jointly and severally liable with the 1st defendant.

The defendants denied the plaintiff's claim. The 1st defendant claimed from the plaintiff in reconvention Rs. 88,000 on grounds of misappropriation of funds due to the estate and management of Oakfield Estate, the management of which was entrusted to the plaintiff under the Agreement No. 944 dated 13th August, 1956. (1D1).

The 1st defendant had purchased Oakfield Estate for Rs. 500,000 in November, 1954. It was 1,074 acres in extent, comprising of 714 acres in rubber, 159 acres interplanted in tea and rubber, 32 acres in cocoa and rubber, 16 acres in paddy and 153 acres in jungle. He had taken a loan of Rs. 60,000 from C. W. Mackie & Company for this purpose.

The estate was managed for the 1st defendant by de Soysa & Co. from 1.12.1954 till September, 1955. During this period, a sum of Rs. 45,000 had been paid to Mackie & Co. in reduction of their loan. The average profit during this period was said to have been Rs. 3,000 a month.

From September, 1955 till 14th August, 1956, Vedamanicam, the chief clerk of the estate, managed the estate. In June, 1956, Mackie & Co. had filed action in the District Court of Colombo against the 1st defendant to recover the balance sum of Rs. 15,156.48 due to them. The 1st defendant, who was a renter, was in urgent need of Rs. 25,000 at this time, to deposit towards his toddy rents.

The 1st and 2nd defendants entered into the present transaction with the plaintiff, to enable the 1st defendant to obtain the necessary financial accommodation. The 2nd defendant was merely an accommodating party to enable the 1st defendant to raise the necessary funds. The parties are agreed that the promissory note sued upon, the crop bond and the writing by the 2nd defendant were all executed for this purpose and formed part of a single transaction.

At the execution of the promissory note, the plaintiff paid the 1st defendant Rs. 25,000 by cheque. He also undertook to settle the claim of Rs. 15,000 odd of C. W. Mackie & Co., which was then in suit. The plaintiff had thereafter settled the claim of Mackie & Co. by an arrangement with them to pay that sum by instalments. That was a private

transaction between them. Mackie & Co. thereupon moved that their action against the 1st defendant be dismissed stating that their claim and costs had been settled. The action was accordingly dismissed without costs. (Vide 1 D 3 (b). Marginal page 1173.)

It is quite clear that the 1st defendant obtained the full consideration of Rs. 40,000 on the promissory note in suit. The fact that the plaintiff had made a separate arrangement with Mackie & Co. to pay the amount due from 1st defendant to them by instalments, does not mean that the plaintiff had failed to settle in full the liability of 1st defendant to Mackie & Co. Once the action of Mackie & Co. against the 1st defendant was dismissed on the ground that their claim and costs had been settled, the liability of 1st defendant to Mackie and Co. was fully extinguished. The submission made on behalf of 1st defendant in this appeal, that the promissory note is fictitious on the ground that the plaintiff did not pay the money due to Mackie & Co. is without any substance.

The plaintiff's action was dismissed with costs by the learned District Judge on certain legal objections and judgment was given in favour of 1st defendant on his claim in reconvention in a sum of Rs. 5,000. The plaintiff has appealed from that decision and the 1st defendant has filed cross objections against the amount awarded to him in reconvention.

For the purposes of this appeal, we propose to consider first the objection raised by the defendants that the plaint discloses a misjoinder of parties and causes of action. They conceded that there was no misjoinder so far as the 1st cause of action on the promissory note was concerned. With regard to the alternate cause of action, they conceded that if the writing given by the 2nd defendant was a guarantee of the amount due from the 1st defendant to the plaintiff on the crop bond, there was no misjoinder of parties and causes of action and the action was duly constituted. They argued, however, that the writing given by the 2nd defendant was not a guarantee but was a separate and principal obligation undertaken by the 2nd defendant, to pay the debt due from the 1st defendant to the plaintiff upon the crop bond.

The learned District Judge upheld this contention and we are in entire agreement with his finding on this question. In construing a deed very similar in terms with P5, the Privy Council held in *Wijewardena v. Jayawardena*¹ —

“.....the question to be decided is whether on a proper construction of the deed, the defendant has bound himself to the plaintiff as principal debtor or has made himself liable only as a surety. This question must be answered by consideration of the deed as a whole.”

¹ (1924) 26 N. L. R. 193 at p. 197.

They also stated, “ It was, however, alleged that the statement in clause 3 ‘ that this guarantee shall be a continuing guarantee ’ changed the character of the obligation created by paragraph 1 into one of suretyship only. Their Lordships cannot agree with this contention and do not think that such a description of the document can alter the real nature of the contract as appearing in the express terms in paragraph 1. It is settled law that the mere use of a descriptive term cannot affect the reality of a transaction. ”

The contract of guarantee is defined in the “ South African Law of Obligations ” by Lee & Honore, page 138, section 541, as follows.....

“ The contract of Suretyship or Guarantee is a contract whereby one person (surety or guarantor) promises another person (creditor) to be answerable in the event of a third party (the principal debtor) making default in the performance of a duty owed by such third party to the creditor. ”

The deed P5 (marginal page 116) has the heading “ Guarantee ”. The 1st paragraph of P5 is as follows. “ In consideration of the Ceylon Estate Agency & Warehousing Co., Ltd., at my request agreeing not to require immediate payment of the sum of rupees forty thousand (Rs. 40,000) lent and advanced by the Company to Mr. Norvin St. Clair Hilarion de Alvis, I, the undersigned G. John Paris Perera....do hereby agree to pay to the Company in Colombo the said sum of Rs. 40,000 with interest thereon at 7% per annum from 10th August, 1956. ”

Paragraph 2 states, “ This guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of the moneys herein mentioned but shall be a continuing security.... ”

Paragraph 8 states, “ I agree that the Company shall be at liberty either in one action to sue the debtor and me jointly and severally or to proceed in the first instance against me. ” The next portion of this paragraph is not intelligible. There is a reference in it to, “ and all other rights and benefits to which sureties are or may be by law entitled. ” It further states, “ it being agreed that I am liable in all respects hereunder as principal debtor jointly and severally to the extent aforesaid including the liability to be sued before recourse is had against the debtor ”.

Though this contract is referred to in the deed as a guarantee and the deed refers to the rights and benefits to which sureties are entitled to and provision is made in the deed that the contracting party (i. e., the 2nd defendant) may be sued before recourse to the debtor (i. e. the 1st, defendant), we are satisfied on reading the deed as a whole, that this deed P5 is not a guarantee of the 1st defendant’s debt to the plaintiff but that the 2nd defendant has become a principal debtor of the plaintiff for the consideration set out in paragraph 1 of the deed. The concluding portion of paragraph 8 also confirms that view.

We shall now consider if there is a misjoinder of parties and causes of action on the plaintiff's alternate cause of action. Section 5 of the Civil Procedure Code defines the expression "Cause of action" as a wrong for the prevention or redress of which an action may be brought. It includes a refusal to fulfil an obligation. In *Croos v. Gunewardena Hamine*¹ and *Arulananthan v. The Attorney General*,² the expression, "Cause of action" has been given a broad meaning. In the earlier case, Wendt J. said, "I think that the word 'obligation' in this definition is to be understood not in the narrow sense in which a parol promise to pay, a promissory note and a mortgage, although given for the same debt, may be described as three different obligations, but in the more generally understood sense of a liability to pay that sum of money. Reading the definition in this case the cause of action was the same in both cases, namely the failure to pay one and the same debt."

That decision was approved and followed by Dias S.P.J. and Gunasekara J. in *Arulanantham v. the Attorney-General*. In that case, there were two separate agreements. In one, the 1st defendant alone was liable for all damages and in the other the 2nd and 3rd defendants were only liable to pay up to Rs. 2,000 of the damages. It was submitted that these were contracts of suretyship. But the principle of law enunciated in both these cases is that the expression "cause of action" must be given a broad and liberal meaning.

Applying that principle to the present case, we are satisfied that the obligation sought to be enforced on the crop bond from the 1st defendant, and the writing (P5) from the 2nd defendant is one and the same, that is the obligation to repay the loan of Rs. 40,000 given to the 1st defendant by the plaintiff or the balance outstanding on that account. Though there were two separate documents, they were in fact one and referred to the same obligation. It may be noted that in P5, the 2nd defendant agreed that the plaintiff may sue him and the 1st defendant in one action jointly and severally. The fact that 1st defendant was no party to that agreement is immaterial as the loan was only given to him. The fact that the 2nd defendant undertook to be jointly and severally liable with 1st defendant for that debt, did not, in any sense, increase 1st defendant's liability. It only relieved him of his liability to some extent. The promissory note, the crop bond and the writing (P5) were entered into by all the parties as parts of a single transaction and with the consensus of all.

We hold there is no misjoinder of parties and causes of action in this case.

The plaintiff's action on the first cause of action on the promissory note was dismissed by the learned District Judge on the ground that he

failed to aver in the plaint that the promissory note was duly presented for payment but it was dishonoured by the 1st defendant and that notice of dishonour was given to the 2nd defendant.

The plaintiff failed to make such averments in his plaint and he also failed to raise any issues on these points and offer any evidence in proof thereof. It is necessary to consider if the plaintiff was required by law to present this promissory note for payment. Section 89 of the Bills of Exchange Act (Chapter 82, Legislative Enactments of Ceylon, Revised Edition) provides as follows.....

“Section 89 (1). Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.”

“Section 89 (2). Presentment for payment is necessary in order to render the indorser of the note liable.”

The promissory note P2 is in favour of the 2nd defendant and is made payable at Colombo to him or his order. The 1st defendant lives at Hendala and the 2nd defendant at Pamunuwa. The 2nd defendant was only an accommodating party and the promissory note was immediately endorsed by 2nd defendant and given over to the plaintiff. Rs. 25,000 out of the consideration was paid by the plaintiff direct to the 1st defendant. It was thus clearly understood by all parties to the promissory note that payment was to be made to the plaintiff.

The question arises for decision if Colombo, which is the place of payment designated in the promissory note, is a particular place of payment within the meaning of section 89 (1) of the Bills of Exchange Act. Two local cases have considered the question whether a note payable at a particular town, was a note payable at a particular place.

In *Storer v. Sinthamany Chettiar*¹ the promissory note was made payable at Negombo. The maker was resident at Chilaw and had no business or interests in Negombo. Maartensz J. held in that case, “Thus, if a note payable at Negombo is made by a person who lives or has a place of business in Negombo or it can be gathered from the course of business carried on by the maker and the payee, where presentment for payment should be made, Negombo would, in my opinion, be a sufficiently specific description of the place where the note is payable, to render presentment for payment imperative. It was held in that case that a particular place of payment was not mentioned in the note and presentment for payment was not necessary to render the maker liable.

¹ (1938) 40 N. L. R. 109.

In *de Silva v. Gunawardena*¹ the promissory note was made payable at Talawakele. The maker and payee were both residents of Talawakele and had their places of business there. Keuneman J. stated in that case that as both the maker and the payee had their places of business at Talawakele, "This may at first sight appear to create an ambiguity as to which place at Talawakele is to be the place of presentment but I think on consideration, that as we are dealing with presentment for payment, it may *prima facie* be taken that presentment should be made at the address of the maker of the note, who is responsible for the payment." It was held in that case that a particular place of payment was designated in the promissory note.

Keuneman J. further stated, "It is, I think, clear from the English cases cited to us, that where a note has to be presented for payment at a particular place, an allegation to that effect that presentment has been made at that place, is a necessary ingredient in the plaint and that plaintiff's cause of action is not complete without such an allegation."

These cases indicate that the court can look into the surrounding circumstances to ascertain if the place of payment designated in the promissory note is a particular place of payment or not. In the present case, it is only the plaintiff who has a place of business in Colombo. Both the defendants have their residences outside the town of Colombo and have no places of business in Colombo.

In the crop bond No. 943 (1D2), the 1st defendant engaged and bound himself to pay the sum of Rs. 40,000 and interest or the balance outstanding to the said obligee in Colombo on demand. By the Writing P5, (page 116), the 2nd defendant too promised to pay the said sum of Rs. 40,000 lent and advanced to the 1st defendant, and interest to the plaintiff in Colombo.

As the deed (1D2), the writing P5 and the promissory note P2 were documents executed in connection with this loan of Rs. 40,000 to the 1st defendant by the plaintiff, it is clear that the parties agreed that the balance outstanding on this loan should be paid to the plaintiff in Colombo, meaning thereby at plaintiff's place of business in Colombo. We, therefore, hold that a particular place of payment was mentioned in the body of the promissory note and that presentation for payment was necessary before the plaintiff could sue the defendants on the promissory note.

In the case of *de Silva v. Gunawardena* cited earlier, Keuneman J. held that the plaintiff pleaded in the plaint that the promissory note was marked for non-payment clearly meaning thereby that it was noted for non-payment. He said, "I am inclined to think that the allegation with regard to the noting, carries with it the implied allegation that the note was duly presented for payment."

¹ (1941) 42 N. L. R. 433

We hold that in an action on a promissory note where presentment for payment is necessary, to make the maker and indorsers liable, it is a necessary averment in the plaint that the promissory note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants.

As the plaintiff has failed to make these necessary averments in the plaint and has also failed to cure the defect in the plaint by raising the relevant issues at the trial, we hold that the plaint in this case fails to disclose a cause of action against the defendants on the 1st cause of action on the promissory note (P2). The learned District Judge has rightly dismissed the plaintiff's 1st cause of action on this ground.

With regard to the 2nd cause of action, the estate in question was subject to several mortgages executed prior to the crop bond (1D2). A mortgage action D. C. Colombo No. 5332/M.B. (1D195—page 1397) was filed on tertiary mortgage bond No. 74 dated 3rd June, 1955 by the mortgagees, against the mortgagors, one of whom was the present 1st defendant. The plaintiff was made the 5th defendant in that case as a puisne encumbrancer, for the purpose of obtaining a mortgage decree binding on his interests. Order was made to enter judgment in that case against 1 to 3 defendants. (See 1D196—page 1412.)

It has been argued in this case that the decree in the mortgage action has wiped out the rights of the plaintiff as against the 1st defendant as the plaintiff did not assert his rights against him. The relevant issues on this question are issues 20 to 22 (b). A short answer to this question is that no decree has been entered nor has any order been made to enter a decree against the 5th defendant in that case, (i.e., against the present plaintiff). The plea of Res Judicata must, for this reason alone, fail.

As this point has been overlooked in the argument of the case both in the trial court and in appeal, we shall refer to another point raised in the case before both the courts. Does the crop bond 1D2 affect any interest in land? The relevant portion of this bond mortgages and hypothecates as a first and primary mortgage free from any encumbrances "all the crops and produce described in the 1st schedule hereto (hereinafter called 'mortgaged property') of the estate plantations and premises called and known as Oakfield Estate in the 2nd and 3rd schedules hereto more particularly described and all the right, title interest property claim and demand whatsoever of the obligor in to out of or upon the same."

The 1st schedule reads as follows

“ All and singular the crops and produce consisting of latex, all rubber manufactures or otherwise including rubber sheet smoked or otherwise and crepe rubber of all grades scrap crepe, Teas including green leaf and tea manufactured or in process of manufacture and all other crops or produce harvested or manufactured or otherwise of every sort and description now lying and which may hereafter at any time and from time to time and at all times be harvested, manufactured, brought in or lie upon the premises in the 2nd and 3rd schedules hereto or any factory or building thereon and in or upon any factories or godowns, stores, buildings, warehouses and premises at which the said crops and produce now are and may at any time hereafter and from time to time and at all times be stored and kept.”

We have no doubt at all that this mortgage refers only to the severed crops of the estate and has no reference whatsoever to the standing crops of the estate. As such this is not a mortgage that affects any land. The fact that this bond has been registered in the Land Registry, does not affect the interpretation of this bond.

The learned District Judge has erred in holding that this crop bond (1D2) affects immovable property. He has also erred in holding that the decree in the mortgage action D. C. Colombo No. 5332/M.B. is a bar to the plaintiff filing this action.

It is not necessary in this case to express our views on this plea of Res Judicata assuming that the bond (1D2) referred to immovable property and a proper decree had been entered in the mortgage action, binding on the plaintiff's interests in this land, as they would be obiter.

The balance due to the plaintiff from the 1st defendant on this loan has to be ascertained after taking into account the income from and expenditure on Oakfield Estate, which was managed by the plaintiff for the 1st defendant. A monthly statement of the detailed expenditure of the estate as per documents P43 to P51 and a monthly statement of the account between the plaintiff and the 1st defendant as per documents 1D7, 1D11 to 1D18 were sent to the 1st defendant.

In this connection, the correspondence between the plaintiff and the 1st defendant during March, 1957 shortly before the Agency Agreement was terminated is revealing. By P6 dated 8th March, 1957, 1st defendant informed the plaintiff that he had made arrangements to sell the estate and hoped to finalise the transaction on or before 30th April, 1957. He said that the intending purchaser had applied to C. W. Mackie & Co., Ltd. requesting them to take over the 1st defendant's liability to the plaintiff. He also stated that his debt to the plaintiff has been decreased by about Rs. 10,000 during the past two months.

The plaintiff promptly replied by letter P7 dated 8th March, 1957, that they could not understand his statement that the debt was decreased by Rs. 10,000. Plaintiff pointed out that the original loan was Rs. 40,000 and that it now stands at Rs. 43,473.84 and Rs. 1,211.93 on account of the Superintendent remain unpaid.

The 1st defendant replied to this letter by his letter P8 of 9th March, 1957, stating that he is making every endeavour to discharge his obligations to the plaintiff. He did not challenge the correctness of his liability to the plaintiff as stated in P7.

In challenging the claim of the plaintiff in this action, the 1st defendant alleged that he had been debited twice over with the estate expenses for August and September 1956. According to the Ledger 1DB, page 345, the 1st defendant's account with the plaintiff appears under the name Oakfield Estate. On 29.9.56 the 1st defendant is debited with Rs. 14,270.60 being the amount transferred from the account of the Superintendent of this estate, at pages 193, 196 and 84 in this ledger. A corresponding credit item is entered in the Superintendent's account at page 194. This sum represents the balance due to the plaintiff from the Superintendent of this estate on 29th September, 1956. On 30th October, 1956 the 1st defendant is debited with the following items :—

	Rs. c.
Estate Expenditure for August 5,631 45
Estate Expenditure for September 11,170 68
 Total ..	16,802 13

At a superficial examination, it would appear that the 1st defendant has been double debited with the item of Rs. 14,270.60. The actual state expenditure for these two months were Rs. 5,631.45 and Rs. 11,170.68 as shown in the detailed monthly statements P43 and P44. The actual estate expenditure incurred by the Superintendent for a particular month is generally more than the amount sent to him by the plaintiff during that month. According to 1D8, in August 1956, the balance due from the Superintendent was only Rs. 2,812.98, but the actual estate expenditure incurred by the Superintendent for that month was Rs. 5,631.45.

The 1st defendant's account in the ledger 1D8 at page 245 shows that he was credited with "The Superintendent's A/C October Credit balance transferred" Rs. 3,068.77. Thereafter the 1st defendant was debited with the actual estate expenditure for the preceding month and was credited with the credit balance transferred from the Superintendent's account.

On 29th November, 1956, the 1st defendant was debited with the estate expenditure for October Rs. 14,143.74 and was credited on 30.10.56 with a sum of Rs. 1,880.33 being transfer of balance from Oakfield Estate A/C. (This should be from Oakfield Estate Superintendent's A/C.) The corresponding entries appear in the Superintendent's A/C.

Sometimes there is no such credit balance transferred, as the amount sent to the Superintendent during that month is more than what was spent by him that month. In that event, a debit balance will be debited to the 1st defendant's A/C as in December, 1956. On 20.12.56 plaintiff was debited with the Oakfield Estate expenditure A/C November Rs. 13,778.72 and again on 31.12.56 he was debited with Balance transferred from Oakfield Superintendent Rs. 749.87.

In the statement of A/Cs for the months of April and May, 1957 sent to the plaintiff (ID18. page 1, 190), he is credited on 30.4.57

“ By balance A/C Superintendent, Oakfield Estate, Rs. c.	
transferred.....	.. 10,981 16

and on 31.5.57

“ By Superintendent, Oakfield, balance transferred ..	1,168 19
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We are satisfied that the 1st defendant has not been debited twice over with the sum of Rs. 14,270.60 nor has he been over-charged on that account. The 1st defendant is a toddy and arrack renter. He received monthly statements of the estate expenditure and his account with the plaintiff. If there was such a large over-charge or double debit, he could not have failed to detect it. It was suggested in the course of this appeal that the plaintiff restricted his claim of Rs. 41,620.32 to Rs. 25,000 because there was a large overcharge in the account. We are unable to speculate on the reason for which the plaintiff restricted his claim.

It was also urged in this appeal that the plaintiff paid C. W. Mackie & Co. the sum of Rs. 15,000 odd by instalments from the proceeds of sale of the produce of 1st defendant's estate. There is nothing in the accounts to bear out this suggestion. There are certain payments to Mackie & Co. charged to the 1st defendant's A/C. These will be dealt with later.

We shall now deal with 1st defendant's claim in reconvention. The learned District Judge has awarded Rs. 5,000 as damages against the plaintiff for mismanagement of the estate. Under the Agreement No. 944 dated 13th August, 1956 the 1st defendant appointed the plaintiff to manage and control Oakfield Estate for remuneration.

Under paragraph 3, the management was to be under the unfettered control of the plaintiff, subject to the general policy as may be agreed to between the parties.

Under paragraph 4, the plaintiff undertook to manage and work the estate to the best interest of the owner and to maintain it in a good and proper state of management and cultivation. The plaintiff also undertook to exercise and perform all such powers, duties, functions and responsibilities as are commonly undertaken by estate agents and secretaries.

The 1st defendant was entitled to appoint a visiting agent for the estate and the agricultural policy shall be agreed on by the owner, the visiting agent and the plaintiff. The 1st defendant did not appoint a visiting agent but he himself visited the estate fairly regularly and over-looked the estate, though he had no special knowledge or experience as a planter.

It is clear on the evidence that this estate was in a rather neglected condition and the rubber including the budded rubber had been slaughter-tapped for some years prior to the Agreement. It is common knowledge in estate circles that old rubber is slaughter-tapped for a short period before the rubber is felled for replanting. Sometimes when the old rubber is uneconomic for ordinary tapping, it is slaughter-tapped for a short period before it is abandoned. But it is unheard of to slaughter-tap budded rubber trees under proper agricultural supervision of an estate.

As the plaintiff had allowed this pernicious practice to continue after the plaintiff took over the management of the estate, without an express directive from the owner to do so, the plaintiff has undoubtedly committed a breach of the agreement. The 1st defendant was fully aware of the prevailing practice and condoned it. Even a tyro would have been aware that this practice will be very harmful to the budded rubber trees and will greatly diminish the value of the estate, though he would temporarily get a higher yield from the rubber.

The least that the plaintiff could have done in these circumstances, was to have warned the owner of the ill-effects of continuing this bad practice. There is no evidence of the extent in budded rubber in this estate. The amount awarded by the learned District Judge as damages included the damages for the bad manufacture of rubber. The evidence shows that the smoked sheet rubber manufactured in this estate was of a very poor quality.

Mr. Warusavitarne, a Visiting Agent and an experienced planter, who visited the estate, has given evidence, which has been accepted by both parties. He has stated that about 90 to 95% of the out-turn of sheet rubber should be of grade 1, in a normal estate. Only about 40% of sheet rubber in this estate came up to grade 1. There was a difference of 3 to 4 cents in the prices of grades 1 and 2 of sheet rubber.

It is not necessary to go into any detail about the loss caused to this estate by the bad manufacture of rubber. The damages for mismanagement have been claimed by the 1st defendant in his 2nd claim in reconvention, in a sum of Rs. 50,000.

But this claim is limited to the reduction in the value of the estate. The value of the estate has not been diminished by the bad manufacture of rubber. The 1st defendant would have had a separate cause of action for the loss caused by such bad manufacture. As he has made no such claim, it is not necessary to consider this claim any further.

This estate had been abandoned shortly after the plaintiff's management was terminated. About $1\frac{1}{2}$ years later, this estate which had been purchased by the Agricultural and Industrial Credit Corporation under a primary mortgage, was sold to Mr. D. L. W. Rajapakse for Rs. 75,000. This estate has been valued by Mr. Warusavitarne in June, 1956 at Rs. 456,000. (See Valuation Report P88.)

We are unable to take into consideration the low price of this sale, in considering the damage caused to the estate by the plaintiff's mismanagement. Several other factors have contributed to the low price realised. Even as an abandoned estate, the price realised is ridiculously low.

Considering all the circumstances, we award the 1st defendant Rs. 5,000 as damages on his 2nd claim in reconvention. The learned District Judge has awarded the same sum but for both mismanagement and bad manufacture of rubber.

On the 1st claim in reconvention, the 1st defendant claimed Rs. 38,000 for alleged misappropriation of income, on the grounds of double debits and improper accounting. On this claim, the learned District Judge has awarded Rs. 5,682.57. We have already dealt with the alleged double debits. This item has been disallowed by the learned District Judge and we, too, have come to the same conclusion.

The learned District Judge allowed the 1st defendant three payments made to Mackie & Co. :—

- (a) Rs. 2,890 paid by him in terms of an abortive settlement.
(See P17 dated 7. 8. 57 and P18 dated 10. 8. 57.)
- (b) Rs. 74.82 as a liability undertaken by plaintiff.
- (c) Rs. 1,500 another payment to Mackie & Co. which should have been paid by plaintiff.

He also allowed the 1st defendant Rs. 334.93 being a sum paid by him to plaintiff under the abortive settlement.

On these items, the 1st defendant would be entitled to Rs. 4,799·75.

He has disallowed the plaintiff the sum of Rs. 882·72 charged as interest on Rs. 15,000. The plaintiff has settled the liability of 1st defendant to Mackie & Co. and there is no reason why the plaintiff is not entitled to charge the interest on the full Rs. 40,000.

The 1st defendant also claimed Rs. 15,156·48. This was the sum for which Mackie & Co. sued the 1st defendant. The plaintiff settled that claim with Mackie & Co. and the action was accordingly dismissed. This sum and the Rs. 25,000 paid direct to 1st defendant by the plaintiff were duly charged to 1st defendant's A/C. There was no double charge of the item of Rs. 15,156·48.

The learned District Judge excluded this item because the plaintiff had restricted his claim to Rs. 25,000. We see no valid ground on which the 1st defendant can claim this sum. We disallow this claim of Rs. 15,156·48.

We find that the 1st defendant has been wrongly charged with the four items referred to earlier, totalling Rs. 4,799·75. This sum must be set off from the amount due to the plaintiff on the Crop Bond (1D2). Even after giving credit to 1st defendant for these items, there is a sum in excess of Rs. 25,000 due to the plaintiff on his alternate cause of action.

The 1st defendant cannot claim this sum of Rs. 4,799·75 as money misappropriated by the plaintiff, as these items must be and have been taken in account, in considering the liability of 1st defendant on the plaintiff's alternate cause of action. For these reasons, we dismiss defendant's first claim in reconvention.

We set aside the judgment and decree of the learned District Judge and direct that judgment and decree be entered for plaintiff for Rs. 25,000 as prayed for with costs on his alternate cause of action. The plaintiff's 1st cause of action is dismissed without costs.

The 1st defendant's 1st claim in reconvention is dismissed without costs. We direct that judgment and decree be entered on 1st defendant's 2nd claim in reconvention for Rs. 5,000 with costs in that class.

Subject to the above directions, the plaintiff's appeal is allowed and the cross objections of the defendants are dismissed. The plaintiff is allowed his costs of appeal.

G. P. A. SILVA, J.—I agree.

1967

Present : Tambiah, J., and Alles, J.

R. P. CHALONONA, Appellant, and T. P. WEERASINGHE,
Respondent*S. C. 156/1966—D. C. Anuradhapura, 648/T*

Appeal—Time limit for presenting petition of appeal—Sunday not a dies non—Holidays Act, No. 17 of 1965, s. 2 (a)—Civil Procedure Code, s.754 (2)—Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960.

According to section 2 (a) of the Holidays Act, No. 17 of 1965 Sunday is no more a *dies non*. Sundays, therefore, cannot be excluded now when counting the number of days within which a petition of appeal should be presented in terms of section 754 (2) of the Civil Procedure Code.

Relief granted under Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960 applies only to appeals filed within the prescribed time.

APPEAL from a judgment of the District Court, Anuradhapura.

Frederick W. Obeyesekere, with E. St. N. W. Tillekeratne, for 1st respondent-appellant.

C. R. Gunaratne, for plaintiff-respondent.

September 8, 1967. TAMBIAH, J.—

In this case judgment was delivered on 21st January, 1966, and the Petition of Appeal was filed on 10th February, 1966. Counsel for the plaintiff-respondent takes up the preliminary objection that the appeal is out of time. Even applying the ruling stated in *Boyagoda v. Mendis*¹, this appeal should have been filed on 9th February, 1966.

Mr. Obeyesekere for the appellant, however, submitted that in view of Section 754 (2), Sundays also should not be counted. But in view of the Holidays Act No. 17 of 1965, which came into operation on 1st January, 1965, Sunday is no more a *dies non*, vide section 2 (a) of the Holidays Act, No. 17 of 1965. Therefore the Petition of Appeal has been filed out of time.

The Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960 cannot help the appellant in this case. Relief granted under that Act only applies to appeals filed within the prescribed time. For these reasons the appeal is rejected with costs.

ALLES, J.—I agree.

Appeal rejected.

1967

Present : Alles, J.

V. M. ABDUL SAMAD, Appellant, and H. D. SIRINAYAKE,
Respondent

S. C. 68/1966—C.R. Kandy, 18382

Rent Restriction (Amendment) Act No. 12 of 1966—Applicability of its provisions at stage of execution of decree—Inapplicability if tenant is in arrears of rent for 3 months—Rent Restriction Act, s. 12 A (1) (a).

Where execution proceedings for the enforcement of a decree obtained by a landlord for the ejectment of his tenant had begun but were not completed on the date when the Rent Restriction (Amendment) Act No. 12 of 1966 came into operation, the tenant is entitled to take shelter under the provisions of the Amending Act, even if he had gained time by unsuccessful applications for stay of execution of writ and by preferring an appeal to the Supreme Court. But he is liable to be ejected under section 12 A (1) (a) of the Rent Restriction Act (as amended by Act No. 12 of 1966) if he was in arrears of rent for three months at the time of the institution of the action.

APPEAL from a judgment of the Court of Requests, Kandy.

S. Sharvananda, with M. Sivarajasingham, for the plaintiff-appellant.

T. B. Dissanayake, with Nihal Jayawickrema, for the defendant-respondent.

Cur. adv. vult.

August 14, 1967. ALLES, J.—

This case illustrates some of the hazards that have to be experienced by a landlord after the passing of the Rent Restriction (Amendment) Act No. 12 of 1966.

The plaintiff filed action against his tenant, the defendant, on 2.7.64 for ejectment from the premises in question on the ground that the defendant was in arrears of rent from December 1963 to June 1964. During the course of the trial the case was settled and it was agreed between the parties that the defendant was in arrears of rent ; the defendant agreed to pay the arrears of rent amounting to Rs. 724/32 and a further sum of Rs. 47/94 monthly as damages failing which the plaintiff was entitled to take out writ. The terms of the consent decree were carefully drawn up by both parties and supplemented by further conditions on 3.6.65. On 16.9.65, it was brought to the notice of Court that the defendant had defaulted in the payment of the very first monthly instalment agreed upon between the parties. The defendant denied that there was any default and the dispute was fixed for inquiry. On 1.10.65, after hearing the submissions of Counsel, the Court dismissed the objections of the defendant and the application for execution of the

writ was allowed. The Court was of the view that the defendant's objections were devoid of merit and were merely an excuse for his failure to pay. From this order the defendant made applications to the Supreme Court in Revision or *restitutio in integrum* and also lodged an appeal. The application in revision was dismissed on 10.12.65 and the appeal was withdrawn on 23.3.66. When the record was returned to the Court, Proctor for the plaintiff on 7.4.66 again moved for the re-issue of writ and the application was allowed on 28.4.66. On the same day the liquidator of the Company of which the defendant was the Manager intervened and prayed that writ be stayed pending inquiry as he claimed to be in possession and not bound by the decree. The defendant acquiesced in the petitioner's application. This application came up for inquiry on 6.5.66 and the Magistrate made order on 31.5.66 that the application lacked bona fides and dismissed the liquidator's application. Thereafter the learned Commissioner proceeded to consider the legal position resulting from the passing of the Amendment Act which received the Governor-General's assent on 10.5.66 and held, that in view of the provisions of the Amending Act which was given retrospective effect from 20.7.62, the plaintiff was not entitled to take proceedings for the enforcement of the decree. It would appear that as a result of the two applications for the stay of writ and the abandonment of the appeal, the passage of time had enured to the benefit of the defendant who was now able to take shelter under the provisions of the Amending Act. The present appeal is from the order of the Commissioner of 31.5.66.

For the plaintiff to succeed in appeal he must satisfy the Court in this case that the defendant was in arrears of rent for three months at the time of the institution of the action on 2.7.64. Between January 1964 and the date of action the defendant remitted the rent for four months, the other cheques in payment of rent being dishonoured. He has therefore paid rent for the months of December 1963 and January, February and March 1964. The June rent was not due on the date the plaint was filed. The defendant was therefore in arrears of rent only for two months—April and May. Consequently the plaintiff cannot avail himself of the benefit of the new section 12A (1) (a) of the Amending Act since proceedings for the enforcement of the decree had 'begun' but were not completed on the date the Amending Act came into operation.

Since both Commissioners who heard the objections of the defendant to the issue of writ were of the view that the defendant's application of 1.10.65 and his nominee's application of 6.6.66 were devoid of merit and intended to delay the issue of writ which enabled the defendant to successfully seek shelter under the provisions of the law, I would, in the circumstances of this case, while being constrained to dismiss the appeal, deprive the defendant of his costs in appeal.

Appeal dismissed.

[PRIVY COUNCIL]

1967 *Present : Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce, Sir Douglas Menzies, and Sir Alfred North*

M. S. KARIAPPER, Appellant, and S. S. WIJESINHA and another, Respondents

PRIVY COUNCIL APPEAL No. 38 OF 1966

S. C. 8/1966—Application for a Mandate in the nature of a Writ of Mandamus under Section 42 of the Courts Ordinance

Constitutional law—Imposition of Civic Disabilities (Special Provisions) Act, No. 14 of 1965, ss. 7, 10—Validity—“Judicial power”—Usurpation of judicial power by Parliament—Statute altering constitutional rights of particular persons—Mode of ascertaining the true character of such enactment—Amendment or repeal of a provision of the Constitution by inconsistent enactment—Validity thereof in the absence of an expressed intention to amend—Ceylon (Constitution) Order in Council, 1946, ss. 13 (3) (k), 24, 29 (1) and (4)—Mandamus to the Clerk and Assistant Clerk of the House of Representatives—Inappropriateness of such proceedings to question validity of the Act.

A Commission of Inquiry constituted under section 2 of the Commissions of Inquiry Act made reports in 1959 that allegations of bribery against six persons, who were members of the Legislature, had been proved. Consequently, on 16th November 1965, the Imposition of Civic Disabilities (Special Provisions) Act was enacted imposing certain civic disabilities on those six persons, one of whom was the appellant. Section 7 of the Act is in the following terms :—“Where, on a day immediately prior to the relevant date, a person to whom this Act applies was a Senator, or a member of the House of Representatives or of any local authority, his seat as a Senator or such member, as the case may be, shall be deemed, for all purposes, to have become vacant on that date.”

The appellant, who became a member of the House of Representatives on 5th April 1965, made the present application for a writ of *mandamus* requiring the respondents, who were the Clerk and the Assistant Clerk of the House of Representatives, to recognise him as a member of Parliament and to pay him his remuneration and allowances as a member. The validity of the Imposition of Civic Disabilities (Special Provisions) Act was challenged on the ground that it was unconstitutional. It was not disputed that the appellant's seat was vacated upon a ground not to be found in section 24 of the Constitution of Ceylon and that it was, to that extent, inconsistent with the provisions of the Constitution. Nor was it disputed that the Constitution embodies the doctrine of the separation of legislative, executive and judicial power, at least to the extent that it commits judicial power to the Courts to the exclusion of the Parliament. It was contended, however, that the Act, although it

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purported to have been enacted as an amendment of the Constitution in the manner provided by section 29 (4) thereof, was not an effective amendment for the reasons (1) "that the Act was not a law. Instead of being the exercise of legislative power it was the usurpation of judicial power", and (2) "that even if the Act were an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character".

Held, (i) that the impugned Act is what it purports to be, a law made by Parliament, and not a usurpation of judicial power. Its character is not that of a bill of attainder or a bill of pains and penalties because it does not condemn the appellant for any action, *i.e.*, it contains no declaration of guilt of bribery or of any other Act. The disabilities which it imposes do not have the character of punishment for guilt. It is the finding of the Commission of Inquiry that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any findings of its own against the appellant or any other of the six persons named in the Schedule. The principal purpose which the disabilities imposed by the Act serve is not to punish particular persons against whom the findings of bribery were made but to keep public life clean for the public good.

(ii) that an Act which is inconsistent with section 24 (1) of the Constitution is not invalid merely because it does not provide expressly for the amendment or repeal of a provision of the Constitution. The words "amend or repeal" in the earlier part of section 29 (4), read with section 29 (1), of the Constitution cover and make valid an amendment or repeal by inconsistent enactment, provided that the special legislative procedure laid down in section 29 (4) is complied with.

Held further, that an application for the issue of a writ of *Mandamus* to the Clerk and the Assistant Clerk of the House of Representatives was not appropriate procedure to question the validity of the impugned Act.

APPEAL from a judgment of the Supreme Court reported in (1966) 68 N. L. R. 529.

E. F. N. Gratiaen, Q.C., with *L. Blom-Cooper, M. I. Hamavi Haniffa* and *Mark Fernando*, for the petitioner-appellant.

Ralph Millner, Q.C., with *R. K. Handoo* and *H. L. de Silva*, for the respondents.

Cur. adv. vult.

July 24, 1967. [Delivered by SIR DOUGLAS MENZIES]—

This is an appeal from a judgment and decree of the Supreme Court of Ceylon (Sansoni C.J. and G. P. A. Silva J.) refusing the appellant's application for a mandate in the nature of a writ of mandamus requiring the respondents who are the Clerk to the House of Representatives, Ceylon, and the Assistant Clerk to the House respectively to recognise the appellant as a member of Parliament and to pay him his remuneration and allowances as a member.

The appellant was elected to the House of Representatives on 22nd March 1965 and was sworn as a member thereof on 5th April following. His term of office was for five years. He continued as a member of the House until 15th November 1965 and the principal question with which the Board is concerned is whether his seat was vacated by the coming into operation on 16th November 1965 of the Imposition of Civic Disabilities (Special Provisions) Act hereinafter called "the Act". It was, if the Act was within the competence of the Parliament of Ceylon, for, in the circumstances, the effect of section 7 was to vacate the appellant's seat.

The unusual procedure which the appellant adopted to obtain a decision upon the validity of the Act—which, not surprisingly, has turned out to be a source of difficulty—was followed because, strangely enough, it seemed the only way to bring the question of the validity of the Act directly before the Supreme Court. Other proceedings seeking a declaration and an injunction in connection with related matters were, so their Lordships have been informed, commenced in the District Court and those proceedings there lie dormant. With them, the Board is not concerned although their Lordships do appreciate that their conclusions here will, as Counsel for the appellant frankly stated, have a vital bearing on the proceedings in the District Court.

The Act, as its preamble indicates, followed, but at a distance of five years, the reports made in 1959 by a Commission of Inquiry constituted under section 2 of the Commissions of Inquiry Act. This Commission, upon inquiry, found that allegations of bribery against certain persons, members of the Senate, House of Representatives or State Council of Ceylon, had been proved. The appellant was one of those persons. The preamble to the Act recorded "And whereas it has become necessary to impose civic disabilities on the said persons consequent on the findings of the said Commission". The Act consequently imposed disabilities upon any person "to whom the Act applies" and "a person to whom this Act applies" was defined to mean "each person specified in the Schedule to this Act in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved". The Schedule named six persons including the appellant. The disabilities imposed by the Act extended to disqualification for seven years from registration as an elector and from voting at elections; disqualification for seven years from being a candidate for election to the House of Representatives or to any local authority; disqualification for seven years from being elected or appointed as Senator or member of the House of Representatives or a member of any local authority or sitting and voting as such; and disqualification for all time from being employed as a public servant. Section 7 of the Act is the one with which the Board is immediately concerned. It is in these terms:

"Where, on the day immediately prior to the relevant date, a person to whom this Act applies was a Senator, or a member of the

House of Representatives or of any local authority, his seat as a Senator or such member, as the case may be, shall be deemed, for all purposes, to have become vacant on that date."

If this section is valid the appellant's application, wherein he asserted his continued membership of the House of Representatives, was rightly refused by the Supreme Court.

The attack upon the validity of the Act asserted two propositions with regard to it. First, that it was inconsistent with the Ceylon (Constitution) Order in Council 1946, *i.e.*, the Constitution of Ceylon, and, secondly, that although it purported to have been enacted as an amendment of the Constitution in the manner provided by section 29 (4) thereof, it was not an effective amendment. Three reasons were advanced for this second proposition :

- (1) That the Act was not a law. Instead of being the exercise of legislative power it was the usurpation of judicial power.
- (2) That even if the Act were an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character.
- (3) That if, upon its proper construction, the Act were both an assumption by the Parliament of judicial power and the exercise of that power, the Act attempted too much for judicial power would need to be acquired by Parliament under an amendment of the Constitution before it could be exercised by Parliament. This would require two Acts of Parliament.

On two important matters there was no controversy before the Board.

The appellant's first proposition, that there was inconsistency between the provisions of the Act and the Constitution of Ceylon, was not disputed. By section 24 of the Constitution provision is made for the vacation of the seat of a member of Parliament in specified circumstances which have no relevance to the appellant. These include section 24 (1) (d) viz. "if he (*i.e.*, a member of Parliament) becomes subject to any of the disqualifications mentioned in section 13 of this Order". Section 13 (3) (k) is as follows :

"if during the preceding seven years he has been adjudged by a competent court or by a Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof to have accepted a bribe or gratification offered with a view to influencing his judgment as a Senator or as a Member of Parliament."

The appellant was not adjudged to have accepted a bribe, etc., by a court or by such a Commission. There is therefore no doubt that, if the Act is valid, the appellant's seat was vacated upon a ground not to be found in the Constitution as it stood before the Act came into force.

The second matter not in controversy before the Board was that the Constitution of Ceylon embodies the doctrine of the separation of legislative, executive and judicial power, at least to the extent that it commits judicial power to the Courts to the exclusion of the Parliament. This was decided by the Privy Council in *Liyanage v. The Queen*¹. Their Lordships after referring to a number of the provisions of the Constitution of Ceylon said at pages 287 and 288 :

“ These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution’s silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by the executive or the legislature.”

Later at page 289, after referring to the contention of the Solicitor-General that the Supreme Court was wrong in finding in the Constitution of Ceylon a separation of powers rather than merely a separation of function, their Lordships said :

“ . . . that decision was correct and there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature.”

The Board is now in a position to consider the first question for its determination, viz., whether the Act is what it purports to be, a law made by Parliament ; or, is rather, an exercise of judicial power.

Counsel for both the appellant and the respondents were content to accept, so far as it goes, the description of “ judicial power ” adopted by the Judicial Committee in *Shell Company of Australia Limited v. Federal Commission of Taxation*² in a passage referring to the Constitution of the Commonwealth of Australia :

“ What is ‘ judicial power ’? Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in *Huddart, Parker & Co. v. Moorehead* 8 C. L. R. 330, 357, where he says ‘ I am of opinion that the words “ judicial power ” as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. ’ ”

¹ (1967) *A. C.* 259 ; 68 *N. L. R.* 265.

² (1931) *A. C.* 275 at pages 295 and 296.

This description was adopted, however, in a case where the question at issue was whether or not a Taxation Board of Review was exercising judicial power in the sense of ascertaining and applying an established standard of liability and it is not so pertinent in a case such as this where the problem is rather to ascertain the true character of an enactment which is in form legislation altering legal rights by its own force. This observation does however point to what appears to their Lordships as the appellant's fundamental difficulty, i.e., that what is claimed to be a judicial determination is in form legislation altering the law as it stood. Counsel for the appellant have naturally fastened upon certain observations in which bills of attainder and bills of pains and penalties have been referred to as "an exercise of the judicial power of Parliament in a legislative form", e.g., Halsbury's Laws of England, 3rd Ed., Vol. 28, page 398, and have sought to establish that the character of the Act is that of a bill of attainder or a bill of pains and penalties. Reference was also made to observations in *Liyanage v. The Queen* (supra) at page 291 to describe the Acts there successfully impugned viz. :

"One might fairly apply to these Acts the words of Chase J., in the Supreme Court of the United States in *Calder v. Bull* :

'These acts were legislative judgments; and an exercise of judicial power.'

Blackstone in his Commentaries said :

'Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only and has no relation to the community in general; it is rather a sentence than a law.'

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges."

Moreover by reference to decisions of the Supreme Court of the United States of America it was sought to support the conclusion that the Act would, in the United States of America, fall within the category of an act of attainder.

It is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand and because the Board is of the opinion that the character of the Act is not that of an act of attainder or a bill of pains and penalties it is not necessary here to attribute a particular character to what has, as has already been seen, been described an "exercise of the judicial power of Parliament in a legislative form". The Act is not an act of attainder or a bill of pains and penalties because it does not condemn the appellant for any action, i.e., it contains no declaration of guilt, and because the disabilities which it imposes have not the character of punishment for guilt.

At this point it is convenient to say a little more about the United States cases upon which Mr. Gratiaen so greatly relied. They were all cases involving the construction and application of Article I, Section 9, clause 3 or Article I, Section 10 of the Constitution of the United States of America which together prohibit Congress or a State from passing a bill of attainder or *ex post facto* law. As early in the constitutional history of the United States as 1866 it was decided that "a bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings v. The State of Missouri*¹. In the same case the Court described such laws as follows :

" In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge ; it assumes, in the language of the text-books, judicial magistracy ; it pronounces upon the guilt of the party, without any of the forms of safeguards of trial ; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise ; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. "

Mr. Gratiaen seizing upon the description of the enactment of the bill of attainder as an assumption of judicial magistracy went so far as to submit that Article I, Section 9, clause 3 of the Constitution of the United States of America was plainly superfluous because the separation of powers, so clearly embodied in that Constitution, carried with it as a necessary consequence the limitation that Congress could not pass a law truly described as an exercise of judicial magistracy. He went on to contend that what was to be found by express prohibition in the Constitution of the United States was, upon the authority of the American decisions, to be found by implication in the Constitution of Ceylon. Their Lordships, however, would express no opinion upon the hypothetical question of the American law, *i.e.*, whether or not the Congress of the United States could, in the absence of Article 1, Section 9, clause 3 of the Constitution, pass an Act of attainder, and the Board is not prepared to base any reasoning in relation to the powers of the Parliament of Ceylon upon the assumption that Congress could not do so.

In considering the argument that the Act is in truth a bill of attainder or a bill of pains and penalties their Lordships have, of course, been greatly assisted by the judgments of the justices of the Supreme Court to which their attention has been drawn and they have found particularly valuable guidance in the judgment of Frankfurter J. in the *United States v. Lovett*² notwithstanding that in the result that learned judge was one of the minority. Frankfurter J. said " All bills of attainder specify the offence for which the attained person was deemed guilty

¹ *IV Wall.* 277 at page 323.

² *328 U. S. 303.*

and for which punishment was imposed". In rejecting the contention that the Act thereunder consideration was a bill of attainder His Honour said "no offense is specified and no declaration of guilt is made. . . . Not only does section 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. . . . Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony. . . . or because he is no longer qualified. . . . 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact'". *Cummings v. State of Missouri*, 4 Wall. 277, 320, 18 L. Ed. 356, pages 322, 323 and 324.

The two elements found by Frankfurter J. to be absent from the law under consideration in *United States v. Lovett* (supra) the Board find to be absent from the Act. First, it contains no declaration of guilt of bribery or of any other act. As has already been observed it applies to "each person specified in the Schedule of this Act in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved." It is the Commission's finding that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the Schedule. The question of the guilt or innocence of the persons named in the Schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in any circumstances. Secondly, the disabilities imposed by the Act are not, in all the circumstances, punishment. It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good. Their Lordships have already summarised the disabilities imposed by the Act and what has just been said applies to all disabilities so imposed. The particular task of the Board is, however, to decide whether the law vacating the appellant's seat is a valid law and in their Lordships' opinion it would be wrong to describe that law as one for the punishment of the member whose seat is vacated. Reference has already been made to earlier legislation vacating the seats of persons convicted of bribery by a Court or found by certain Commissions to have been guilty of bribery. The Act is a law of the same character as this legislation notwithstanding that it operates in respect of particular persons against whom findings of bribery

have been made. Unforeseen cases may always arise calling for the special exercise of Parliament's power to protect itself. Thus if a member of Parliament were to act in a way not previously proscribed but obviously unfitting him to remain in Parliament a new law vacating his seat would not, in essence, be a law punishing him for his conduct. The case now under consideration is, of course, substantially different from the case of *The Queen v. Richards e.p. Fitzpatrick and Browne*¹ but it may be observed that in a judgment, approved by the Judicial Committee, Dixon C.J. speaking for the High Court of Australia did emphasise the tendency to treat the powers and privileges attached to the House of Commons for its own protection as incidents of the legislative function. His Honour said :

“ It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically—perhaps one might even say, scientifically—they belong to the judicial sphere.”

It was no doubt the recognition of this tendency that influenced G. P. A. Silva J. to say :

“ a Court will be slow to invalidate any law passed by the Parliament imposing certain disabilities or disqualifications on Members of Parliament in view of the power the Parliament has to control its own proceedings and impose its own discipline.”

Speaking generally, however, their Lordships would observe that it is not readily to be assumed that disciplinary action, however much it may hurt the individual concerned, is personal and retributive rather than corporate and self-respecting. The distinction between discipline and punishment is one which the High Court of Australia has drawn recently in *The Queen v. White and Others e.p. Byrnes*². The question was whether the chief officer of a Commonwealth Department who in the exercise of powers conferred by section 55 of the Public Service Act found an officer of his department guilty of an “ offence ” in refusing to have obeyed a lawful order and imposed a fine therefore exercised “ judicial power ”. Section 55 made wilful disobedience to a lawful order an “ offence ” for which punishment was provided. The Court having observed the difficulty discovered in the case was apparent rather than real and arose from the choice of language that had been made said at page 670 :

“ Section 55, in creating so-called “ offences ” and providing for their “ punishment ”, does no more than define what is misconduct

¹ 92 C. L. R. 157.

² 109 C. L. R. 665.

on the part of a public servant warranting disciplinary action on behalf of the Commonwealth and the disciplinary penalties that may be imposed or recommended for such misconduct ; it does not create offences punishable as crimes."

For the foregoing reasons their Lordships therefore reject the argument that the Act is legislation of the same character as an act of attainder or a bill of pains and penalties.

Their Lordships however going beyond this merely negative conclusion, are of opinion that the Act is an exercise of legislative power and not the usurpation of judicial power. The Act is an Act of Parliament purporting to change the law and providing in terms that in the event of inconsistency with existing law the Act shall prevail. Section 10. In determining whether the Act should be regarded as a usurpation of judicial power weight must be given to the consideration that it is in form legislation and that it is enacted :

"..... by the Queen's Most Excellent Majesty by and with the advice and consent of the Senate and the House of Representatives of Ceylon in this present Parliament assembled, and by the authority of the same....."

The Act is subject to the ordinary incidents of legislation, viz., it can be repealed or amended. Furthermore, for the reasons already stated the Act does not declare guilt or impose punishment. Moreover, although the Act has a strictly limited operation in that it applies only to "each person specified in the Schedule in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved ", its terms show that reference to the Reports—which do not form part of the Act—will or may be necessary in its application. It does not speak like a court order. Finally, although the operation of the Act is made to depend upon past events that operation is prospective for the disabilities are imposed from the date of its commencement for the periods defined.

Having come to the conclusion that the Act is legislative in character it now becomes necessary to consider the contention that being inconsistent with the provisions of the Constitution it is invalid because it was not enacted in accordance with the requirements of section 29 (4) of the Constitution. Section 29 (1) and (4) of the Constitution are as follows :

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

"(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island :

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent

unless it had endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present)."

Here it may be observed that subsections (2) and (3) forbidding laws interfering with religious freedom and rendering void any laws in contravention of this prohibition do not require consideration.

The bill for the Act when presented for the Royal Assent did have endorsed upon it the certificate of the Speaker required by the proviso to section 29 (4) and that certificate was in accordance with actual voting in the House. The critical question is, therefore, whether something more was required to bring the Act within the power of Parliament conferred by section 29 (1) and (4). Counsel for the appellant argued that there was and that the Act, being inconsistent with the Constitution as it stood, was invalid for the reason that it was not in form an express amendment of the Constitution.

As long ago as 1920 the Judicial Committee in *McCawley v. The King*¹ decided that an uncontrolled constitution could like any other Act of Parliament be altered simply by the enactment of inconsistent legislation. Their Lordships' statement of the proposition which was rejected was as follows :

"The constitution of Queensland is a controlled constitution. It cannot, therefore, be altered merely by enacting legislation inconsistent with its articles. It can only be altered by an Act which in plain and unmistakable language refers to it; asserts the intention of the Legislature to alter it; and consequently gives effect to that intention by its operative provisions."

The reason for the rejection of this proposition was thus stated :

"The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal."

The power of the Parliament of Ceylon to amend or repeal the provisions of the Constitution is restricted in the manner provided by section 29. There is, therefore, a most material distinction between the Constitution of Ceylon and that of Queensland which is made apparent by the following citations from the judgment of Lord Birkenhead L.C. His Lordship said :

"The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

¹ (1920) A. C. 691.

Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature."

Nevertheless, notwithstanding the distinction that renders the decision in *McCawley's Case* inapplicable here their Lordships do rely upon a passage from the judgment of the Lord Chancellor. It is as follows :

" . . . Narrow constructions were placed by colonial judges upon the instruments creating constitutions in colonial Legislatures. Causes of friction multiplied, and soon a conflict emerged, analogous to that which is the subject of discussion to-day, between those who insisted that the constitutions conceded to the colonies could be modified as easily as any other Act of Parliament, and those who affirmed that the statute defining such constitutions was ' fundamental ' or ' organic ' and that therefore the constitution was controlled. These controversies became extremely grave, and were reflected in an opinion, cited in the course of the argument and given in 1864 by the law officers of the day, Sir Roundell Palmer and Sir Robert Collier. These distinguished lawyers were of opinion, and the Board concurs in their view, that when legislation within the British Empire which is inconsistent with constitutional instruments of the kind under consideration comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. If they passed legislation which was inconsistent with the earlier Act, it must be presumed that they were aware of, and authorized such inconsistency."

Although this passage has no bearing upon the ultimate question here, *i.e.*, whether the manner and form required by section 29 for a constitutional amendment were actually observed, it has an important bearing upon the question to which a good deal of argument was addressed, namely, whether an inconsistent law should be regarded as an amendment of a controlled constitution in the absence of an expressed intention to amend. The expression of opinion of the law officers concurred with by the Board is that, as a general rule, an inconsistent law amends. This is, of course, but an instance of the fundamental principle that it is from its operation that the intention of a statute is to be gathered. As the law officers said in the opinion already referred to :

" ' If the colonial Registration Act was *ultra vires* of the Legislature of South Australia, it can only be so on the ground that it altered the electoral law contained in the Constitutional Act, No. 2 of 1855. Assuming this to have been its effect, we cannot accede to the argument, which seems to have found acceptance with two South Australian Judges, that it was not passed " with the object " of altering the Constitution of the Legislature. It must be presumed

that a legislative body intends that which is the necessary effect of its enactments ; the *object*, the *purpose* and the *intention* of the enactment, is the same ; it need not be expressed in any recital or preamble ; and it is not (as we conceive) competent for any Court judicially to ascribe any part of the legal operation of a Statute to inadvertence.”

In the *Bribery Commissioner v. Ranasinghe*¹ the Judicial Committee had occasion to consider *McCawley's* case with reference to the Constitution of Ceylon and explained the essential difference between *McCawley's* case and the case then under consideration. Lord Pearce giving the judgment of the Board said :

“ It is possible now to state summarily what is the essential difference between the *McCawley* case and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as *pro tanto* an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result.”

Accordingly, therefore, upon general principles and with the guidance of earlier authority their Lordships have come to the conclusion that the Act, inconsistent as it is with the Constitution of Ceylon, is to be regarded as amending that Constitution unless there is to be found in the constitutional restrictions imposed on the power of amendment some provision which denies it constitutional effect. This brings the Board to the actual terms of section 29 (1) and (4).

Section 29 (1) confers full legislative power upon Parliament subject only “to the provisions of this Order”, *i.e.*, the Constitution. Subsection (4) indicates that the power conferred by subsection (1) extends

¹ (1965) *A. C.* 172 ; *66 N. L. R.* 73.

to amending or repealing "any of the provisions of this Order". The exercise of this power is however restricted by the proviso. As has already been explained, their Lordships do read the words "amend or repeal" in the earlier part of section 29 (4) as covering an amendment or repeal by inconsistent enactment. Indeed were these words "amend or repeal" not to be regarded as covering an alteration by implication it might be that a law effecting such an alteration could be enacted under section 29 (1) without any restriction arising from subsection (4). Their Lordships however do not so read the statutory provisions and have no doubt that the Parliament of Ceylon has not uncontrolled power to pass laws inconsistent with the Constitution. Apart from the proviso to subsection (4) therefore the Board has found no reason for not construing the words "amend or repeal" in the earlier part of section 29 (4) as extending to amendment or repeal by inconsistent law. Attention was, however, directed to the words in the proviso "Bill for the amendment or repeal" and it was argued that only a bill which provided expressly for the amendment or repeal of some provision of the Order would fall within these words. Their Lordships would find it difficult to restrict the plain words of the earlier part of the subsection by reference to an ambiguity in the proviso, if one were to be found, but they find no ambiguity and they reject the limitation which it has been sought to introduce into the proviso. A bill which, if it becomes an act, does amend or repeal some provision of the Order is a bill "for the amendment or repeal of a provision of the Order". It would have been inexact to refer in the proviso to a bill to amend or repeal a provision of the Order, but a bill which when passed becomes an amending Act falls exactly within the description under consideration. The bill which became the Act was a bill for the amendment of section 24 of the Constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have upon becoming law which gives it its constitutional character not any particular label which may be given to it. A bill described as one for the amendment of the Constitution which contained no operative provision to amend the Constitution would not require the prescribed formalities to become a valid law whereas a bill which upon its passing into law would, if valid, alter the Constitution would not be valid without compliance with those formalities. In his judgment in the Supreme Court Sansoni C.J. quoted aptly from the judgment of Isaacs and Richards JJ. in *McCawley's* case—the minority judgment in the High Court approved by the Privy Council—as follows: "The effect of the repealing Act must therefore depend on what it *does*, and not on the label it affixes to itself." See 26 C. L. R. at page 63. Their Lordships also agree with Silva J. when he said "I do not think that when the proviso to section 29 (4) proceeded to set out the manner of presentation of a constitutional amendment it also intended to prescribe a particular form to be present on the face of it".

In the course of argument a good deal was made of the doubts and complexities that must follow if the Constitution can be amended by laws which do not, as it were, show their colours, and the point was forcibly emphasized by reference to the very law under consideration. The Board is thoroughly aware of the difficulties that are likely to result from altering the Constitution except by laws which plainly and expressly amend it with particularity. Considerations of this sort, powerful as they ought to be with the draftsman, cannot in a court of law weigh against the considerations which have brought the Board to its conclusions that a bill, which upon its passage into law would amend the Constitution, is a bill for its amendment. In association with the considerations to which reference has just been made attention was drawn to section 10 of the Act. This section is far from clear and their Lordships have not felt able to base any affirmative reasoning upon it. All that can be gathered from it is that Parliament was aware that the Act might be regarded as amending the Constitution in some particulars. The introduction of such a provision does little to obviate the complexities to which legislation such as the Act must inevitably give rise in the future if and when it becomes necessary to set out the Constitution as amended.

Finally upon the merits of the case their Lordships would observe that in view of their conclusion that the Act is a law and not an exercise of judicial power it has not been necessary to consider the question, which was fully argued on both sides, whether Parliament can by a law passed in accordance with the proviso to section 29 (4) both assume judicial power and exercise it in the one law.

Their Lordships have thought it proper to deal with the appeal upon its merits before considering whether the procedure actually adopted to bring the question of the validity of the Act before the Supreme Court, *i.e.*, an application for a mandate in the nature of a writ of *mandamus* to the Clerk and the Assistant Clerk of the House of Representatives, was appropriate. In the Board's opinion it was not. In the end it was practically conceded by Mr. Gratiaen that it had not been shown that the respondent or either of them were under a duty to the appellant to pay him his parliamentary salary and allowances even if he continued to be a member of Parliament. Furthermore in their Lordships' opinion it was not shown that the respondents or either of them owed any duty to the appellant to "recognise" him as a member of Parliament even if a sufficiently precise meaning to found *mandamus* could be accorded to the vague word "recognise". The duties upon which reliance was placed arose under the Standing Orders of the House of Representatives and although they were no doubt duties in respect of members of the House they were duties owed to the House itself or to the Crown as the employer

of the respondents. On the question of the competence of the proceedings in the Supreme Court their Lordships have therefore come to the same conclusion as did Sansoni C.J.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

1967 *Present: H. N. G. Fernando, C.J., and Sirimane, J.*

D. P. WIJESUNDERA, Appellant, and T. P. KUNJIMOOSA & CO. and another, Respondents

S. C. 481/64—D. C. Kandy, 7101/S

Cheque—Notice of dishonour—Circumstances when it can and cannot be dispensed with—Bills of Exchange Ordinance (Cap. 82), ss. 49 (12), 50 (2) (c) (v).

Where a cheque when presented for payment is dishonoured because “ effects were not cleared ”, an indorser of the cheque must be given due notice of dishonour before he can be sued. In such a case section 50 (2) (c) (v) does not dispense with notice of dishonour.

A P P E A L from a judgment of the District Court, Kandy.

A. C. Gooneratne, Q. C., with R. Gooneratne, for the 1st defendant-appellant.

C. Ranganathan, Q. C., with V. E. Selvarajah, for the plaintiff-respondent.

Cur. adv. vult.

June 9, 1967. SIRIMANE, J.—

This was an action filed by the plaintiff company against the two defendants for the recovery of a sum of Rs. 2,000 which they alleged was due to them on two cheques marked “ A ” and “ B ”.

Cheque “ A ” was for a sum of Rs. 1,000 drawn by the 1st defendant in favour of the 2nd defendant. Cheque “ B ” was also for a similar sum drawn by an unknown person but endorsed by the 1st defendant to the 2nd defendant. The 2nd defendant had obtained cash on both these cheques from the plaintiff company. When presented for payment both cheques were dishonoured.

The learned District Judge has entered judgment against the two defendants and the 1st defendant has appealed.

The only point urged in appeal was that there was no notice of dishonour given to the 1st defendant within a reasonable time as required by the Bills of Exchange Ordinance (Cap. 82).

Section 49 (12) of that ordinance provides that :

“ The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

- (a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill ;
- (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.”

The cheque “ A ” was dishonoured on 3.4.62 and cheque “ B ” on 11.5.62. Notice of dishonour is a condition precedent to a right of action against an indorser or a drawer.

Such a notice was sent to the 1st defendant in respect of both cheques nearly a month later, viz., on 11.6.62 by letter P3. There was no notice, therefore, as required by the section quoted above nor were there any special circumstances to excuse such a notice.

In respect of cheque “ A ”, however, payment was stopped by the drawer (1st defendant).

Under Section 50 (2) (c) (v) of the Bills of Exchange Ordinance, notice of dishonour is dispensed with when the drawer countermands payment.

The argument in regard to lack of due notice of dishonour, therefore, does not apply to cheque “ A ”, but it is entitled to succeed in regard to cheque “ B ”. That cheque was not drawn by the 1st defendant and was dishonoured because “ effects were not cleared ”, to quote the endorsement made on it by the bank.

The learned District Judge in answering the issue relating to due notice of dishonour had overlooked this fact, and wrongly decided that the 1st defendant was not entitled to notice in respect of *both* cheques on the ground that he had countermanded payment.

The 2nd defendant has not appealed against the judgment. In fact, at the trial he had given evidence which favoured the plaintiff’s case and stated in the course of that evidence : “ When the two cheques were dishonoured, the plaintiffs came and saw me and they asked me to give them the money due on the cheques. ”

The judgment against him must therefore stand.

We vary the judgment and decree in respect of the 1st defendant only by entering judgment against him for a sum of Rs. 1,000 with legal interest thereon from date of action, and costs in the lower court.

As both parties have partially succeeded here, there will be no costs of appeal.

H. N. G. FERNANDO, C.J.—I agree.

Appeal partly allowed.

[ASSIZE COURT]

1966

Present : Manicavasagar, J.

THE QUEEN v. M. KARTHENIS DE SILVA and 3 others

S. C. 120/64—M. C. Galle, 12442

IN THE MATTER OF AN APPLICATION FOR WITHDRAWAL OF AN INDICTMENT
UNDER SECTION 217 (3) OF THE CRIMINAL PROCEDURE CODE

Trial before Supreme Court—Withdrawal of indictment—Permissibility—Criminal Procedure Code, s. 217 (3).

In a prosecution before the Supreme Court, there were two abortive trials. At the commencement of the third trial, Crown Counsel satisfied the Court, upon the material before it, that the trial would inevitably result in a verdict of acquittal.

Held, that it was open to the prosecuting Counsel to apply, under section 217 (3) of the Criminal Procedure Code, for the withdrawal of the indictment before the return of the verdict.

APPPLICATION for the withdrawal of an indictment under section 217 (3) of the Criminal Procedure Code.

A. A. de Silva, Crown Counsel, for the Attorney-General.

Kaniska de Zoysa, with *R. D. de S. Nagahawatta* (assigned) for the Accused.

December 14, 1966. MANICAVASAGAR, J.—

Counsel for the Crown seeks my consent to withdraw the indictment against these four accused persons who are accused of having committed the offence of murder by causing the death of Peduru Handi Upasaka, *alias Tailor Upasaka*, on the 4th day of April, 1964.

The application is made under Section 217 (3) of the Criminal Procedure Code.

On 15th February, 1966, five accused persons were brought to trial before an English speaking jury ; after the trial had proceeded for several days, the Presiding Judge discharged the jury, consequent on an allegation made against a juror. The five accused persons were brought to trial for the second time on 6th May, 1966 ; at the closure of the case for the Crown, the jury on the direction of the Judge returned a verdict of not guilty against one of the accused persons on the ground that there was no evidence against him. At the conclusion of the trial, the jury were not ready to return a verdict, being divided 4 to 3, and the Judge discharged the jury and directed a fresh trial.

These accused persons are now before me facing a third trial, and Crown Counsel in supporting his application has given me a resume of the evidence at the two preceding trials, and also drawn my attention to certain infirmities in the evidence ; his submission is that this trial must necessarily end in a verdict of acquittal. Reference was made to the practice in England in the event of there being a third trial. The English practice is that where the jury are not agreed at the two previous trials, the Crown offers no evidence at the third trial, and the Judge thereupon directs the jury to return a verdict of not guilty. This practice, however, has no application to the instant case, for the reason that it was only at the second trial the jury were not able to return a verdict as required by law, the first trial not having reached the stage of a verdict by the jury.

The instant application must be decided on the construction of Section 217 (3) of the Criminal Procedure Code. This provision calls for the exercise of judicial discretion ; the guiding principle being that the Court should be satisfied that this is not an attempt to interfere with the course of justice for an improper and illegitimate purpose, and the Counsel for the Crown in exercising his executive functions is not acting improperly. The Court should also be satisfied in taking the matter away from the normal procedure of a trial, that the material before it does not provide even a reasonable chance of conviction. Bearing these principles in mind, I have examined the evidence given at the two previous trials in this Court, the depositions of the witnesses and the statements recorded by the Police, and my view is that not a moment should be spent in calling upon these men to face another trial, because I am convinced that upon the material before me the trial must inevitably result in a verdict of acquittal. No reasonable jury can find otherwise. On the evidence of the 2nd accused and his witnesses it has been indubitably established that he could not have been at the venue of the incident at the time Upasaka came by his death—I am not taking into consideration several other material infirmities arising on the evidence of Linton and Ematin—is sufficient to throw a reasonable doubt on the entire case for the Crown.

The application is granted and the accused persons are discharged.

1967

Present : Alles, J.

THE ATTORNEY-GENERAL, Appellant, and T. G. GUNAWARDENE
Respondent

S. C. 44/1967—M. C. Moneragala, 5468

Offence of selling an article in excess of controlled price—Sentence of imprisonment obligatory—Control of Prices Act (Cap. 173), as amended by Act No. 44 of 1957 and Act No. 16 of 1966, s. 8 (6)—Criminal Procedure Code, s. 15B.

Where a person contravenes any provision of the Control of Prices Act, section 8 (6) of that Act, as amended by Act No. 16 of 1966, makes the imposition of a term of imprisonment obligatory even in the case of a first offender. An order of detention till rising of Court, under section 15B of the Criminal Procedure Code, cannot be substituted in place of a sentence of imprisonment.

APPEAL from an order of the Magistrate's Court, Moneragala.

L. B. T. Premaratne, Senior Crown Counsel, for the Attorney-General.

Nihal Jayawickrema, for the accused-respondent.

Cur. adv. vult.

May 21, 1967. ALLES, J.—

The Attorney-General appeals from the sentence imposed on the accused-respondent who was convicted on his own plea with having sold a pound of onions in excess of the controlled price in contravention of Section 8 (1) of the Control of Prices Act (Chapter 173). The penal provision is contained in Section 8 (6) of the aforesaid Act as amended by Section 6 (3) of the Control of Prices (Amendment) Act No. 44 of 1957 and as further amended by Section 2 (1) of the Control of Prices (Amendment) Act No. 16 of 1966.

When the accused pleaded guilty to the charge the Magistrate made the following observations :—

“ The accused owns a small boutique with a stock-in-hand of less than Rs. 400. I convict the accused and fine him Rs. 100. He is also detained till rising of Court.”

It is the contention of the Attorney-General that the learned Magistrate has misdirected himself in law in not imposing a sentence of imprisonment on the accused-respondent.

The Control of Prices Act which was enacted in 1950, in Section 8 (6) declared that every person who contravenes any provision of the Act shall on conviction for the first offence be liable to a fine not exceeding Rs. 7,500 or imprisonment for a term not exceeding 6 months or to both such fine and imprisonment. In 1957, the penal provisions were amended and it became obligatory to sentence an offender to a term of imprisonment not exceeding 6 months and also to the imposition of a fine. In 1966, the law was further amended requiring an offender to be punished with a term of imprisonment of *not less than 4 weeks and not exceeding 6 months*.

The various amendments to the penal provisions of the Act from 1950 to 1966 indicate that the legislature took a serious view of the contravention of the provisions of the Act and thought it necessary that deterrent punishment amounting to the imposition of a term of imprisonment was obligatory even in the case of a first offender.

It would appear from the learned Magistrate's order that he has failed to consider the amendments to the law. In detaining the accused-respondent until the rising of the Court he seems to have acted under Section 15B of the Criminal Procedure Code which section *empowers* a Magistrate to detain an offender in Court in lieu of a term of imprisonment. Crown Counsel submits that Section 15B has no application to the instant case since under the amended Act of 1966 the Court is not "empowered" to act under its provisions in view of the imperative provisions of the amending Act. There is no conflict between Section 15B of the Criminal Procedure Code and Section 8 (6) of the Control of Prices Act as amended by the Act of 1966. The particular intention expressed in the amending Act would be in the nature of an exception to the general intention expressed in Section 15B of the Criminal Procedure Code (vide Maxwe on Interpretation of Statutes (11th Edition) pages 164–165). Craies only Statute Law (6th Edition) pages 373–374 expresses the same view under the heading "Curtailment without Repeal" when the author says that "if a subsequent Statute merely creates an exemption or exception from its operation by the inclusion of a condition, the previous Statute is not necessarily repealed and prior enactments may be rendered inoperative without being actually repealed. . . . In other words, a general enactment is *pro tanto* avoided by an express enactment entirely inconsistent with it." In this case the general intention expressed in Section 15B of the Criminal Procedure Code is *pro tanto* avoided by the express enactment of Section 2 (1) of the amending Act of 1966.

Learned counsel for the accused-respondent submitted that this was a case in which the appropriate order that should be made is one under Section 325 of the Criminal Procedure Code and cited in support the order of my brother Manicavasagar, J. in S. C. 58/67—M. C. Colombo

36484/A (Supreme Court Minutes of 20.3.67) where in similar circumstances the accused was dealt with under Section 325 of the Criminal Procedure Code. It does not appear that my brother Manicavasagar, J. had the advantage of a full argument on the question of law that was raised in the case — the amending Act of 1966 was not brought to his notice when the matter was first argued before him and he appears to have been convinced on the facts of the case that it was eminently a case in which the accused should be dealt under Section 325 of the Criminal Procedure Code regardless of the imperative provisions of the amending Act. With all respect to my brother Manicavasagar, J., I regret I am unable to say that the order made by him in the case before him was legally correct.

Counsel for the respondent also submitted that the amending Act of 1966 was *ultra vires* because it purported to interfere with the exercise of judicial power and cited in support the judgment of the Privy Council in *Queen v. Liyanage* ¹. In *Liyanage's* case the Privy Council had occasion to consider the validity of two particular pieces of legislation — The Criminal Law (Special Provisions) Acts of 1962 which, according to Lord Pearce was “a legislative plan *ex post facto* to secure the conviction and enhance the punishment of particular individuals”. The Acts, he said, “constituted a grave and deliberate incursion into the judicial sphere”, but Lord Pearce did not state that this precluded the legislature from legislating on any matter that was necessary for the good government of the country. At page 283 he said: “It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence”.

The amendments to the Control of Prices Act effected in 1957 and 1966 were considered necessary by the State to halt the growing prevalence of a type of offence which undermined the social structure of the country and seriously affected its subjects and which the State considered should be suppressed by the imposition of a deterrent punishment. Such an attitude on the part of the legislature in no way affects the exercise of judicial power.

I, therefore, allow the appeal of the Attorney-General and impose on the accused-respondent a sentence of 4 weeks rigorous imprisonment in addition to the fine of Rs. 100 already imposed on him.

Appeal allowed.

1967

Present : Alles, J.

S. E. FERNANDO, Appellant, and N. M. JINADASA, Respondent

S. C. 47/1967—Labour Tribunal Case, 2903

Industrial Disputes Act—President of Labour Tribunal—Appointment by the Public Service Commission—Subsequent appointment by the Judicial Service Commission—Validity.

A person appointed by the Public Service Commission as President of a Labour Tribunal continues to have valid and effectual jurisdiction under that appointment if, while that appointment remained unrevoked, the Judicial Service Commission purported to appoint him to the same office subsequently in consequence of the decision in *Walker Sons & Co. Ltd. v. Fry*.

A P P E A L from an order of the President of a Labour Tribunal.

H. W. Senanayake, for the defendant-appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

September 9, 1967. ALLES, J.—

The point of law raised at the hearing of this appeal by Counsel for the appellant was that the President of the Labour Tribunal acted without jurisdiction when he made the order against his client in view of the decision of the Privy Council in *The United Engineering Workers Union v. Devanayagam*.¹

The President was appointed by the Public Service Commission by notification in the *Government Gazette* No. 14,004 of 10.4.64, but subsequent to the decision of the Divisional Bench of the Supreme Court in *Walker Sons & Co. Ltd v. Fry*,² he was again appointed as President by the Judicial Service Commission (vide *Government Gazettes* Nos. 14,693 of 29.4.66 and No. 14,732 of 20.1.67). The application by the respondent was made on 6.11.66 and the appellant filed answer on 8.12.66 and the President delivered the order in the instant case on 12.2.67 at a time when he was appointed by the Judicial Service Commission. The majority decision of the Privy Council in the above-mentioned case overruled the majority decision of the Supreme Court in *Walker Sons & Co. Ltd. v. Fry* and held that the President of a Labour Tribunal does not hold judicial office within the meaning of section 55 (5) of the Ceylon (Constitution) Order in Council, 1946 and therefore does not require to be appointed by the Judicial Service Commission.

¹ (1967) 69 N. L. R. 289.

² (1965) 68 N. L. R. 73.

It has been submitted on behalf of the appellant that the subsequent appointment of the President by the Judicial Service Commission makes invalid the prior appointment of the President by the Public Service Commission in that pending the appeal to the Privy Council Presidents of Labour Tribunals ceased to carry out the duties and obligations of their office as Presidents. I am unable to agree. The appointment of the President by the Public Service Commission was never revoked by that body and the appointment of the President by that body continued to be valid and effectual notwithstanding the purported re-appointment by another body in the exercise of their powers under the Constitution. The fact that the Presidents did not exercise their powers as Presidents subsequent to the decision in *Walker Sons & Co. Ltd. v. Fry* was out of an abundance of caution in the event of the Privy Council upholding the decision of the Divisional Bench and cannot affect any orders properly made by them in the exercise of their powers since they were always properly appointed by the appropriate authority. I am therefore unable to subscribe to the view put forward by learned Counsel for the appellant that the President in the instant case acted without jurisdiction. The appeal is therefore dismissed.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1967 Present : H. N. G. Fernando, C.J. (President), Manicavasagar, J.
and Siva Supramaniam, J.

THE QUEEN v. R. R. ABILINU FERNANDO

C. C. A. APPEAL No. 17 OF 1967, WITH APPLICATION No. 19

S. C. 271—M. C. Avissawella, 76439

Evidence—Witness for the prosecution—Adverse witness—Proof of former statements made by him incriminatory of the accused—Admissibility—Evidence Ordinance, s. 154—Court of Criminal Appeal Ordinance, s. 5 (1).

The accused-appellant was charged with the murder of his brother's wife. At the trial the father of the appellant was called as a witness for the prosecution. In the examination-in-chief he was questioned only in order to elicit from him the fact that he had identified the deceased woman at the *post mortem* examination. In cross-examination his evidence was favourable to the accused on three points (1), (2) and (3). In view of this evidence Crown Counsel, after obtaining permission from Court, put questions which might have been put in cross-examination concerning points (1), (2) and (3). Furthermore, he asked the witness questions relating to two new points (4) and (5), viz., whether he saw the appellant just after the alleged murder, and whether the appellant had a knife in his hand at that time. In view of the denials made by the witness in respect of all five points, Crown Counsel confronted him with the statements he had made in his depositions in the Magistrate's Court. Those statements were contradictory of his evidence at the trial not only in respect of points (1), (2) and (3) but also in respect of points (4) and (5).

Held, that the prosecution should not have been permitted to prove the witness's former statements incriminatory of the accused in respect of points (4) and (5). "If at a trial a prosecution witness voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with a statement made by him in his deposition, the discretion of the trial Judge under s. 154 of Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely some testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement incriminatory of the accused by the device of first tempting or provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more serious consequence is to cause grave prejudice to the accused."

Held further, that, in view of other independent testimony, the conviction of the accused should be affirmed in terms of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance.

APPEAL against a conviction at a trial before the Supreme Court.

M. M. Kumarakulasingham, with *Cosme Dalpathado, H. W. A. Andrade* and *N. Balakrishnan* (Assigned), for the Accused-Appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 18, 1967. H. N. G. FERNANDO, C.J.—

The appellant was convicted by an unanimous verdict of the jury of the murder of his brother's wife. The principal witness for the prosecution, one Premaratne, gave evidence which if believed clearly establishes that he had seen the appellant stab the deceased woman more than once ; and this together with certain independent evidence as to motive sufficed to establish the guilt of the appellant.

After leading the medical evidence, the prosecution called one Samel Fernando, the father of the appellant and the father-in-law of the deceased woman. This witness was in examination-in-chief questioned only in order to elicit from him the fact that he had identified the deceased woman at the post mortem examination.

In cross-examination, Samel Fernando in answer to certain questions gave evidence—

- (a) suggesting the possibility that the previous witness Premaratne may not have been able to identify the assailant of the deceased woman because of trees and hedges which could have impeded his view of the scene ;
- (b) indicating that there had been no ill-feeling between the appellant on the one hand and the deceased woman and her husband (the appellant's brother) on the other ;
- (c) suggesting that there had been police interference with witnesses prior to their giving evidence in the Magistrate's Court.

In view of this evidence Crown Counsel moved to put to the witness questions which might have been put in cross-examination, and this application was allowed by the learned Commissioner. Thereafter Crown Counsel proceeded to examine the witness further, firstly with the object of negativing the suggestion that there had been police interference with the witness himself ; secondly, there was the following examination :—

“ Q. Did your son John complain to you prior to this incident that this accused was trying to get on terms of intimacy with his wife and was harassing them ?

A. No.

Q. Did you say this in the Magistrate's court ?

Court : I take it that John will be a witness.

Crown Counsel : Yes, My Lord.

Q. Did you say this in the Magistrate's Court : "Prior to this incident I received a complaint from my son John Fernando.... (Crown Counsel omits four words) that this accused was attempting to get on terms of intimacy with the deceased" ?

A. No.

Q. Did you also say in the Magistrate's Court : "In consequence I advised this accused" ?

A. No.

Q. Did you continue and say this : "For some time prior to this incident the accused was angry with the deceased as she rejected his advances" ?

A. No.

Q. As a result of this were any complaints made to the Grama Sevaka and the police ?

A. No.

Q. And did you say this continuing your evidence in the Magistrate's Court : "Several complaints had been made to the Grama Sevaka and the Police" ?

A. No. "

These statements in the witness's depositions were subsequently proved at the trial.

It will be seen that the matters which were thus for the subject of Crown Counsel's further examination related to that part of his testimony to which I have referred at (b) above. I can see no objection to the examination with respect to these matters.

Thereafter Crown Counsel put to the witness the following part of his deposition in the Magistrate's Court :—

"Today at about 12.30 p.m. I went to the latrine behind this house. At the time the deceased was at home and my son John had gone to work in a gem pit which is about half a mile from here. When I was in the latrine I heard the deceased crying out "අමුණ" about four times. I rushed out of the latrine and I saw the deceased fallen on the rubber land behind her house....."

At this stage, after an intervention by Court, Crown Counsel asked the witness the following questions :—

"Q. When you came out and saw your daughter-in-law lying fallen did you see this accused running away ?

A. I did not see.

Q. Did you see this accused having a knife or some other pointed object in his hand ?

A. No. I saw 2 or 3 people running along the road.

Q. Did you say this in the Magistrate's Court : " I saw the accused running away " ?

A. No.

Q. Did you further say : " he had a knife or some other pointed object " ?

A. No. (The whole passage is marked X2)."

It appears from certain remarks made by Crown Counsel during the trial that he was aware that the witness Samel would not give evidence on the lines of his deposition in so far as the evidence would implicate his son the appellant. That presumably was why the examination-in-chief did not cover the alleged incident of stabbing. It will be seen, however, that during the examination permitted under Section 154 the prosecution did refer to the contents of the deposition to the effect that the witness had seen the appellant running away with a knife in his hand from the place where the deceased woman lay fallen, and that those contents of the deposition was ultimately proved in the extract marked " X 2 ".

Now the witness had not previously given at the trial any testimony to the effect either that he had not seen the appellant just after the incident, or that the appellant did not have a knife in his hand at that time. Hence the assertions in " X 2 " concerning those matters were not used to contradict any testimony to the contrary which had been elicited from him by Counsel for the defence. What actually took place at the trial was that Crown Counsel, knowing that the witness would deny these matters, first elicited such a denial and then proceeded to show that the witness had made different statements at a different time.

Learned Senior Crown Counsel at the argument of the appeal justified this course on the ground that there had been in the cross-examination by the defence the following evidence from the witness :—

" Q. Did you hear anybody crying in pain ?

A. Yes. I went out to see.

Q. Did you see anybody ?

A. Yes.

Q. Then what did you do ?

A. My daughter-in-law was lying fallen and I raised her up."

The argument was that this evidence, because it did not contain any reference to the appellant having been seen by the witness at the time when he saw the deceased woman lying fallen, might lead the jury to

doubt whether the previous witness Premaratne could himself have seen the appellant stabbing the deceased. We do not agree with the factual implication of this argument. So far as the Jury was concerned, there was no real inconsistency between the evidence of the witness Premaratne, which related to a stage up to and including the fall of the deceased woman, and that of Samel, which related to a stage subsequent to a fall of the deceased woman. Had the matter been left as it remained at the end of the cross-examination there was very little or nothing elicited by the defence from the witness Samel as to the presence or absence of the appellant at the scene.

Moreover, the prosecution case as presented to the Jury was clearly not intended to include any testimony from Samel implicating the appellant as having been present at the scene with a knife in his hand. If that had been the prosecution's intention Samel should have been questioned with respect to these matters during the examination-in-chief.

In fact what transpired at the trial was that the prosecution elicited denials on these matters from the witness with the intention of contradicting him by proof of his deposition. As learned Senior Crown Counsel has presented the point, this course was followed only in order to shake the witness's credibility by showing that he said one thing in the trial Court and another to the Magistrate. But it happens that the Jury was then informed of evidence given before the Magistrate which was clearly prejudicial to the appellant.

In the ordinary case where a prosecution witness turns adverse he does so during the course of his examination-in-chief. Thus a witness may have testified before a Magistrate that he was present at a certain place, that he saw A and B together, that they had an argument, and that ultimately A stabbed B. It may happen at the trial that the witness commenced his evidence by stating that he was not present at the particular place and that he did not see A and B together, thus indicating that he will not give testimony in accordance with his deposition. If such a situation occurs, the prosecution should, unless it succeeds in tactfully persuading the witness to come out with his former testimony, abandon him for the purpose of the trial. If a witness persists in denying that he saw A and B together on the particular occasion, there is no need for the prosecution to proceed further and obtain a denial from the witness that he saw A stab B, and thereafter to contradict that denial by proving a deposition that he did see A stab.

If at a trial a prosecution witness voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with a statement made by him in his deposition, the discretion of the trial Judge under s. 154 of Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely some testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement

incriminatory of the accused by the device of first tempting or provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more serious consequence is to cause grave prejudice to the accused.

There was however ample evidence from the witness Premaratne and the witness John Fernando as to the stabbing of the deceased woman by the appellant and the strong motive for the stabbing. Under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance we upheld the conviction and dismissed the appeal.

Appeal dismissed.

1967 *Present : H. N. G. Fernando, C.J., Tambiah, J., and Siva Supramaniam, J.*

S. KANAGASABAI, Petitioner, and F. CONRAD PERERA and 3 others, Respondents

S. C. 195/65—Application for Writs of Certiorari and Prohibition

Debt Conciliation Ordinance (Cap. 81)—Appointment of Debt Conciliation Board—Validity.

In so far as the Debt Conciliation Board duly exercises its lawful powers, the Board does not hold judicial office and, therefore, does not require to be appointed by the Judicial Service Commission.

APPLICATION for writs of *Certiorari* and *Prohibition*.

C. Thiagalingam, Q.C., with T. Parathalingam and K. Sivananthan, for the Petitioner.

Mervyn Fernando, Crown Counsel, for the 1st, 2nd and 3rd Respondents.

P. Somatillekam, for the 4th Respondent.

August 28, 1967. H. N. G. FERNANDO, C.J.—

The main point the Counsel for the petitioner has argued in this case was that the Debt Conciliation Board which functions under the Ordinance, (Chapter 81), exercises judicial powers and that, therefore, the Board as presently constituted should have been appointed by the

Judicial Service Commission. We do not find that the Ordinance entrusts to the Board any power to make judicial determination or judicial orders. In so far as the Debt Conciliation Board duly exercises its lawful powers, the Board does not hold judicial office.

The application is dismissed with costs fixed at Rs. 500/- payable to the 4th Respondent.

TAMBIAH, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

Application dismissed.

1967

*Present : T. S. Fernando, J., Abeyesundere, J.,
and Siva Supramaniam, J.*

M. ARNOLIS PERERA and another, Appellants, and
M. DAVID PERERA and others, Respondents

S. C. 438 of 1962—D. C. Gampaha, 8891/L

Lease of Crown land—Renewal of it after expiry—Requirement of prescribed form—Acceptance of rent without due execution of a new lease—Effect—Crown Lands Ordinance (Cap. 454), ss. 8 (1), 96, 110.

Section 8 (1) of the Crown Lands Ordinance debars the disposition of Crown land except by an instrument of disposition executed in the prescribed manner.

Accordingly, where a lease of Crown land in favour of certain co-lessees expires after the Crown Lands Ordinance came into operation, acceptance of rent by the Crown thereafter, without a renewal of the lease executed in the prescribed manner, cannot confer on the co-lessees any legal title which may form the basis of an action between them for declaration of title to the property.

APPEAL from a judgment of the District Court, Gampaha.

*Colvin R. de Silva, with D. S. Wijewardene and Nihal Jayawickrama,
for the defendants-appellants.*

*Eric S. Amerasinghe, with W. D. Gunasekera, for the plaintiffs-
respondents.*

Cur. adv. vult.

July 19, 1967. T. S. FERNANDO, J.—

The four plaintiffs who are children of one Issan Appu instituted this action on the 3rd November 1960 against their brother the 1st defendant and a man who claimed to be the latter's tenant seeking from the District Court (a) a declaration that they are entitled to the possession of a boutique bearing No. 49 (formerly No. 42) standing on a land described in Schedule "A" to the plaint and depicted in Surveyor-General's Office Lease plan No. 1100 of 6th December, 1912. By an amendment of their plaint, the plaintiffs alleged that the boutique was at all times material to the action in the possession and enjoyment of the 3rd and 4th plaintiffs, while renewals of a lease of the land on which the boutique stands were obtained nominally in favour of the 1st and 2nd plaintiffs but for the benefit of the 3rd and 4th plaintiffs. They amended the prayer accordingly seeking a declaration of entitlement to possession in favour of the plaintiffs or any [of them as may be determined by court.

The defendants who sought the dismissal of the action took up the position that the 1st and 2nd plaintiffs and the 1st defendant are co-lessees of the land on which boutique No. 49 stands.

The District Court granted a decree declaring the 3rd and 4th plaintiffs entitled (i) to possession of boutique No. 49 and of the Crown allotments Nos. 4271 and 4270, (ii) to have the defendants ejected therefrom, and (iii) to damages fixed at Rs. 40 per mensem.

On P1, Issan Appu, the original lessee of the Crown, obtained on lease, for a period of fifty years commencing on 1st July 1904 and ending on 30th June 1954, the allotment (in extent 3·59 perches) depicted in plan No. 1100 referred to above and as contemplated in the covenants in Part IV of P 1 erected the boutique then described as boutique No. 42. Issan Appu died in 1932 leaving a last will by which his three sons (the 1st and 2nd plaintiffs and the 1st defendant) became entitled to be regarded as lessees of the lot depicted in plan No. 1100. There were certain other lots of which they similarly became co-lessees. In 1943 the 1st and 2nd plaintiffs and the 1st defendant entered into a deed of exchange P5, according to which they distributed the enjoyment of the several Crown lots their father had leased from the Crown. On the same date that P5 was executed they gifted by P6 to their two unmarried sisters, the 3rd and 4th plaintiffs, the enjoyment, for the remaining period of their father's lease P1, i.e., until 30th June 1954, of lot No. 4271 (depicted in the afore-mentioned plan No. 1100) and lot No. 4270 with boutique No. 42. The 3rd and 4th plaintiffs appear to have enjoyed the receipt of rents of boutique No. 42 till 30th June 1954.

Some three years elapsed after the date of expiry of P1 before the officers of the Crown gave their mind to the question of the renewal of the lease or the receipt of rent in respect of the land. Rents were received in 1957 in respect of the lot in question. The 1st and 2nd plaintiffs and the 1st defendant appear to have paid in money by way of rent, the 1st and 2nd plaintiffs paying in two-thirds of the rent to the office of the D. R. O. and the 1st defendant a one-third to the Village Headman. The learned trial judge has held that only the payments made to the office of the D. R. O. can be treated as valid and has doubted the bona-fides of the action of the Village Headman in purporting to accept money by way of rent. It is unnecessary to examine the evidence on the question of payment of money in this way as rent in respect of a renewal of the lease because we are satisfied that no attention has been paid in the District Court to the imperative requirements of the law governing the grant of leases of Crown land at the relevant time, i.e., from 1st July 1954 and thereafter.

The question that was agitated in the District Court was whether the 1st and 2nd plaintiffs (on behalf, as they claimed, of the 3rd and 4th plaintiffs) had the right to be treated as the persons in whose favour the lease of the land was renewed or whether the 1st and 2nd plaintiffs and the 1st defendant had all been regarded as co-lessees of the land. There was no examination of the legality of the claim of any of the contending parties to be lessees. It appears to have been assumed in the court below that payment of money by way of rent amounted to a continuation of the lease to the persons who paid or on whose behalf such money was paid. Nor was there any consideration by the learned judge of the question whether the suit instituted by the plaintiffs was none other than a possessory suit. If it was a possessory suit, there is no doubt it was filed after the period of prescription had elapsed. It must, however, be mentioned that in the notes of argument of counsel appearing on the brief there is a reference to an argument raised by the 1st defendant's counsel to this effect, although it is right to add that no issue was raised in respect of this point throughout the trial.

In regard to the claim of the parties to be Crown lessees, we have to take note of the fact that, even before the date of expiry of P1, the Crown Lands Ordinance (Cap. 454) had come into operation on 1st September 1949. Section 8 (1) of that Ordinance enacted as follows:—

“ Every disposition of Crown land under this Ordinance must be effected by an instrument of disposition executed in such manner as may be prescribed.”

Section 96 enables regulations to be made in respect of leases of Crown land and the forms required for making such leases, and section 110 defines an “ instrument of disposition ” as including any instrument or document whereby a lease relating to Crown land is effected. A fresh

lease after the expiry of P1 on 30th June 1954 had, therefore, unquestionably to be effected by an instrument of disposition within the meaning of the Crown Lands Ordinance, and no receipt acknowledging rent, even if it had been issued by the proper officer of Government, was a legal substitute therefor.

The resulting position then is that no valid lease has been granted since 30th June 1954 in respect of the land on which boutique No. 49 stands, and, notwithstanding the payment and acceptance of money as rent, the argument of plaintiffs' counsel that the plaintiffs have a right to a recognition of a contractual right entered into with the Crown cannot be upheld.

Faced with the position that there is no valid lease in favour of any of the plaintiffs after the expiry of P1, Mr. Ameresinghe argued that at the least the plaintiffs must be treated as tenants of the Crown from month to month. He sought to gain some support for his contention in certain decisions of this Court relating to the rights of a lessee under a non-notarial lease, but he had to concede that the latest decision of this Court on this very point, viz., *Hinniappuhamy v. Kumarasinghe*¹, is against his argument. In that case two judges of this Court, after referring to previous conflicting decisions on the point, set out lucidly their reasons for preferring to follow the line of decisions which does not regard Mr. Ameresinghe's contention with favour. Having given my mind to the decisions referred to in *Hinniappuhamy's case* (supra), I would respectfully follow the ruling in this case and apply it in the interpretation of section 8 (1) of the Crown Lands Ordinance. That section means, in my opinion, nothing less than that no disposition of Crown land can be effected except by an instrument of disposition executed in the prescribed manner. In this view of the matter, even if the receipts which the plaintiffs can point to as having been obtained by them in 1957 have been issued, as the trial judge has found, by the officer ordinarily authorised by the Government to collect its rents, they cannot maintain the action they instituted in the absence of an instrument of disposition in their favour. Alternatively, if the action they have instituted is construed, as it must be, as a possessory action, it must again fail as not having been instituted within a year of dispossession as required by section 4 of the Prescription Ordinance (Cap. 68).

The appeal is therefore allowed, and the plaintiffs' action is dismissed with costs in both Courts.

ABEYESUNDERE, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

¹ (1957) 59 N. L. R. 566.

1967 Present : H. N. G. Fernando, C.J., and G. P. A. Silva, J.

N. VISUVANATHAN, Appellant, and M. THURAIRAJAH and another, Respondents

S. C. 721/64—D. C. Chavakachcheri, 2634/L

Paddy Lands Act—Section 63—Meaning of term “tenant-cultivator”.

The protection conferred by the Paddy Lands Act to an individual is enjoyed only by a person who by his own labour and that of members of his family cultivates a paddy land. A person is not a “tenant-cultivator” within the meaning of the definition of that term in section 63 of the Paddy Lands Act if he employs hired labour for any two of the three different kinds of work contemplated in the definition, viz., ploughing, sowing and reaping ; and in regard to the watching and tending of crops, this must be done only by the tenant himself or members of his family.

APPEAL from a judgment of the District Court, Chavakachcheri.

M. S. M. Nazeem, with M. Sivanathan, for the defendant-appellant.]

C. Ranganathan, Q.C., with R. Manikkavasagar, for the plaintiffs-respondents.

Cur. adv. vult.

October 5, 1967. H. N. G. FERNANDO, C.J.—

The appeal in this case was against a decree of the learned District Judge ordering the ejectment of the defendant from a paddy land and for damages. The decree was entered on the basis that the defendant was a lessee under the plaintiff, and committed default in complying with the conditions of his lease.

Learned Counsel for the defendant in appeal has argued that the defendant was a tenant-cultivator within the meaning of the Paddy Lands Act and that therefore his ejectment cannot be ordered except in terms of that Act.

According to the definition of ‘tenant-cultivator’ in section 63 of the Act, as amended in 1961, a tenant-cultivator is a person who “ by himself or by any member of his family carries out (a) two or more of the operations of ploughing, sowing and reaping, and (b) the operation of tending or watching the crop in each season during which paddy is cultivated.” I am in agreement with the learned District Judge that the defendant has not brought himself within the scope of the definition.

It would appear that the extent of 8 acres which is involved in this action is only part of a tract of 35 acres, the cultivation of which has been undertaken by the defendant. His evidence at the trial was that he bought a tractor to plough his fields and drove the tractor whenever he could ; if he was ill he employed a casual driver. Whenever he needed

labourers he engaged labourers for hire. Earlier, at an inquiry before the Assistant Commissioner of Agrarian Services, he had admitted that the *harvesting* was done with hired labour, sometimes on a contract basis and sometimes on payment in cash or in kind. On that occasion he admitted that he has a licensed tractor driver to do the work of *ploughing*, and that he employed labourers also for the purpose of *sowing* the land. Considering that the entire tract is of an extent of 35 acres it is most unlikely that the defendant could in fact have himself done two (or even one) of the operations of ploughing, sowing and reaping ; and indeed he could not seriously maintain that position in his evidence.

I think it well on this occasion to point out that the Act in defining the expression "tenant-cultivator", only clarifies the ordinary meaning of that expression. The protection conferred by the Act to an individual is enjoyed only by a person who actually by his own labour and that of members of his family, cultivates a paddy land. The definition contemplates three different kinds of work (ploughing, sowing and reaping) for which actual labour is necessary, and if hired labour is in fact employed for two of these kinds of work, then the cultivator is not a "tenant-cultivator" ; and in regard to the watching and tending of crops, this must be done only by the tenant himself or members of his family. These conditions certainly have not been fulfilled in this case.

For these reasons the appeal was dismissed with costs after argument.

SILVA, J.—I agree.

Appeal dismissed.

1966 Present : Sansoni, C.J., and Abeyesundere, J.

AGATHESU and another, Appellants, and ULUKESU and 4 others, Respondents

S. C. 577/63—D. C. Jaffna, 1506/L

Thesavalamai—Sale by co-owner—Notice to the other co-owners—Can it be waived ?—Release of right to pre-empt—Requirement of notarial execution—Thesavalamai Pre-emption Ordinance (Cap. 64), ss. 2 (1), 5, 8, 10.

In an action to set aside a deed of transfer on the ground that the notice prescribed by section 5 of the Thesavalamai Pre-emption Ordinance was not given, defences of estoppel, waiver and acquiescence, assuming that they are applicable, must be proved by clear and unequivocal evidence. Such defences, however, are inapplicable, in view of the prescribed formalities which have to be followed prior to a sale by a co-owner.

Furthermore, a right of pre-emption being a right in land, a release of a right to pre-empt must be notarially executed to be of any force or avail in law.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, Q.C., with *K. Sivananthan*, for the Plaintiffs-Appellants.

J. D. Aseerwatham, for the Defendants-Respondents.

Cur. adv. vult.

August 2, 1966. SANSONI, C.J.—

The plaintiffs, who are co-owners of the land described in the plaint, sued to have the deed of transfer No. 2963 of 14th June 1961 executed by the 1st defendant (another co-owner) in favour of the 2nd and 3rd defendants set aside on the ground that the notice prescribed by section 5 of the Thesawalamai Pre-emption Ordinance, Chap. 64, had not been given. Admittedly, such notice was not given. The 2nd and 3rd defendants in their answer pleaded that the deed in question was executed at the instance of the plaintiffs, and the plaintiffs were therefore estopped from claiming the right to pre-empt the 1/4 share transferred by that deed. Pleas of waiver and acquiescence were also raised on the same ground.

The learned District Judge held that the impugned deed was executed with the knowledge and approval of the plaintiffs. He further held that the plaintiffs had by their conduct released the 1st defendant from his obligation to offer the shares sold to the plaintiffs in the first instance.

On the facts I am unable to accept the findings of the learned Judge which are not supported by the evidence. Although the 2nd defendant in his evidence said that the plaintiffs agreed to the 1st defendant transferring his 1/4 share to the 2nd and 3rd defendants because the 2nd and 3rd defendants had transferred certain shares of another land to the plaintiffs on deed No. 10393 of 11th March 1957 (D2), this evidence was contradicted by the 1st defendant whom the 2nd and 3rd defendants also called as their witness. The witness was specifically questioned by the Judge on the crucial question whether the plaintiffs were aware that he had agreed to transfer the land to the 2nd and 3rd defendants, and the following questions and answers show that the plaintiffs were not aware of the intended execution of the impugned deed :—

“Q. Can you say whether the plaintiffs were aware that in lieu of the 2nd and 3rd defendants transferring a share of the land on D2, you had agreed to give your share in the land dealt with on P1, to the 2nd and 3rd defendants ?

A. No.

Q. Why did the 2nd and 3rd defendants re-sell the land to plaintiffs, the land which they had bought two months earlier ?

A. The plaintiff told the 2nd and 3rd defendants that plaintiff's aged parents who were living in the Wanni wished to spend their last days on this land.

Q. Were you present when the conversation between the plaintiffs and the 2nd and 3rd defendants took place ?

A. No, I was not present at this conversation. Later I was present when the 2nd and 3rd defendants re-sold the share they bought on D1 from plaintiffs. I only spoke to the 2nd and 3rd defendants. I did not speak to the plaintiffs. Plaintiffs met me the day before deed D2 was executed. Plaintiffs were not present when I told the 2nd and 3rd defendants that I would transfer to them a share of the land in dispute.

Q. Were the plaintiffs aware of it later ?

A. No.

Q. You did not know what arrangements there were between the plaintiffs and the 2nd and 3rd defendants ?

A. No."

Assuming that defences of estoppel, waiver and acquiescence can arise in a case such as this, those defences must be proved by clear and unequivocal evidence, and that is lacking in this case.

But I would put the case on a higher ground and hold that section 8 of the Thesawalamai Pre-emption Ordinance gives the plaintiffs a right to bring this action even if they were aware of the intended transfer by the 1st defendant to the 2nd and 3rd defendants. A right of action is expressly conferred on a co-owner by section 8 in a case where the provisions of this Ordinance have not been obeyed. Whatever the earlier law may have been with regard to the position of a co-owner who was aware of an intended sale, the Ordinance in words which are absolute and explicit enables a co-owner to enforce the right of pre-emption where the notice required by section 5 was not given. Defences of estoppel, waiver or acquiescence are inapplicable where one finds in an Ordinance such as this prescribed formalities which have to be followed prior to a sale by a co-owner. I do not doubt that the whole object of the Ordinance was to provide a procedure by which a purchaser from a co-owner could ensure that he would get a sound title. Non-compliance with its provisions means that his title is defective and open to attack by another co-owner.

One of the issues raised at the trial was whether the plaintiffs had released the 1st defendant from his obligation to offer his share of the land to them. On the evidence of the 1st defendant which has been quoted above this issue must be answered in the plaintiff's favour. I also take the view that a release of a right to pre-empt must be notarially executed to be of any force or avail in law. A right of pre-emption is a right in land. It is, though conferred by law, as much a right over

land as a right conferred by an agreement *inter partes* to sell land. Section 2 (1) of the Ordinance speaks of it as "the right of pre-emption over such property, that is to say, the right in preference to all others whomsoever to buy the property.....". Section 10 requires an action under Section 8 to be registered as a *lis pendens* in accordance with the provisions of the Registration of Documents Ordinance. Therefore even if on the facts the plaintiffs had purported to release their right to pre-empt, such release would have been void in law as it was not embodied in a notarial document.

I would set aside the decree appealed from and declare that the plaintiffs are entitled to pre-empt the 1/4 share of the land described in the plaint, order that the plaintiffs should deposit a sum of Rs. 3,000/- in Court within 30 days of this judgment being communicated by the District Judge to the parties in open Court, declare deed No. 2963 of 14th June, 1961, null and void, and direct the Secretary of the District Court to issue a Conveyance to the plaintiffs for the 1/4 share on the sum of Rs. 3,000/- being deposited in Court. The plaintiffs-appellants are entitled to their costs in both Courts.

ABEYESUNDERE, J.—I agree.

Appeal allowed.

1967

Present : G. P. A. Silva, J.

B. WEERASINGHE, Appellant, and **R. H. M. KARUNARATNE**
(Police Sergeant), Respondent

S. C. 222/67—M. C. Galle, 27924

Unlawful betting on horse-racing—Quantum of evidence—Elements necessary to constitute a proper search by a police officer—“Premises”—Betting on Horse-racing Ordinance (Cap. 44), ss. 2, 3 (3), 11 (2), 17, 19 (b).

The presumption of being guilty of the offence of unlawful betting on a horse-race would not arise under section 19 (b) of the Betting on Horse-racing Ordinance unless the instruments of unlawful betting found in the possession of the accused person were found in consequence of such a search of premises as was in conformity with the requirements of section 17. The possession by a person of betting slips or other material which may be deemed to be instruments of unlawful betting does not by itself constitute an offence.

The evidence in the present case was that a police party did not set out on any information received in regard to any unlawful betting being carried on in any premises but that, while they were proceeding along a road, they came across the accused by accident and, when he was searched on suspicion, found in his possession certain instruments of unlawful betting.

Held, that there was a clear contravention of section 17 (2) of the Betting on Horse-racing Ordinance because the police officer who made the search did so without recording the grounds of his suspicion and, secondly, because there was no proof that the documents in question were contained in any “premises” within the meaning of that word as defined in section 2.

APPEAL from a judgment of the Magistrate's Court, Galle.

A. H. C. de Silva, Q.C., with *K. C. Kamalanathan* and *V. Selvarajah*, for the Accused-Appellant.

Faisz Mustapha, Crown Counsel, for the Attorney-General.

May 9, 1967. G. P. A. SILVA, J.—

The accused-appellant in this case was charged with the following offence, namely, that he did on the 15th June, 1966 bet unlawfully on a horse-race by having in his possession instruments of unlawful betting, to wit : betting slips, payment chits, sporting cards, etc., in breach of section 3 (3), read with section 19 (b) of the Betting on Horse-racing Ordinance (Chapter 44 of the Legislative Enactments), and with having committed an offence punishable under section 11 (2) of the Betting on Horse-racing Ordinance. The evidence in this case consisted mainly of that of a Sub-Inspector of Police who stated that on the day in question he and a police party were proceeding towards Matara on the Galle-Matara Road when he saw a man standing by the road-side who, on seeing him, hid a parcel in his breast under his shirt. On suspicion he stopped the Land Rover in which he travelled, went up to him and searched and found a parcel which contained cash Rs. 15 in an envelope, 4 betting slips which contained the names of three horses, two sporting cards, one pencil, one piece of carbon and one small bill book. The Sub-Inspector also stated that the accused had no permit or licence to accept bets or to have the betting slips in his possession.

The learned counsel for the appellant does not contest this evidence but he argues that the search of this person has not been made in accordance with the provisions of the Betting on Horse-racing Ordinance. The word “instrument of unlawful betting” is defined in the Ordinance and what was found in the possession of the accused could come within the definition of instruments of unlawful betting. Under section 3 (3) any person who—

(a) makes or places a bet on a horse-race other than a taxable bet, or

(b) receives or negotiates a bet on a horse-race other than a taxable bet, shall be deemed to bet unlawfully on a horse-race and shall be guilty of an offence. Section 19 (b) enacts that any person who is found in possession of any instrument of unlawful betting on the occasion of

his being searched under this Ordinance, shall be presumed, until the contrary is proved, to be guilty of the offence of unlawful betting on a horse-race. The important words under this section are “on the occasion of being searched under this Ordinance”. The presumption would therefore apply only to a person who has been searched under the provisions of this Ordinance and certain instruments of unlawful betting are found in his possession. In order to consider whether a person has been searched under this Ordinance, one has to look at section 17. Section 17 (1) provides that a search warrant may be issued by a Magistrate to search the premises, upon the Magistrate being satisfied that there is reason to suspect that any offence against this Ordinance or any regulation made thereunder is being or has been committed, or that there is any document or thing directly or indirectly connected with any such offence, in any premises. The facts in this case do not fall within the provisions of sub-section 17 (1). The only other search that is contemplated under this Ordinance is one under section 17 (2). This sub-section requires that where a police officer of or above the rank of Sergeant in charge of a police station has reason to suspect that any such offence, that is to say, an offence referred to in section 17 (1), is being or has been committed, or that there is any such document or thing, in any premises and that a search warrant cannot be obtained under sub-section (1) without affording the offender an opportunity to escape or of concealing evidence of the offence, he may, after recording the grounds of his suspicion exercise all or any of the powers which could have been conferred on him by sub-section (1). The premises contemplated in this section would be premises which are defined in section 2. It would thus appear that there was a clear contravention of section 17 (2) because the police officer made a search of the accused without recording the grounds of his suspicion and secondly because there is no proof that the documents in question were contained in any premises, as contemplated by the Ordinance. On the evidence it is clear that the police party did not set out on any information received in regard to any unlawful betting being carried on in any premises but they came across the accused by accident as they were proceeding on some other business towards Matara-Galle Road. On a consideration of the provisions of section 19 (b), it would appear that the possession of betting slips or other material which may be deemed instruments of unlawful betting by any person does not by itself constitute an offence. The presumption of being guilty of the offence of unlawful betting would only arise if such person were to be found in possession of such instruments during a proper search of premises within the meaning of the Ordinance. Crown Counsel has very properly indicated that he is unable to support this conviction.

For the above reasons I set aside the conviction and sentence and acquit the accused.

Appeal allowed.

1967

Present : Siva Supramaniam, J.

A. MADULAWATHIE, Petitioner, and E. A. WILPUS and another, Respondents

S. C. 223/64—*Habeas Corpus Application*

Habeas corpus—Custody of child—Father's preferential right.

In an application made by a wife for the issue of a writ of *habeas corpus* against her husband in respect of the custody of their daughter who was 5 years and 9 months old—

Held, that, so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right.

APPLICATION for a writ of *habeas corpus*.

R. D. C. de Silva, for the petitioner.

L. W. Athulathmudali, for the 1st respondent.

Cur. adv. vult.

August 22, 1967. SIVA SUPRAMANIAM, J.—

This application concerns the custody of the 2nd respondent Daya Luxmie Edirisinghe, a girl 5 years and 9 months of age at present. The petitioner is her mother and the 1st respondent her father.

The petitioner and the 1st respondent were married in 1960 and they have another child, a boy about 3 years of age, who is with the petitioner. According to the petitioner, the 1st respondent left the matrimonial home on 9th November 1963 and, in her absence, removed the elder child Daya Luxmie on 13th November 1963. The version of the 1st respondent, on the other hand, is that he had a quarrel with the petitioner on the 11th November in consequence of which the petitioner ordered him to leave the house along with the children. Accordingly he left the house on the 12th November taking with him only the elder child, who has been with him since that date. On 9.1.64 the petitioner made an attempt to remove that child from the 1st respondent's house but was unsuccessful. Thereafter she made the present application to this Court for the issue of a writ of *Habeas Corpus* against the 1st respondent and for an order granting her the custody of the said child. The 1st respondent made a similar application in respect of the younger child who was in the custody of the petitioner but his application was dismissed on 6.4.1965 mainly on the ground that the child who was of tender years (being only a little over one year of age then) needed a mother's care and attention.

The grounds of the present application were set out by the petitioner in her petition as follows :—

- (a) “ The respondent cannot give proper care, attention and motherly affection to the 2nd respondent, her daughter, and in consequence the child is in a continuous state of nervous anxiety ”.
- (b) “ There is no proper person to look after the child as the 1st respondent is always away from his home ”.
- (c) “ The 1st respondent threatened me with bodily harm whenever I visited to see the child ”.

At the enquiry held by the Magistrate into this petition, the petitioner alleged that the 1st respondent was on terms of illicit intimacy with one Leelawathie but she made no attempt at all to prove that allegation, which was denied by the 1st respondent. The 1st respondent made a counter allegation that the petitioner was on terms of incestuous relationship with her step-brother, one Sirisena, which, he said, was the cause of the quarrels between himself and the petitioner culminating in his leaving the matrimonial home. He led some evidence in support of his allegation but the learned Magistrate rejected it as a fabrication.

In an application of this nature for the custody of a child, the paramount consideration is the welfare of the child. It is settled law that, subject to that consideration, so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. (Vide *Calitz v. Calitz*¹, *Ivaldy v. Ivaldy*² and *Weragoda v. Weragoda*³.) Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right. It would follow that unless she discharges that burden the father is entitled to the custody. In the instant case, the learned Magistrate, to whom the petition was sent for inquiry and report, appears to have overlooked this aspect of the question when he recommended that the custody of the child be granted to the petitioner.

Of the three grounds set out by the petitioner in her petition the last one, namely that the 1st respondent threatened her with bodily harm whenever she visited the child is irrelevant to the question under consideration. I should state, however, that on the evidence led by her, that allegation is without any foundation. Her first ground, that the child is in a continuous state of nervous anxiety owing to want of care and attention on the part of the 1st respondent, is also unsupported by any evidence and would appear to be false. Her second ground, that there is no proper person to look after the child as the 1st respondent is always away from his home, although it appears to have impressed the learned Magistrate, does not bear examination. The evidence of the 1st respondent is that he is a cultivator. He would be away from home when he has to attend to his duties as a cultivator. The 1st respondent stated in

¹ (1939) *A. D.* 56.

² (1956) *57 N. L. R.* 568.

evidence that he lives with his parents and younger sister and they are in a position to attend to the needs of the child in his absence. One does not expect a father who wishes to have the custody of his child to give up all employment and remain at home to be in constant attendance on the child. Besides, the child is now of school-going age and the 1st respondent will be in a better position to attend to her educational needs.

The learned Magistrate, however, has stated as an additional reason for his recommendation that if the custody of the 2nd respondent is granted to the petitioner, both children will be able to grow up together and the 2nd respondent will have a companion to play with. While it is undoubtedly very desirable that the children of a family should have the companionship of each other, particularly when they are young, that can hardly be the deciding factor in the determination of the question under consideration.

On the evidence led by the petitioner before the Magistrate, she has failed to show that the interests of the child require that the custody should be granted to her. In my view, the child will be looked after equally well by either parent and from the point of view of her welfare it would appear to be immaterial whether she is with the petitioner or with the 1st respondent. There does not seem to be any substance in the petitioner's allegation that the 1st respondent does not possess adequate means to bring up the child in reasonable comfort. There is no sufficient ground therefore to interfere with the 1st respondent's legal right and to deprive him of the custody of the child. In this view of the matter, it is unnecessary to examine the 1st respondent's allegation that the environment in the petitioner's home will be detrimental to the moral welfare of the child.

I dismiss the petitioner's application.

If the petitioner wishes to have access to the child, the 1st respondent will make suitable arrangements for that purpose. If the parties cannot agree on these arrangements, it will be open to the petitioner to make an application to the Magistrate who will give necessary directions after hearing both parties.

Application dismissed.

1967

Present : Samerawickrame, J.

S. SATHAPPAN, Petitioner, and W. T. JAYASINGHE (Controller of Immigration and Emigration) and another, Respondents

S. C. 667/66—Habeas Corpus Application

Habeas corpus—Immigrants and Emigrants Act, ss. 6, 27, 28 (2)—Removal orders—Persons against whom they may be made—Right of Minister to delegate his power.

There is no justification for the view that the Immigrants and Emigrants Act is wholly inapplicable to a person who had entered Ceylon before the date of its enactment. A person who had originally entered Ceylon before the Act came into operation and who does not fall within the exceptions mentioned in section 27 is a person in respect of whom a removal order may be made under section 28 (2) if paragraph (a), (b) or (c) of that sub-section applies to him.

The discretionary power vested in the Minister to make a removal order may be delegated by him to an Assistant Secretary of the Ministry in terms of section 6 of the Act.

APPLICATION for a writ of *habeas corpus*.

K. Shanmugalingam, with *M. D. K. Kulatunga*, for the petitioner.

Mervyn Fernando, Crown Counsel, for the respondents.

Cur. adv. vult.

July 26, 1967. SAMERAWICKRAME, J.—

This is an application for the issue of a writ of Habeas Corpus. The petitioner alleges that the corpus Suppiah Enamuthu Nadarajan has been in Ceylon for the last twenty years and has never left Ceylon during that period, but has made Ceylon his home and has been domiciled here. He further alleges that on the 31st October, 1966, the said Suppiah Enamuthu Nadarajan was arrested by officers of the Immigration Department acting on the orders of the 1st respondent and that he is now detained at the Slave Island detention camp by the 2nd respondent. The petitioner states that the detention of the said Nadarajan is illegal and prays for the issue of a writ of Habeas Corpus and for an order for the release of the said Nadarajan from the said illegal detention. The respondents have filed objections to this application.

Learned Crown Counsel submitted that the matter could be disposed of upon the averment in paragraph 13 of the affidavit of Everard Joseph Stanislaus de Silva Wijeyeratne. In the said paragraph there is pleaded a removal order in respect of the corpus made in terms of Section 28 (2) read with Section 6 of the Immigrants and Emigrants Act.

Learned counsel for the petitioner has raised the following matters in regard to the validity of the said removal order. He submitted—

- (1) that the Immigrants and Emigrants Act has no application to the petitioner because the petitioner had entered Ceylon before the date of the said Act.
- (2) that the power of making a removal order in terms of Section 28 (2) could not be delegated to any other person by the Minister and that the removal order in question which has been made by an Assistant Secretary is therefore invalid.
- (3) that the petitioner is not a person to whom sub-section (c) of Section 28 (2) applied.

There are express provisions in each of the parts 3, 4, 5, of the Immigrants Act which deal with the question as to the persons to whom the said part would apply. The question, therefore, whether the particular provisions in the Act apply or do not apply to a person must be determined by reference to such provisions contained in the Act. I can see no justification for the view that the Act itself is wholly inapplicable to a person who had entered Ceylon before the date of its enactment.

Section 28 (2) empowers the Minister to make a removal order in respect of a person if he is satisfied that that person is one to whom sub-paragraphs (a), (b) or (c) of the sub-section apply. It is no doubt true that where a power of this nature is given it must be exercised by the authority to whom it has been entrusted and cannot ordinarily be delegated. This is, however, subject to the exception that the authority may be empowered by the Statute itself to delegate the exercise of the power.

S. A. de Smith in "Judicial Review of Administrative Action", 1st Edition, at page 173 states: "A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another."

Section 6 of the Immigrants and Emigrants Act states "The Minister may either generally or specially authorize the Permanent Secretary or any Assistant Secretary to the Ministry or the Controller to exercise, perform or discharge any power (other than the power conferred by section 2 or section 31 or section 52), duty or function vested in, or imposed or conferred upon, the Minister, by or under this Act."

I am of the view that under and in terms of this provision, it was open to the Minister to delegate the function conferred on him by Section 28 (2) to an Assistant Secretary of the Ministry.

Section 28 (2) states: "Where the Minister is satisfied that a person to whom this Part applies—

- (a) enters or remains in Ceylon in contravention of any provision of Part III or of any regulation made by virtue of the powers conferred by that Part ; or
- (b) has had his visa or endorsement cancelled ; or
- (c) has overstayed the period specified in the visa or endorsement,

the Minister may by order, direct a prescribed officer to arrest, detain and take on board a ship such person and may further direct by that order, or by any subsequent order that the master of that ship shall remove from Ceylon such person."

Under this provision, it is clear that the Minister can only make a removal order in respect of "a person to whom this Part applies". Section 27 sets out "that this part would apply to every person unless (a) he is a citizen of Ceylon ; or (b) by virtue of any order under Part I for the time being in force, he is exempted from the provisions of this Part". Nadarajan is neither a citizen of Ceylon nor has it been claimed on his behalf that an order under Part I had been made exempting him from the operation of Part V of this Act. The Minister had, therefore, authority to make a removal order in respect of Nadarajan if he was satisfied that he had overstayed the period specified in the visa or endorsement.

Where an authority is empowered to take a prescribed course of action when it is satisfied that a given state of affairs exists, the expression of satisfaction or opinion of that authority is decisive. It may be, however, that a Court might hold the action taken invalid if it can be shown that there was no evidential or rational basis upon which the authority could have formed the view that the prescribed state of affairs existed.

The only question, therefore, that I have to decide is whether the authority who took the view that Nadarajan was a person to whom sub-paragraph (c) of Section 28 (2) applied had before him evidentiary material upon which he could reasonably have formed that view.

It appears that several petitions had been received alleging that Nadarajan was overstaying his residence permit or visa. Upon inquiry it was found that permit No. C. 32207 dated 20th June, 1951, valid for two years from the date of issue and permit No. CE 9549 of the 18th August, 1953, valid from the date of issue, that is the 17th August, 1955, had been issued to one S. E. Nadarajan who in his application for the said permits had declared himself to be the holder of Passport No. 79368. While inquiries were in progress, the corpus Nadarajan made an application for a permit or visa dated 7th April, 1966, forwarding Passport No. C. 010750 and stating that he had not held a residence permit earlier. Upon being questioned he admitted that he was an Indian national but he denied that he had applied for or held permits Nos. C. 32207 and CE. 9549. Upon inquiries made at the Indian High Commission, it was found that the corpus had been issued India Ceylon Passport No. C. 010750 and that the holder of that Passport had earlier been issued India Ceylon Passport No. 79368 which had been mentioned in the application for the permits issued in 1951 and 1953. A written communication from the Indian High Commission stating these facts had been obtained by the Assistant Secretary and has been placed before Court.

Upon this evidence, it would appear that there is material to show that the corpus had held two residence permits and at least two passports. The inference is almost irresistible that he had at sometime left Ceylon after he had first entered in 1948.

Mr. Shanmugalingam appearing for the applicant submitted that even if it be correct that the corpus had issued to him residence permits and passports, it did not show that he had in fact left the country and

that he may well have made arrangements to do so and for that purpose obtained the necessary documents but that he did not in fact leave. Had the corpus admitted that he obtained these permits but that he did not in fact leave the country, the matter may have merited some inquiry but as he chose to deny the receipt by him of these documents, the authority, namely, the Assistant Secretary, cannot be blamed for drawing an inference adverse to him.

I am of the view that from the material that was available before him, the Assistant Secretary may reasonably have taken the view that it was established that the corpus had left Ceylon sometime after he had first come here in 1948.

I am, accordingly, of the view that the removal order issued in respect of the corpus is valid and that his detention is lawful. The application is, accordingly, refused.

Application refused.

[PRIVY COUNCIL]

1967 *Present : Lord Morris of Borth-y-Gest, Lord Wilberforce, Lord Pearson, Sir Jocelyn Simon, and Sir Alfred North*

P. S. WIJEWARDENE, Appellant, and G. B. S. GOMES and others, Respondents

PRIVY COUNCIL APPEAL No. 14 OF 1966

S. C. 460 of 1960—D. C. Colombo, 14315/T

Administration of estates—Judicial settlement of accounts—Application under Civil Procedure Code, s. 729—A legatee's objections to the accounts—Right of appeal to the Privy Council—Scope—Voluntary Settlement of future shares in a company—Death of Settlor before allotment of the shares—Rights, if any, of the Trustees of the Settlement to the ownership of the shares when they come to be allotted—Trusts Ordinance (Cap. 87), s. 6—Identity of property designated in a last will—Quantum of evidence—Article due to a legatee—Refusal by the executors to deliver it—Personal liability of the executors—Gifts under a will—Direction that they should take effect on the "date of distribution"—Meaning of expression "date of distribution"—Relevancy of date of final assessment of estate duty—Estate Duty Ordinance (Cap. 241).

Appeals concerned with the taking of an account, as in a judicial settlement of accounts under section 729 of the Civil Procedure Code, will not be entertained by the Judicial Committee of the Privy Council if questions of fact rather than principles of law are involved.

(i) On 28th February 1950 the principal shareholder of a company (Associated Newspapers of Ceylon Ltd.) executed, for the benefit mainly of his youngest son, a Voluntary Settlement, which included 6,000 ordinary shares in the company of which he was the registered owner and 1,000 further ordinary shares "which had been issued but not yet allotted and which the Settlor is about to be caused to be allotted into the names of the Trustees". On the same day he executed in favour of the Trustees of the Settlement a transfer of the 6,000 shares of which he was the registered owner, but died on 13th June 1950, before any allotment of the 1,000 shares of the new issue had been made. In due course the 1,000 shares were allotted to the executors of the deceased shareholder's estate on payment by them of a balance sum of money due in respect of those shares.

The question arose whether the Settlement Trustees were entitled to call upon the executors to transfer to them the 1,000 newly allotted shares. In view of doubts as to whether a valid trust had been constituted in respect of those shares, the main contention on behalf of the respondent executors was that the deceased shareholder should be regarded as having formally agreed with the Trustees to cause to be allotted, or to transfer, to them the 1,000 new shares. Consequently, it was argued, so soon as the new shares came to be allotted, the Trustees of the Voluntary Settlement were in a position to enforce the promise made by the deceased.

Held, that, assuming that if the necessary basis of fact were shown to exist an effective trust could be constituted under the law of Ceylon, there was no

evidence, either extrinsic or intrinsic, to establish that the alleged promise was made by the deceased. More than a mere manifestation of intention is required in order to constitute a promise enforceable in law. Accordingly, the 1,000 shares which were the subject of the new issue did not pass to the Trustees of the Voluntary Settlement but devolved under the last will of the deceased.

(ii) Where the identity of a piece of land designated by a Testator falls to be determined upon consideration of not only a particular plan mentioned in the will but also upon other pieces of extrinsic evidence, the Privy Council will not interfere with the concurrent findings of the trial Court and the Supreme Court unless some substantial misdirection or error in law has occurred.

(iii) The respondent executors rejected the claim of the appellant to a painting to which the latter was entitled as legatee under the will and wrongly gave it to a third person.

Held, that, if the executors could not deliver the painting to the appellant, they should pay him the value of the picture, the amount of such value to be paid by the executors personally and not out of the estate of the Testator.

(iv) The last will directed that the gifts contained therein should take effect on the "date for distribution" and after the value of the relevant properties has been "finally assessed for estate duty purposes".

Held, that the date for distribution related to the making of the final, and not a provisional, assessment for purposes of estate duty. As the final assessment figures were in fact communicated to the executors in August 1957, the date on which distribution could have been made could properly be taken to be 31st December, 1957.

APPEAL from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *M. P. Solomon, L. Kadirgamar* and *Mark Fernando*, for the appellant (a legatee).

S. Nadesan, Q.C., with *R. K. Handoo* and *N. Chinivasagam*, for the respondents (executors and the other legatees).

Cur. adv. vult.

July 5, 1967. [Delivered by LORD WILBERFORCE]—

This is an appeal from the judgment and decree of the Supreme Court of Ceylon dated 24th May 1963 dismissing an appeal from the judgment of the District Court of Colombo dated 30th May 1960. The proceedings relate to the estate of Tudugalle Don Richard Wijewardene who died on 13th June 1950 and whose will, dated 26th May 1950, was proved on 21st March 1951. The proving Executors made an application under section 729 of the Civil Procedure Code for the judicial settlement of the accounts of their administration up to 31st December 1957. The present appellant, who is the eldest son of the Testator and a legatee under his will, raised certain objections to these accounts. He succeeded with regard to one only in the District Court and appealed unsuccessfully to the Supreme Court of Ceylon as regards the remaining objections. As regards that objection on which he had succeeded, the executors lodged a cross-appeal and succeeded in the Supreme Court in reducing

the amount awarded to the appellant. The appellant now appeals to their Lordships against the rejection of his objections and against the reduction in the amount awarded to him in respect of the matter on which he was successful.

The appeal, as presented to their Lordships, related to six matters ; but as regards two of these, namely (a) certain fees payable to the firm of Proctors acting for the executors and (b) the cost of a passage from Canberra for a person named in the will as executor, Counsel for the appellant properly and inevitably conceded that these were not matters which could be raised on an appeal to this Board. According to their Lordships' practice, recently restated in *Vander Poorten v. Vander Poorten*¹, appeals concerned with the taking of an account will not be entertained where questions of fact rather than principles of law are involved.

There remain four other questions relating to individual and unconnected matters and their Lordships will deal separately with them.

1. The appellant claims to be entitled to a quarter share of a holding of 1,000 ordinary shares in the Associated Newspapers of Ceylon Ltd. The validity of this claim depends in the first instance upon whether the 1,000 shares in question devolved under the will of the Testator or formed part of the Trust Fund under a Voluntary Settlement made by the Testator on 28th February 1950. The Testator, who was the principal shareholder and managing director of the company, was the registered owner in 1950 of 8,026 shares of Rs. 100 each out of a total ordinary share capital of 11,500 shares. A meeting of the directors was held on 9th February 1950 at which it was resolved to issue 2,000 ordinary shares at par, such shares to be offered to members in proportion to their existing holdings. On 16th February 1950 a circular letter was sent out to the members, including the Testator, containing an offer from the company to each member in accordance with the resolution. The number of shares of the new issue to which the Testator was entitled under this offer was 1,396. There was attached to the circular letter a form of request for allotment to be completed and returned to the company together with a payment of Rs. 50 a share before 15th March 1950. The remaining Rs. 50 were to be paid on allotment on or before 15th September 1950. On 28th February 1950, that is to say after receipt of the offer but before he had taken any action upon it, the Testator executed a Voluntary Settlement for the benefit, in the main, of his youngest son. The Settlement was, according to a schedule, to include 6,000 ordinary shares in the company of which the Testator was the registered owner and 1,000 further ordinary shares which "had been issued but not yet allotted and which the Settlor is about to cause to be allotted into the names of the Trustees". On the same day the Testator executed a transfer to the Trustees of the Settlement of 6,000 shares of which he was the registered owner. On or about 7th March 1950 the Testator applied to the company for an allotment of 1,396 new ordinary shares and sent to the company a cheque for Rs. 69,800 being the amount payable on application. The company,

on 7th March 1950, acknowledged the receipt of this application. A meeting of the directors of the company was held on 6th April 1950 at which the applications for allotment of the new shares were recorded and agreed to. On 26th May 1950 the Testator executed his last will in which he made certain dispositions of shares in the company but he expressly excluded from those dispositions any shares which had formed the subject of the Voluntary Settlement. He died on 13th June 1950 before any allotment of the shares of the new issue had been made. In due course the 1,396 shares to which the Testator was entitled were allotted to the executors on payment by them of the final amount due.

In these circumstances the question arose whether the Settlement Trustees were entitled to call upon the executors to transfer to them 1,000 of the allotted shares. In fact the executors transferred to the Trustees, by agreement with three of the Testator's children, or at least without objection by them, 750 of these shares ; but, on objection being made by the appellant, they retained 250. The appellant contends that the 1,000 shares in question do not belong to the Settlement Trustees but ought to devolve under the will.

Under the Trusts Ordinance of Ceylon (Cap. 87) Section 6, for an effective trust to be created there must (unless the Settlor is himself to be the Trustee) be either a testamentary disposition or a transfer of the trust property to the Trustee.

The learned District Judge held that a valid trust had been constituted because the Voluntary Settlement of 28th February 1950 was effective as a transfer to the Trustees of the rights of the Settlor in the 1,000 shares and constituted a valid declaration of trust in respect of those shares. The contention that the Settlement amounted itself to a transfer appears to their Lordships to involve considerable difficulties both on the form of the Settlement and having regard to the facts relating to the shares. Moreover, such a contention was expressly disclaimed in argument before the District Court ; nor does it appear to have been contended before the Supreme Court. Furthermore, if and so far as it is suggested that the Settlor had declared himself a Trustee of the shares, or of the rights in them, this was inconsistent with the form of the Settlement, and with the well-known principle that where a trust is intended to be effected by means of a transfer of property to trustees, and no such transfer takes place, effect cannot be given to the trust as a declaration by the Settlor that he himself holds the property as Trustee (see *Milroy v. Lord*¹). These particular contentions were in fact not supported in argument by learned Counsel appearing for the surviving Settlement Trustee. Nor did Counsel endeavour to justify an alternative line of argument relied on by the learned District Judge which was to the effect that the (admittedly effective) gift of the 6,000 shares in the company carried with it, as the fruit of that holding, the rights to the new shares issued in 1950. On this point too the facts were against him since the Testator himself had separated the rights from the main holding, transferring the one but not the other.

¹ (1862) 4 *De G. F. & J.* 264, per Turner *L. J.* at p. 271.

In place of these arguments, on which the judgment of the District Court was based, the respondents contended that the Testator should be regarded as having formally agreed with the Trustees to have allotted, or to transfer, to them the 1,000 new shares. Such an agreement, under the law applicable in Ceylon, would, it was argued, be legally enforceable, without the necessity of consideration such as English law would require. Consequently, so soon as the new shares came to be allotted, the Trustees of the Voluntary Settlement were in a position to enforce the promise made by the Testator.

Their Lordships express no opinion whether, if the necessary basis of fact were shown to exist, an effective trust could be constituted in this manner under the law of Ceylon, for they are satisfied that the respondents have failed to show that any such promise was made. That, at the time of making the Settlement, it was the policy and intention of the Settlor to vest in the Trustees both 6,000 of the existing shares and 1,000 of the new shares to be allotted, there can be no doubt, but more than a mere manifestation of intention is required in order to constitute a promise enforceable in law. No evidence was given that any such promise was made to, or relied on by, the Trustees, and the respondents were, consequently, driven to rely upon the terms of the Settlement itself. But these, though again they are evidence of the Settlor's intentions, and also indicate upon what trusts the shares are to be held once vested in the Trustees, cannot be construed as amounting either expressly or by implication to a promise. The words most relied on, which appear both in recital (c) and in the Schedule paragraph (2) are that the Settlor "is about to cause to be allotted into the names of the Trustees", but these are words which declare an intent and fall far short of amounting to a promise. In the absence therefore of the requisite factual substratum their Lordships must hold that this argument fails. It follows that the appellant succeeds, on this objection, in showing that the 1,000 shares the subject of the new issue in 1950, do not pass to the Trustees of the Voluntary Settlement.

There remain certain points of detail. First it appears that since the death of the Testator there has been a bonus issue, on a one-for-one basis, of fully paid shares in the company, so that the 1,000 shares the subject of this issue are now represented by 2,000 shares. It was not disputed that the whole of this aggregate holding devolves together. Secondly their Lordships were informed that, of the 750 shares transferred to the Settlement Trustees, a number said to represent one-eighth part had been transferred to the appellant. The appellant must of course bring any of these shares into account in any distribution of the 1,000 (2,000) shares under the will. Thirdly, although it is now clear that the 1,000 (2,000) shares should pass under the will, it was contended by the respondents that the question remains whether they devolve under clause 15 (1) or under clause 15 (7). Under the former clause the appellant would be entitled to one-quarter (250/500): under the latter to one-fifth (200/400). In view of the fact that the Testator's youngest

son, who would be interested to argue for the second alternative, was not represented on the appeal, in order to avoid further litigation, Counsel for the appellant was instructed to agree to limit his claim to 200/400 out of the 1,000/2000 shares in the company.

The appeal therefore succeeds on this issue and the accounts must be adjusted to give effect to the points above stated.

2. The appellant claims that a piece of land known as Field No. 1 of the Galpokuna Estate devolves to him under the terms of the will. Under clause 15 (1), a half share "of the Galpokuna Division of my Galpokuna Group" was devised to the appellant; the other half share of this division was devised under clause 15 (3) to the Testator's daughter Ranee, the fifth respondent. By clause 15 (2) of the will the Testator devised "all that divided portion known as the Udabaddawa Division of the group aforesaid" to his daughter Nalini, the fourth respondent. The issue is under which of these devises Field No. 1 passes. The question is one of identification upon which extrinsic evidence is admissible and in fact a considerable volume of evidence was led before the learned District Judge and considered by him. This evidence consisted in the main of the following matters: (a) The Testator acquired at separate dates two estates adjoining each other, the Galpokuna estate and the Udabaddawa estate. He combined these two into a single group called Galpokuna group. Field No. 1 originally formed part of Galpokuna estate. (b) On 5th October 1936 two maps were prepared by the same surveyor, Mr. Pieris, who gave evidence at the trial. One of these maps (Exhibit P. 21) showed the Galpokuna group as a whole and was entitled "Plan of Galpokuna group including Udabaddawa Division". The field in question was depicted on this plan in a manner which appears to separate it from the Udabaddawa Division, and a tabular statement grouped it together with other Galpokuna fields and separately from the three Udabaddawa fields. However, the plan did not in terms make any reference to a Galpokuna Division. The other plan (Exhibit P. 23D) purported to show Udabaddawa Division Galpokuna group: the area depicted included Field No. 1. Moreover, on the plan, under the words "Udabaddawa Division" there appear in smaller characters the words "including Field No. 1 of Galpokuna". This plan therefore, on the face of it, appears to show the field in question as included in the Udabaddawa Division. (c) There was the evidence of a Proctor, Mr. Abeywardene, relating to the preparation of the plan Exhibit P. 23D. He said that he had been instructed in 1936 by the Testator to prepare a statement relating to the title to the block of land included in Exhibit P. 23D. Accordingly he obtained the relevant documents and bound all the title deeds relating to this block into one volume. On the cover page of that volume, in what was proved to be the handwriting of Mr. Abeywardene's clerk, appear the words "Title deeds of Udabaddawa Division Galpokuna group in extent A. 183—R. 2—P. 1". The extent of this acreage was such as to include Field No. 1. Mr. Abeywardene was not able to say precisely for what purpose this volume was assembled though he did say that it

was not in connection with any proposed will. The plan (Exhibit P. 23D) was amended on 6th November 1941 by a surveyor so as to include certain new acquisitions. (d) Certain evidence was produced as to the management of the Galpokuna group by a firm of estate agents of which the Testator was himself a director. A crop disposals book (Exhibit D. 35) showed that separate crop figures were maintained in relation to each field in the group as a whole and Field No. 1 was there recorded together with 10 other fields of Galpokuna as distinct from the three fields of Udabaddawa. But in the statements sent to the Testator during his lifetime no separate crop figures of Galpokuna Division and Udabaddawa Division were given and the Testator never asked for separate returns in respect of the two divisions.

In addition to these matters of extrinsic evidence, there was a clause in the will itself from which it was sought by either side to draw support. This was clause 21 which declared that in each appropriation to the Testator's children of estates, plantations and premises or divisions or portions thereof, there should be included "not only all land depicted in the most recent plan of the property appropriated as may be in existence at the date of my death, but also" all further or additional land purchased prior to the Testator's death.

These matters, which their Lordships have only summarised as they are very fully set out in the judgment of the District Court, were carefully considered and weighed by the learned District Judge, who came to the conclusion upon the evidence as a whole that the intention of the Testator in clause 15 of his will was to include Field No. 1 in the Udabaddawa Division. In doing so he also took into account the fact that, if this were so, the four elder children of the Testator (the appellant and his three sisters) would receive approximately equal values of land, whereas if the appellant's contention was correct there would be a considerable inequality as between the appellant and two of the daughters on the one hand and the third daughter (Nalini) on the other. The learned judge deduced from the terms of clause 15, subclauses 1-4, of the will an intention both in relation to the number of shares in the Associated Newspapers of Ceylon Ltd., and in relation to immovable property that the children should be treated alike. Their Lordships are in agreement with the learned judge in attaching some significance to this consideration.

The matter cannot be resolved solely as one of construction of the provisions in the will, or merely by a decision as to what constitutes the most recent plan referred to in clause 21. In the first place that clause was designed not so much to lay down what was to be conclusive or decisive evidence as to the extent of land previously devised, as to make it plain that subsequent additions were to be included. Any plan shown to be the "most recent" would be an element to be taken into consideration, but in conjunction with other material evidence as to the Testator's intention. But, secondly, it appears to their Lordships impossible to say with any certainty that the most recent plan there referred to was Exhibit P. 21 on the one hand or P. 23D on the other.

They were contemporaneous, and if P. 21 may be said to designate the estate as a whole, or possibly, the two separate divisions the plan which designated Udabaddawa Division was P. 23D.

The identity of the property designated by the Testator therefore fell to be determined upon consideration of the other pieces of extrinsic evidence to which reference has been made. It was on a balance of these that the learned District Judge reached his conclusion that the field devolves as part of the Udabaddawa Division.

In such a matter their Lordships would be reluctant to interfere with the findings of the trial judge, more particularly when these were, as in the present case, concurred in by the Supreme Court. To justify such interference it would be necessary to show that some substantial misdirection or error in law had occurred. After a careful consideration of the judgment of the learned District Judge their Lordships are fully satisfied that no such error or misdirection can be shown and indeed their Lordships find themselves in substantial agreement with his findings. They therefore find that the appellant does not succeed with this objection.

3. This objection relates to a painting to which the appellant claims to be entitled under the will but which has not been made over to him by the executors. The painting was one which was commissioned by the Testator during his lifetime from a Mr. Floyd, who, it appears, was invited by the Testator from England in order to execute a number of paintings for him. Mr. Floyd in fact did paint a number of pictures during his stay in Ceylon. The disputed picture was one depicting the scene at the Assembly Hall on Independence Day, 4th February 1948, and showed His Royal Highness the Duke of Gloucester handing over the grant of independence to the Prime Minister of Ceylon. Under the will, in consequence of a nomination made by the Testator's widow, the appellant became entitled to the Testator's pictures and paintings. The case made by the executors at the trial was that the painting did not belong to the deceased and therefore did not pass under his will. They called certain evidence to substantiate this which was rejected by the learned District Judge and it is not now disputed that the painting should have passed to the appellant and that he was entitled to have it made over to him. It is further not now in dispute that the executors wrongly handed it over to a third person. The only question now in issue relates to the value for which the executors are accountable to the appellant in the event of the painting itself not being forthcoming. In his original objections to the executors' accounts the appellant placed an arbitrary value upon the painting of Rs. 12,500. At the trial, through his counsel, he indicated his willingness to accept Rs. 10,000 and this was the figure awarded by the learned Judge. On appeal this amount was reduced to Rs. 1,340. The appellant now submits that the Supreme Court was not justified in making this reduction and seeks to have the original award restored.

It is unfortunate that the evidence as to the value of this picture is, on any view, exiguous. This is no doubt because it formed a small item in relation to the estate as a whole and because the main dispute at the trial was whether it formed part of the estate or not. Indeed even so late as the time when the executors lodged their objections against the decision of the District Court no clear issue had been stated as regards the picture's value. In these circumstances their Lordships are reluctant to reach the conclusion that the finding of the District Court should be disturbed. Nevertheless they find it impossible to escape from the conclusion that the evidence before it was insufficient to justify the valuation of Rs.10,000. The figure was based upon the evidence of one Atukorale (a witness found to be unreliable) that he had been asked by Mr. Floyd to sell it for Rs.10,000, an insufficient basis for finding as the judge did find that this was its true value. Their Lordships therefore consider that the Supreme Court was justified in holding that this finding of the District Judge could not be maintained. The substituted figure of Rs.1,340 which was accepted by the Supreme Court was arrived at on the basis of an insurance policy taken out in 1948 by the Testator in which the "Assembly Hall" was included and against which the figure of £100 was inserted. It appears that this figure was stated by the Testator himself in a signed list which he sent to the insurance company. No evidence was called to show that any valuation at this figure was made or as to the basis on which insurance cover was requested or given so that the figure appearing in the policy can hardly be accepted as satisfactory evidence of value. In the same policy a number of other paintings by the same artist were indifferently valued at £50.

The appellant sought to justify the higher valuation upon the well-known principle that where a wrong-doer has deprived a claimant of the opportunity of having an item of property appraised, he must submit to having it valued as an object of the highest quality of its kind. Admitting the general validity of the rule, it cannot help the appellant here, first because it was not satisfactorily shown that the painting could not have been valued—since its situation at about the time of the trial seems to have been known—and secondly because the appellant was unable to provide the court with a valuation on the highest quality basis. In view of the protracted litigation which has taken place, and the not very considerable sum of money involved, their Lordships are reluctant to remit this issue for a fresh valuation to be obtained but in the circumstances they consider that this is the only possible course to take, and that the decision of the Supreme Court must be varied accordingly. They express the hope that agreement may be possible between the parties interested which will make further proceedings unnecessary.

4. This claim relates to the date for distribution of the Testator's estate. The question arises under clause 15 of the will in which it was directed that the gifts therein contained, which included gifts to the appellant, should take effect on the "date for distribution". The executors claim and their accounts have been submitted on the basis

that the date for distribution was 31st December 1957. The appellant's claim (as amended) is that the correct date should be 31st March 1954. These differing dates are in each case related to the making of an assessment for purposes of estate duty. The earlier date contended for by the appellant is related to the fact that an assessment for estate duty was made on 3rd March 1951 and he contends that in accordance with estate duty legislation this assessment became final after three years, on 3rd March 1954, in the absence of fraud or evasion. Consequently it is said the executors could have distributed the estate on 31st March 1954 provided that they had sufficient money in hand. The appellant undertook to show from the accounts that in fact sufficient money was in the hands of the executors. The executors on the other hand contend that the assessment of 3rd March 1951 was a provisional assessment only (it is in fact so described) and the date contended for by them is related to a final assessment for estate duty purposes which was made on 4th June 1958. The effect of this assessment was communicated to the executors in August 1957 and it is consequently contended that distribution could not have been made before 31st December 1957.

Before considering the relevant clause in the will it is necessary to examine the machinery adopted in Ceylon as regards assessment of estate duty. The present Estate Duty Ordinance (Cap. 241, which dates from 1938) does not make any provision for a provisional assessment. It requires that a return should be made by the executors, that estate duty should be assessed by the Commissioner of Estate Duty and that probate shall not issue until his assessment has been made and a certificate given that the appropriate estate duty has been paid. An additional assessment may be made at any time within three years after the original assessment, but not after this period unless there has been fraud or wilful evasion. This procedure evidently involves practical difficulties in relation to estates of any size or complexity and it was found by the District Court that a practice has been established whereby a provisional assessment is made by the Commissioner based on information supplied by the executors and whereby Letters of Administration or of Probate are issued upon the strength of a provisional certificate showing that duty in accordance with the provisional assessment has been paid. Later a final assessment is made on the basis of figures officially accepted. This procedure seems to have originated under the earlier Estate Duty Ordinance (No. 8) of 1919 as is confirmed by the case of *Saibo v. Commissioner of Stamps*¹. The learned judge took the view that the same practice of making a provisional assessment was followed under the present Ordinance, that no final assessment takes place at this stage and that notwithstanding the provisional assessment it is open to the Commissioner to make a final assessment beyond a period of three years of the date of the provisional assessment.

¹ (1938) 40 N. L. R. 374.

Whether such a procedure, convenient though no doubt it is, is strictly consistent with the terms of the present Ordinance, is not a matter on which their Lordships need express any opinion. For the question for determination is not whether the right procedure has been followed, but what the Testator meant in his will. For this purpose, their Lordships agree with the learned District Judge that the existence *de facto* of the procedure of provisional assessment, followed by final assessment, is relevant, and that it is this which has to be related to the relevant testamentary clauses. Their Lordships will deal with these briefly since the applicable dispositions are fully considered in the judgment of the learned District Judge, with which their Lordships are here in full agreement.

The relevant clauses in the will are clauses 14, 15 and 16. The scheme of these clauses is that the distribution which is directed to be made under clause 15 cannot be carried out until the executors have considered whether some adjustment or charge of the assets to be distributed to individual children requires to be made under clause 16 in view of steps taken by the executors to provide for estate duties. These adjustments or charges, however, cannot themselves be decided upon until the value of the relevant properties has been "*finally assessed for estate duty purposes*". These latter words are those contained in clause 16 and it must be clear in the context of the practice referred to that they contemplated a final assessment made by the authorites rather than any provisional assessment which may have been made on figures supplied by the executors. It follows that the necessity or otherwise for adjustments or charges cannot be decided upon until the final assessment has been made and therefore that the date for distribution must wait upon that final assessment. From what has been said as regards the assessment procedure the conclusion appears inescapable that the date for distribution cannot be prior to, but on the contrary must be deferred until after, the final assessment, which in this case was not made until June 1958. Their Lordships are content to accept that, as the assessment figures were in fact communicated to the executors in August 1957, the date on which distribution could have been made can properly be taken to be 31st December 1957.

Their Lordships do not think it necessary to expand upon this particular objection for the reasons that they are fully satisfied with the careful analysis of the will and of the estate duty legislation made by the learned District Judge and with his conclusion. This objection therefore also fails.

To summarise :

1. The appellant was entitled to an appropriate share of the 1,000 Ordinary Shares in Associated Newspapers of Ceylon Ltd. referred to in the Note to Schedule I of the voluntary final account dated 16th July 1958; as well as of any bonus shares issued in respect of the said 1,000 shares since the death of the deceased. Such

appropriate share shall be taken to be one-fifth less any part of the said 1,000 shares (and bonus shares) which the appellant may have already received. The accounts are to be adjusted accordingly.

2. The Order of the Supreme Court is to be varied by directing that if the executors cannot deliver the painting of the Assembly Hall to the appellant, the executors shall pay him the value of the picture to be assessed by the District Court, the amount of such value to be paid by the executors personally and not out of the estate of the Testator. The proceedings will be remitted to the District Court for the purposes of such assessment.

3. As regards the other objections to the said voluntary account, the appeal is dismissed and the Order of the District Court affirmed.

Their Lordships will humbly advise Her Majesty accordingly.

The respondent executors are to pay to the appellant out of the estate of the deceased one-half of his costs of this appeal. The costs of the respondents are to be paid out of the estate of the deceased.

Appeal partly allowed.

1967 *Present: T. S. Fernando, J., and Tennekoon, J.*

THE SHELL COMPANY OF CEYLON LTD., Petitioner,
and H. D. PERERA and 5 others, Respondents

S. C. 527 of 1966—Application for the issue of a Mandate in the nature of a Writ of Certiorari

Industrial dispute—Intended retrenchment of a workman—Reference to an Industrial Court for settlement of proposed retrenchment—Time within which such reference should be made—Misdirection on this point—Effect—Award wrongly invalidating retrenchment of workman—Liability of award to be set aside in certiorari proceedings—“Error of law on the face of the record”—Retrenchment of workman pending inquiry—Award of compensation on that basis—Invalidity—Time within which an award should be made—Court acting in excess of jurisdiction—Effect—Industrial Disputes Act (Cap. 131), ss. 4 (2), 16, 23, 24, 31 F, 31 G, 31 H, 33 (1) (b), 33 (1) (d), 36 (5), 36 (6).

(i) Section 31 H of the Industrial Disputes Act enacts that where, before the expiry of two months after the date of notice given by an employer to a workman as required by section 31 F, an industrial dispute arising out of the intended retrenchment of the workman is referred for settlement, the employer shall not effect the retrenchment within a period of two months after the date of reference of such dispute for settlement. Therefore, if the reference for settlement is made after and not before the expiry of the two months after the date of notice given to the workman under section 31 F, section 31 H does not operate so as to prohibit the employer effecting retrenchment of the workman

within two months after the reference for settlement. If, on account of misdirection on this point by an Industrial Court to which the reference for settlement is made in terms of section 4 (2) of the Industrial Disputes Act, the retrenchment of the workman is wrongly held in the award of the court to have been invalid, the award is liable to be quashed by way of *certiorari* on the ground of error of law on the face of the record, if such error goes to the very root of the determination of the court.

(ii) Where the Minister, acting under sections 31 H and 4 (2) of the Industrial Disputes Act, refers to an industrial court for settlement an intended retrenchment of a workman by his employer, and the only question for determination is whether the proposed retrenchment is justified and to what relief the workman is entitled, the court would be acting in excess of its jurisdiction if it awards relief by way of compensation to the workman on the basis of his actual retrenchment, if such retrenchment is effected during the pendency of the inquiry. In such a case, the award is not one in respect of any "other matter" as contemplated in section 24. The actual retrenchment of the workman after the commencement of the inquiry is an entirely new industrial dispute and is not a matter relating to the original dispute over the proposed retrenchment. The actual retrenchment is not a "fresh matter relating to the dispute" within the meaning of that expression in section 36 (5) of the Industrial Disputes Act.

Obiter : "The inference is somewhat strong that, where a reference of an industrial dispute for settlement as contemplated in section 31 H of the Act has been made, the award must itself be made before the expiry of the two months specified in the said section which is the period of time during which the employer's common law right to retrench is suspended."

APPLICATION for a writ of *certiorari* to quash the award made by an Industrial Court.

E. F. N. Gratiaen, Q.C., with *C. Ranganathan, Q.C.*, *L. Kadirkamar*, *D. C. Amarasinghe* and *A. Paranavitane*, for the petitioner.

N. Satyendra, with *R. L. Jayasuriya*, for the 4th and 5th respondents.

Cur. adv. vult.

September 13, 1967.

The following is the judgment of the Court :—

The petitioner company (hereinafter referred to as the company) seeks in this proceeding an order from this Court quashing an award dated September 25, 1966 made by an Industrial Court composed of the 1st to the 3rd respondents awarding to the 4th and 5th respondents, employees of the company, the sums of Rs. 87,337/50 and Rs. 74,906/25 respectively to be paid by the company by way of compensation under section 33 (1) (d) of the Industrial Disputes Act (Cap. 131), together with a further sum of Rs. 5,000 to each of them as costs of the inquiry before the court. The award is one purporting to have been made in respect of an industrial dispute which had arisen between the company and the said 4th and 5th respondents, two of its employees, and which was referred

to the court for settlement by an order dated November 5, 1962 made by the Minister in terms of section 4 (2) of the said Industrial Disputes Act. The matter in dispute was described in the statement that accompanied the Minister's order as being "whether the proposed retrenchment of the 4th and 5th respondents is justified and to what relief each of them is entitled".—Documents A 22 and A 23.

An Industrial Court is required by section 24 of the Act to make after inquiry, such award as may appear to it just and equitable. Although this dispute was referred to the Court, as indicated above, on November 5, 1962, the award was made nearly four years later, on September 25, 1966. We were surprised to learn from counsel who appeared before us that there were as many as 180 days of inquiry, an expenditure of time and presumably also of money which appears to be out of all proportion to the demands of the actual dispute. The award eventually made is now attacked in this proceeding on several grounds specified in the petition, but learned counsel for the company confined himself to two of these grounds, viz. (1) error of law on the face of the award and (2) want or excess of jurisdiction.

It does not appear necessary to set down in any detail the facts as found by the industrial court. The 4th and 5th respondents were senior executives in the employment of the company and at the time of the dispute were holding high executive positions in it. The enactment by Parliament in May 1961 of the Ceylon Petroleum Corporation Act, No. 28 of 1961, resulted in the compulsory acquisition of some of the assets of the company, and the establishment of the Petroleum Corporation entailed a considerable reduction in the volume of business handled by the company. This reduction of business necessitated a reduction of the company's staff. That some reduction of staff became inevitable was not disputed by the 4th and 5th respondents, the dispute raised by them being that the company's proposal to retrench their services was not in conformity with accepted principles of industrial law and practice and constituted an unfair labour practice.

The industrial court found that the proposed retrenchment of the 4th and 5th respondents is not justified and amounts to an unfair labour practice and set down in its award three reasons for that finding. These were :

- (a) that the principle of "last come, first go" and the criterion of seniority in service implicit in that principle have not been followed by the company in choosing which of the executives to retain in the re-organised set up and which of them to retrench; that the company has failed to satisfy the court that its departure from the said principle is justified, and that this failure has resulted in the 4th and 5th respondents, two senior executives, being retrenched, while many who were junior to them were retained;

(b) that the company, in deciding whom to retrench and whom to retain, did not take the cases of all the executives, whether regionals or expatriates, together, but first decided on the selection and reduction of the expatriate executives ;

(c) that the company by effecting the retrenchment of the 4th and 5th respondents within two months of the date of reference of the dispute to the industrial court acted in contravention of section 31 H of the Act ; that this contravention constitutes a punishable offence and establishes the company's lack of good faith ; and that the purported retrenchment, being one prohibited by statute, is illegal and void.

Counsel for the company based his contention that there is here error of law on the face of the record mainly on the existence of reason (c) set out above. Section 31 F of the Act requires an employer who intends to effect retrenchment in respect of any workman to give (except in certain specified cases) to that workman at least one month's notice in writing of such intention. By two letters (A 17 and A 18), each dated August 28, 1962, the company gave to the 4th and 5th respondents notice under the said section 31 F of intention to terminate their respective services, the notice to expire on September 30, 1962. Each notice contained a statement that at the end of September, 1962 three months' notice (in accordance with the contract of service) will be given terminating the respective respondent's employment, this latter notice to expire on December 31, 1962. Section 31 G enacts that, subject to the provisions of section 31 H, no employer shall effect retrenchment in respect of any workman to whom he has given notice (under section 31 F) of intention to do so until after the expiry of two months after the date of such notice. In the case of the 4th and 5th respondents retrenchment was effected only after December 31, 1962, and it is apparent that there has been no contravention of the provisions of section 31 G.

Section 31 H enacts that where, before the expiry of two months after the date of the notice referred to in section 31 F, any industrial dispute which exists or is apprehended in consequence of the retrenchment intended in that notice is referred by the Commissioner or Minister for settlement (including a settlement by an industrial court), the employer giving such notice is prohibited from effecting the intended retrenchment within a period of two months after the date of reference of such dispute for settlement. The reference under section 4 (2) in this case was made by the Minister only on November 5, 1962 which is after and not before the expiry of the two months after the date of notice (August 28, 1962) stipulated in section 31 H. This section therefore did not operate so as to prohibit the company effecting retrenchment of the services of the 4th and 5th respondents on December 31, 1962. The award itself (see paragraph 5) recites that the company gave by letters dated August 28, 1962 one month's notice of intention to terminate the services of the 4th and 5th respondents. Counsel for the latter sought to argue that there is no

finding that the notice was received by the respondents on that day or at any rate before September 5, 1962, but this argument overlooked the statements A 25 and A 26 dated November 26, 1962 made by the respondents to the Industrial Court to which statements they attached copies of their letters of September 4, 1962 addressed to the company accepting the position that they had duly received the company's notices dated August 28, 1962. It follows, therefore, that reason (c) given by the industrial court (in support of its finding that the proposed retrenchment is not justified) that the company effected retrenchment in violation of section 31 H is clearly erroneous. The error appears to have arisen out of the court misdirecting itself as to the nature of the prohibition contemplated by that section. For the prohibition to attach the reference for settlement should itself have been made within the time specified in that very section. The industrial court has wrongly assumed that for the prohibition to attach the industrial dispute must have come into existence or have been apprehended within the time specified in that section.

Error of law on the face of the award itself being thus established, is the award liable to be quashed by way of *certiorari*? There can be little doubt that the error of law was on a point deemed material by the industrial court itself. To quote the award "the purported retrenchment is illegal and void, since it is made an offence and thus prohibited by the statute"; and again, "we can hold that since the purported retrenchment is no retrenchment in law, the two employees are to be treated as being still in service"; Counsel for the 4th and 5th respondents contended that, even if reason (c) constitutes an error on the face, two other reasons have been given by the court for its finding that the proposed retrenchment is not justified and that these reasons are valid and not open to criticism on the ground of error. Reason (b) was not the subject of any serious criticism by learned counsel for the company, and he stated expressly that the company had nothing to allege against the 4th and 5th respondents. Reason (a) was questioned by counsel as embodying an alleged rule or principle of industrial law which is not valid at any rate in the case of higher executive staff. Learned counsel for the 4th and 5th respondents, relying on a decision of the Supreme Court of India, however, argued that there is an ordinary industrial rule of retrenchment embodied in the principle "last come, first go" to be observed by the employer in the normal case. In this situation, had the court made an award of relief in respect of its finding that the proposed retrenchment is not justified, we would have felt compelled to consider whether the error (c) on the face of the record went to the very root of the determination of the industrial court or whether, this error notwithstanding, the award made by the court remained unaffected. Even where a retrenchment is effected or proposed to be effected in a perfectly lawful way, it is legally competent for the Minister to refer an industrial dispute arising from such a lawful retrenchment or proposed retrenchment to an industrial court for settlement. The court, however, refrained from making an award of relief in

respect of the proposed retrenchment which it had found was not justified. On the finding reached by it, the court rightly apprehended that the only award it could make was to declare that the company was not entitled to retrench the services of the 4th and 5th respondents. It did not, however, make that award because at the time it reached the finding four years had passed after the date of the making of the reference and retrenchment had already been effected. It could not *at that stage*, while holding that the intended retrenchment was unjustified, make any determination as to the terms subject to which the employer *may* retrench because, the retrenchment having already been effected, it was no longer possible to give the employer the choice between changing his mind about retrenching and of retrenching subject to terms. The inference is somewhat strong that, where a reference of an industrial dispute for settlement as contemplated in section 31 H of the Act has been made, the award must itself be made before the expiry of the two months specified in the said section which is the period of time during which the employer's common law right to retrench is suspended. Instead, the court went on to consider a fresh matter which, by an order made on February 8, 1964, it permitted the 4th and 5th respondents to raise. Notwithstanding objection on behalf of the company, this permission was granted in purported exercise of the discretion vested in an industrial court by section 36 (5) of the Industrial Disputes Act. The fresh matter so raised was "whether the termination of the services of the 4th and 5th respondents by the company is lawful and/or justified and to what relief, if any, they are entitled".

On the strength of its finding that the proposed retrenchment was not justified, the court went on to hold that the actual retrenchment was also not justified and has stated in the course of its written award that on this latter finding it could have either (a) held that the 4th and 5th respondents should be treated as being still in service, given their arrears of salary and continued in employment or (b) made an order for their re-instatement under section 33 (1) (b) of the Act. It, however, expressly refrained from making an award giving either of these two reliefs. Taking note of the situation created by the enactment of the amendment to the Ceylon Petroleum Corporation Act by Act No. 5 of 1963 and decisions of the Government in respect of the distribution of petroleum and petroleum products, it considered that an order for re-instatement or an order treating the 4th and 5th respondents as being still in service would not be just and equitable. Holding that the actual retrenchment was not justified, it awarded compensation to the two respondents in the sums already specified at the beginning of this judgment. Assuming, without deciding (since the matter was not argued) that compensation under section 33 (1) (d) can be awarded otherwise than as an alternative to reinstatement, it would be correct to assume that the court awarded compensation because it found the company guilty of wrongdoing and that its quantification of the compensation has some relation to the nature of the wrongdoing. Having found the company guilty of wrongdoing on three

grounds—two in the field of labour practices and one in the field of law—it is difficult to exclude the probability that the findings of wrongdoing in all these three respects did affect the quantification of the compensation. In that event the error of law made by the court would appear to be of a fundamental nature.

The company has contended before us that in permitting this fresh matter to be raised, and thereafter in making an award thereon, the industrial court acted without jurisdiction or in excess of its jurisdiction. In respect of this contention, after oral argument had been concluded on this application and we had taken time for consideration of our judgment, we received from counsel for the contending parties certain additional arguments in writing. It is true that the company did not initiate any proceedings to have the order of February 8, 1964 quashed when it was made, but this omission does not have the effect of an acquiescence in that order which, we have already noted, was made despite the company's objection to the application on behalf of the 4th and 5th respondents.

It has been submitted on behalf of the respondents that it would have been competent to the industrial court on the original reference as to the proposed retrenchment to have awarded the very relief that has now been awarded, and that the question of lack of jurisdiction in the court to make an award on the basis of actual retrenchment cannot depend on the point of time at which the award is made. Apart from observing that the point of time at which the award is made does seem to us to affect the question of the nature of the relief that can be awarded, we do not think it is a profitable exercise to go on to consider what hypothetical awards an industrial court would have had jurisdiction to make on the original matter in dispute, *viz.* the justifiability of the proposed retrenchment, where, as here, the court has expressly refrained from making an award thereon. The award in fact made was not in respect of the dispute as to the proposed retrenchment but on "the fresh matter" as to the actual retrenchment. The jurisdiction to grant relief in respect of the dispute referred to the court by the Minister was, as counsel for the company submitted, manifestly not exercised for the reason that the court felt that the only relief it could award in September 1966 was an order that the company was not entitled to retrench at the end of December 1962. We were impressed also by the argument on behalf of the company that, at the stage when there is yet only a proposal to retrench, an award of compensation or of gratuity as a relief in respect of that proposal cannot be said to be a "just and equitable" award. Such an award anticipates an uncertain future event. Compensation as if an actual retrenchment had been effected does not appear to us to be capable of being construed as an award in terms of section 24 of the Act in respect of the dispute as to the proposed retrenchment which was the only dispute referred to the court.

It remains for us to turn to a consideration of the question whether the award was one that the court had jurisdiction to make in respect of any

“other matter made under this Act” as contemplated in section 24. This involves two other questions, (i) whether in terms of section 36 (5) the fresh matter as to actual termination permitted to be raised was one “relating to the dispute”, and (ii) whether this fresh matter was one that could not have been raised at the commencement of the proceedings.

We would here like to make some reference to the second of these questions before dealing with the first. In paragraph 11 of the court’s award there is a statement to the effect that “on the 17th December 1962 written notice of this (the fresh matter) was given to the company under section 36 (6). We were also satisfied that this matter could not have been raised at the commencement of the proceedings by the two employees because their services were terminated after commencement of the proceedings”. It is difficult to understand how, if it was not possible for the employees to raise this matter at the commencement of the proceedings for the reason that their services were terminated after commencement of proceedings, they could have given notice of this matter on the 17th December 1962, also at a time when their services had not yet been terminated. In paragraph 4 of the award there is a statement to the effect that “proceedings commenced on 27th November 1962”. The notices terminating the services of the employees with effect from 31st December 1962 (documents A19 and A20) are dated 27th September 1962. These notices had been given and were in existence prior to the Minister making his Order of reference on 5th November 1962, and also prior to the giving by the employees on 17th December 1962 of the written notice of the fresh matter they intended to raise under section 36 (5). It seems to us that if the employees were in a position to give notice of the fresh matter on 17th December 1962 there was nothing to prevent their having raised that fresh matter on or about the 27th November 1962 at the commencement of the proceedings because all the facts necessary to raise that matter were in existence on the 27th November 1962 just as much as they were in existence on the 17th December 1962. The fresh matter was permitted to be raised only on 8th February 1964. It seems to us that the industrial court has by a wrong decision on a collateral question given itself a jurisdiction which it would not otherwise have had. While we have made reference in this way to this matter, we must state that learned counsel for the company did not on this ground challenge the jurisdiction of the industrial court to decide this fresh matter, and, in deciding the application before us, we accordingly refrain from taking into consideration the industrial court’s lack of jurisdiction for the reason above indicated.

In regard to the first question referred to in the above paragraph “the dispute” there contemplated is none other than the dispute referred to by the Minister in his order A22 of November 5, 1962. While it may be correct to say that section 36 (5) permits an industrial court to decide fresh matters, the section itself limits them to such fresh matters as are

related to the dispute already referred for settlement. It is useful to contrast this with the power of an industrial court as indicated by the terms of the proviso to section 23. That proviso recognises the power of such a court to admit and decide "any other matter which is shown to the satisfaction of the court to have been a matter in dispute between the parties prior to the date of the order of reference". Such other matter is not limited to a matter relating to the referred dispute. It may be noted in passing that the proviso to section 16 recognises a power even in an arbitrator to admit and decide other matters in dispute between the parties prior to an order of reference, but, unlike the power of an industrial court indicated in section 23, this power is limited to deciding matters arising out of or connected with the referred dispute. It will thus be seen that the power or jurisdiction of the arbitrator or of an industrial court recognised in the various sections of the Act is not a uniform one. Sections 16 and 23 do not themselves confer a power on the arbitrator and industrial court respectively; rather do they recognise the existence of such a power. In regard to section 36 (5), we are inclined to agree with the contention put forward on behalf of the company that this provision is intended for the purpose of dealing with procedure rather than to confer jurisdiction for the admission and decision of fresh disputes that emerge and are raised after proceedings have commenced.

In any event, jurisdiction to decide the fresh matter raised must be derived by the industrial court from section 36(5) and from no other provision of the Act. We agree with the submission made by the learned counsel for the respondents that the fresh matter that can be permitted would at least include a contentious matter between the parties and that the question whether it relates to the original dispute must be judged objectively. He submitted further that the fresh matter permitted in this case is connected with, arises from and is closely related to the dispute as to the proposed retrenchment and no relationship could indeed be closer. But there is much force in the contention on behalf of the company that the fresh matters that can be permitted under section 36(5) must at least be involved in the original dispute. Counsel on its behalf has pointed to the fact, as indicated already, that section 36 deals largely with matters relating to evidence etc. that can be introduced at an inquiry, indicating that sub-section (5) is intended for the purpose of dealing with a procedural matter rather than to confer jurisdiction for the decision of all fresh matters that may be in dispute after the proceedings have commenced. He contended that the actual retrenchment is an entirely new industrial dispute and different to the proposed retrenchment. While there may be a connection between the two disputes in that the actual retrenchment may be a consequence of the proposed retrenchment, we agree that the two disputes, as contended for the company, create different problems as to justifiability, relief and choice of forum. For the respondents it was suggested that section 36 (5) is intended, *inter alia*, to avoid the necessity of a multiplicity of references. It must, however, not be assumed that in so far as the Minister is

concerned, a reference is a mere formality. The desirability of making a particular reference, we venture to think, is carefully considered by a Minister having regard to such things like the demands of industrial peace and the availability of other remedies. If the Minister's concurrence could have been obtained, we apprehend there would have been no difficulty experienced in having this new dispute referred to the same industrial court before it considered the question of making an award on the original reference. The "fresh matter" admitted being that of the actual retrenchment was not, in our opinion, a matter relating to the original dispute which was over the proposal to retrench with effect from the end of December 1962, and therefore in making the award expressly on this fresh matter the industrial court acted in excess of its jurisdiction under the Industrial Disputes Act.

For the reasons we have set out above in this judgment, the award of September 25, 1966 is hereby quashed. Having regard to the most unfortunate course taken on this dispute over long years, and bearing in mind the relative capacities of the contending parties to incur further expenditure, we would make no order as to the costs of the application to this Court. Counsel for the company stated to us at the commencement of the argument that, whatever be the result of this proceeding, the company intends to abide by the offer originally made to the 4th and 5th respondents to pay a terminal benefit of twelve months' gross salary, which is itself an offer of a kind that has the approval of the Commissioner of Labour. We trust it is not in vain that we hope the 4th and 5th respondents will even at this somewhat late stage avail themselves of this offer and thereby put an end to a singularly unfortunate dispute.

(Sgd.) T. S. FERNANDO,
Puisne Justice.

(Sgd.) V. TENNEKOON,
Puisne Justice.

Application allowed.



1967 *Present : H. N. G. Fernando, C.J., and Samerawickrame, J.*

**KALUTARA TOTAMUNE MULTI-PURPOSE CO-OPERATIVE
SOCIETIES UNION LTD.**, Petitioner, and H. S. PERERA
and 3 others, Respondents

S. C. 3/66—Application for a Mandate in the nature of a Writ of Certiorari

*Co-operative Societies Ordinance—Section 53—Dispute relating to a contract of
employment—Reference to an arbitrator—Powers of the arbitrator.*

Where a dispute relating to a contract of employment between a co-operative society and an officer of the society is referred by the Registrar to an arbitrator, the arbitrator can allow only a remedy or relief due to a party under the law. Accordingly, the officer cannot be awarded any compensation if he is ordered to be retired for inefficiency on the ground of mismanagement. An arbitrator under the Co-operative Societies Ordinance does not have the same powers as a labour tribunal under the Industrial Disputes Act.

APPLICATION for a writ of *Certiorari*.

E. R. S. R. Coomaraswamy, with *Nihal Jayawickrema* and *H. A. Abeywardene*, for the Petitioner.

M. Kanagasunderam, Crown Counsel, for the 2nd Respondent.

October 6, 1967. H. N. G. FERNANDO, C.J.—

This is an application for the quashing of the award made under Section 53 of the Co-operative Societies Ordinance. Apparently the Society decided to dismiss the Administrative Secretary on the ground of mismanagement, and the Petitioner decided to refer the matter to the Registrar of Co-operative Societies who referred the "dispute" to an Arbitrator. The Arbitrator has found that the Administrative Secretary was guilty of mismanagement in that he had cashed a large number of cheques, totalling to an extremely high amount, for a customer of the Society. The Arbitrator himself states in the award that the Society cannot retain the services of a person who has been found guilty of such conduct as this, and has accordingly ordered that the Administrative Secretary be retired for inefficiency. Nevertheless, the Arbitrator has ordered that a year's salary be paid to him as compensation for loss of career. On an appeal to him the Registrar of Co-operative Societies who is the 2nd Respondent above-named ordered that he should be paid Rs. 6,300.

The dispute between the Society and its Secretary relates to a contract of employment between the Society and the Secretary, and if the Society was justified in terminating the contract on the ground of misconduct on the part of the Administrative Secretary, the latter can have no legal rights for any compensation. An Arbitrator under the Co-operative Societies Ordinance does not have the same powers as a Labour Tribunal under the Industrial Disputes Act. An Arbitrator can allow only a remedy or relief due to a party under the law.

We set aside the award in so far as it orders the Society to pay one year's salary to the 3rd respondent, as well as the order of the 2nd Respondent for payment of Rs. 6,300. The 3rd respondent must pay to the Society the costs of this application.

SAMERAWICKRAME, J.—I agree.

1967

Present : Tambiah, J., and Alles, J.

D. S. L. HEWAGE, Appellant, and Mrs. L. D. BANDARANAYAKE, Respondent

S. C. 386/66—D. C. Kandy, 7233/L

Rent Restriction (Amendment) Act, No. 12 of 1966—Section 4 (1) (c)—Eviction of tenant in contravention thereof—Right of the tenant to be restored to possession.

The defendant-appellant, a tenant, was illegally ejected by the execution of writ in contravention of the provisions of section 4 (1) (c) of the Rent Restriction (Amendment) Act, No. 12 of 1966.

Held, that the appellant should be restored to possession of the premises let.

APPEAL from an order of the District Court, Kandy.

T. B. Dissanayake, for the defendant-appellant.

No appearance for the plaintiff-respondent.

September 9, 1967. TAMBIAH, J.—

The Defendant-Appellant is a tenant of premises which is governed by the Rent Restriction (Amendment) Act No. 12 of 1966. This Act came into force on 10th May, 1966. The Plaintiff obtained decree for ejectment of defendant earlier and on 9th May, 1966, Proctor for the defendant filed a petition and affidavit and moved to stay execution of writ for a period of one year on certain conditions. This application was heard by the learned District Judge on the 13th of May, 1966, and was refused. Execution proceedings had not terminated on this date.

The Rent Restriction (Amendment) Act No. 12 of 1966 enacts that “proceedings shall not be taken for the enforcement of any judgment or decree in any such action as is referred to in paragraph (a) and where such proceedings have begun before the date of commencement of this Act, but have not been completed on the date of commencement of this Act, such proceedings shall not be continued.” (Vide Section 4 (1) (c) of Act 12 of 1966). It is clear that the proceedings of 9. 5. 66 in this case fall within the ambit of section 4 (1) (c) of the Rent Restriction (Amendment) Act No. 12 of 1966. Therefore the learned District Judge had no jurisdiction to refuse the application made by the defendant-appellant. Indeed, all proceedings thereafter are null and void. Unfortunately for the defendant he was ejected on 20.5.66.

Counsel for the appellant contends that the defendant should be restored to possession since he has been illegally evicted from these premises. In support of his contention he cites the case of 63 N. L. R. page 31. We agree with the contention of the appellant. We set aside the order of the learned District Judge and order that the defendant be placed in possession of the premises. There will be no costs of the appeal.

ALLES, J.—I agree.

Order set aside.



1967

Present : H. N. G. Fernando, C.J., and G. P. A. Silva, J.

THE ATTORNEY-GENERAL, Appellant, and
C. KODESWARAN, Respondent

S. C. 408/64—D. C. Colombo, 1026/Z

Public servant—Contract of employment with the Crown—Claim for arrears of pay—Unenforceability by action in the Courts—Relationship between the Crown and its servants—Inapplicability of Roman-Dutch Law—Applicability of English Law as altered or modified in Ceylon—Right of action when a public servant's terms of engagement are laid down by statute—Treasury Circular issued under compulsion of Official Language Act, No. 33 of 1956—Is it valid?—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 29, 46, 51, 57, 58, 60, 61.

A public servant in Ceylon has no right of redress by action in the Courts for a breach of any of the covenants and rules governing the salaries and conditions of service of public officers. This principle is operative except in respect of terms laid down by statute, and is unaffected, either expressly or by implication, by the provisions of the Ceylon Constitution.

“The right to sue the Crown in Ceylon upon a contract is not founded on Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply to Ceylon. It follows that the question whether the plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon.”

Plaintiff, who was appointed an officer of the General Clerical Service on 1st November 1952, was promoted on 1st October 1959 to the Executive Clerical Class on the results of a competitive examination, in which Sinhala or, in the alternative, Tamil was a compulsory subject. The plaintiff, who is Tamil by race, chose Tamil as his language subject. According to the Minutes applicable, the salary scales, cadre, and conditions of service were liable to alteration from time to time. On 4th November 1961, a new Treasury Circular No. 560 provided, on pain of suspension of increment falling due, that officers of the category to which the plaintiff belonged must pass a proficiency test in Sinhala.

The plaintiff did not present himself for the requisite examination, and the suspension of the increment which fell due on 1st April 1962 was ordered. He sought in the present action a declaration that the Treasury Circular No. 560 of 4th November 1961 was unreasonable and/or illegal and not binding on him, and that he was entitled to the payment of the increment. It was contended that the Circular was issued under the compulsion of the Official Language Act No. 33 of 1956 and that, inasmuch as the latter Act was *ultra vires* because it transgressed the prohibitions against discrimination contained in Section 29 of the Constitution, the Circular too was invalid.

Held, that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denied to the present plaintiff a right to sue for the increment alleged to be due to him under the Minutes. It was not necessary to consider the submissions as to the invalidity of the Official Language Act, because the plaintiff was not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant minutes and regulations provided for such a payment.

APPEAL from a judgment of the District Court, Colombo.

Walter Jayawardena, Q.C., Acting Attorney-General, with *H. Deheragoda*, Senior Crown Counsel, and *H. L. de Silva*, Crown Counsel, for the Defendant-Appellant.

C. Ranganathan, Q.C., with *S. Sharvananda, S.C.* *Crossette-Thambiah*, *D. S. Wijewardene*, *N. Kasirajah*, *K. Thevarajah*, *M. Underwood* and *L. A. T. Williams*, for the Plaintiff-Respondent.

Cur. adv. vult.

August 30, 1967. H. N. G. FERNANDO, C.J.—

The plaintiff was appointed an Officer of the General Clerical Class of the General Clerical Service on 1st November 1952, and on 1st October 1959 he was promoted to Grade II of the Executive Clerical Class of the General Clerical Service on a salary scale of Rs. 1,620 to Rs. 3,780 per annum with annual increments of Rs. 120. An increment of Rs. 10 per month fell due to the plaintiff on 1st April 1962, but on 28th April 1962 he was informed by a letter P2 from the Government Agent, Kegalle (at that time the Head of the Department in which the plaintiff was serving), that the increment had been suspended under the provisions of a Treasury Circular No. 560 of 4th December 1961. The plaintiff sought in this action a declaration that the Circular is unreasonable and/or illegal and not binding on the plaintiff, and that the plaintiff is entitled to payment of the increment which fell due on 1st April 1962. This appeal is from the judgment of the learned District Judge granting such a declaration.

At the time when the plaintiff was promoted to the Executive Clerical Class, the Minutes applicable in relation to recruitment, conditions of service, and salary scales were those published in the Gazette of October 1, 1955. Paragraph 5 of the relevant Minute provided that appointments to the Executive Clerical Class will be made from among members of the General Clerical Class (to which the plaintiff belonged until 1959) on the results of a competitive examination. The regulations and syllabus for the examination were set out in Appendix D to the Minute which prescribed three subjects of examination, i.e., (1) Accounts, (2) Regulations, procedure and office system, and (3) Sinhala or Tamil. The plaintiff, who is Tamil by race, chose Tamil as his language subject for the examination.

Paragraph 7 of the Minute provided that Officers in Grade II of the Executive Clerical Class must pass an examination in National Languages prescribed in Appendix C before they proceed beyond the Efficiency Bar at the stage of Rs. 3,180. Appendix C required clerks of Sinhala, Tamil or Moor parentage to pass in one language. Thus under Appendix C the plaintiff could have chosen Tamil as his language subject for this examination as well.

I must note here that the Minute clearly states that the salary scales, cadre, and conditions of service are liable to alteration from time to time.

On 4th December 1961 a new Treasury Circular No. 560 provided that Officers of the category to which the plaintiff belonged must pass a proficiency test in Sinhala. According to this Circular a Tamil officer (as the plaintiff is) is required to pass a test in Sinhala at 3rd standard level within one year from 1st January 1961, a test at 5th standard level within two years, and at J. S. C. standard within three years.

The Circular provided for suspension of an increment falling due after February 17, 1962 in a case of an officer failing the test. The plaintiff did not present himself for the requisite examination, and the suspension of his increment which fell due on April 1, 1962 was ordered in pursuance of the Circular on the ground that he had not passed the first of the language tests prescribed in the Circular.

One of the grounds on which the plaintiff's action was resisted by the Attorney-General is that a public servant in Ceylon has no right to sue the Crown for the recovery of wages claimed to be due for service under the Crown. This defence, which was rejected by the learned trial Judge, raises questions of great importance and difficulty, and the Court is much indebted to Counsel for the full and able arguments presented at the hearing of this appeal.

The first question to be decided is whether the relationship between the Crown and its servants in Ceylon is regulated by the Roman-Dutch Law, or else by the English Law as altered or modified in its application in this country. The contention that the Roman Dutch Law applies is supported by two early decisions of this Court which are reported in Ramanathan's Reports 1863-68.

The earlier of the two decisions (*Jansz v. Tranchell*¹) was in a case in which the question arose whether the salary of a public servant could be seized in execution of a decree against him. The Court there stated that it is certain, and that the Queen's Advocate admitted, that the salary of a public officer, when his service has been properly performed, is due to him as a debt. The Court proceeded to consider the Roman Dutch Law regarding the liability to seizure of the salary of a public servant, and held that the salary was seizable, but only if other assets of the debtor were not available to satisfy the decree, and if a Court in its discretion regarded the seizure as not being contrary to the public interest in the circumstances of a particular case. The order ultimately made was that the salary of the public servant concerned was not, in the circumstances, liable to seizure.

Thus the Roman-Dutch Law was held applicable to the question whether the salary is seizable. But it is not clear from the Judgment on what basis the Court thought it certain that the salary is a debt due

to a public servant. There is no statement that this is a principle of Roman-Dutch Law or else of English Law. Nevertheless, it is a fair implication that the Crown did not in this case contend that no action lies for the recovery of a public servant's salary.

The later decision in *Fraser's case*¹ was in a suit against the Queen's Advocate, for the recovery of balance salary due to the plaintiff as Postmaster of Galle and as a packet agent, on the ground that he had been wrongfully dismissed from those offices. The first of these offices was held under the Ceylon Government, and the second under the Imperial (British) Government. The action was dismissed by the Supreme Court on the ground that the plaintiff held his offices during pleasure, and that he had no right of action at all, so far as the (Ceylon) Postmastership was concerned, as to anything that happened after the date of his dismissal, because it had been shown that he had in fact been paid his salary up to that date.

Nevertheless, in considering the plaintiff's claim for his salary as the holder of an office under the Imperial Government, the Court drew a distinction between the respective rights of such an officer and of one employed under the Ceylon Government. The Court was of opinion that whereas an action would not lie at all in the former case, an action for earned salary would lie against the Queen's Advocate in the latter case. The entire relevant passage in the Judgment has to be cited here :—

“ We humbly consider that Her Majesty's predecessors and Her Majesty have been graciously pleased to lay aside, as to this island, part of the prerogative of the Crown as to immunity from being sued. By proclamation of the 23rd September 1799, it was amongst other things published and declared that the administration of ' justice and police in the settlements and territories in the Island of Ceylon with their dependencies, shall be henceforth and during Her Majesty's pleasure exercised by all courts of jurisdiction, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such other deviations and alterations as shall by these present or by any future proclamation and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice, to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published.' ”

“ Afterwards, the Ordinance No. 5 of 1835, (which was allowed and confirmed by Her Majesty) repealed parts of the said proclamation, but expressly reserved and retained so much of it as doth publish and declare that ' the administration of justice and police within the settlements then under the British dominion and known by the designation of the maritime provinces should be exercised by all the courts of judicature, civil and criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces.' ”

“ The Ordinance of 1835, itself expressly re-enacts this, and it uses the following words, ‘ which laws and institutions it is hereby declared are and shall henceforth continue to be binding and administered through the said maritime provinces and their dependencies, subject nevertheless to such deviations and alterations as have been or shall hereafter by lawful authority be ordained.’

“ We humbly consider that by these declarations of the royal will, Her Majesty’s subjects in this island, who had or might have any money due to them from the local Government for wages, for salary, for work, for materials, in short for anything due on an obligation arising out of contract, were permitted to retain the old right given by Roman Dutch Law to sue the advocate of the fiscal, now styled the Queen’s Advocate, for recovery of their money. And if the present plaintiff could have shown that any money was due to him under his colonial appointment as Galle post-master, he might have maintained this action. He might have done so in respect of salary due for any period during which he actually served, and also in respect of the further period for which he, still holding the appointment *de jure*, was ready and willing to serve, but was prevented from serving by the wrongful act of his employer.”

This statement of the law of Ceylon cannot be regarded as being merely *obiter*. It is clear that, if any salary earned by the plaintiff prior to the date of his dismissal had not in fact been paid to the plaintiff, the Court would have given judgment for the plaintiff for the unpaid amount ; this on the basis that a right to sue for salary had existed under the Roman-Dutch Law.

The general question of the right of the subject in Ceylon to sue upon a contract with the Crown was considered in the case of *Jayawardena v. Queen’s Advocate*¹. The Court there stated that “ the right to sue the Crown in the person of the Queen’s Advocate for claims arising *ex contractu* has not only been upheld by the Courts of the Colony, but has been recognised by the Legislature in several enactments ”. Reference was thereafter made to Ordinances No. 9 of 1852, No. 7 of 1856 and No. 11 of 1868, all of which contemplated the possibility of suits upon contract by private parties against the Queen’s Advocate. There followed the following observations :—

“ Under these circumstances, we think it too late, at this day, to contest in this Court the validity of this practice. We are bound by the previous decisions of this Court, particularly by the considered decision of the Collective Court in the case of *Fraser v. The Queen’s Advocate*. To hold at this date, for the first time, that a practice, which has so long been sanctioned by the Courts and acquiesced in by the Government, is bad in law, and cannot be sustained, would necessarily create widespread confusion and inconvenience, practically amounting in many cases to injustice. If the precedents and decisions upon which this Court acts are wrong, it must be left to the Court of appeal to set us right.

It was urged by the Queen's Advocate that the practice of suing the Crown is an attempt to impugn the royal prerogative, by virtue whereof no suit or action can be brought against the sovereign ; and such, no doubt, it would be if the prerogative has not been waived in this respect. This Court in *Fraser's case* humbly expressed an opinion that it had been so waived, and we humbly venture to share that opinion. It should be observed that the question is, after all, one purely of procedure. If a judgment be obtained against the Queen's Advocate, no execution can issue either against the Queen's Advocate personally or against the Crown. See Marshall, p. 75 ; Thomson's Institutes, p. 12. A judgment in an action or suit *ex contractu* against the Queen's Advocate gives little, if anything, more than a successful petition of right would do in England. It is merely, as it appears to us, a mode of procedure by which a subject is able to prefer and substantiate his claim against the Crown. Compliance with the claim when substantiated must still be, as we take it, a matter of grace. Petitions of right are now in England prosecuted as ordinary actions ; and as a matter of convenience, we see no objection to parties preferring their claims against the Crown here in the form of a suit against the Queen's Advocate."

The learned Acting Attorney-General in his argument before us suggested that *Fraser's case*, while rightly deciding that the Crown could be sued upon a contract in Ceylon, was wrong in basing the decision on the Roman-Dutch Law. He further argued on the authority in the concluding passage cited above from *Jayawardena's case* that the waiver of immunity from suit by the Crown in Ceylon consisted merely of the acknowledgment of a right to sue the Crown in lieu of the right under English Law to proceed by way of a petition of right. His argument, in my opinion, gains support from the observation in *Jayawardena's case* that a suit *ex contractu* against the Queen's Advocate appears to be merely a mode of procedure by which the subject is able to prefer his claim, and is thus the equivalent of the English Petition of Right.

Shortly after *Jayawardena's case*, there was decided in the Privy Council the case of *Siman Appu v. Queen's Advocate*¹, in which it was held that a suit upon a contract can be instituted in Ceylon against the Queen's Advocate as representing the Crown. Their Lordships considered the question whether the Roman Dutch Law entitled a subject to sue an Officer of Government on behalf of the Government. The note of the argument of Counsel in that appeal shows that *Fraser's case* (as reported in Creasy's Reports p. 10) and *Jayawardena's case* (incorrectly cited as *Fernandez v. The Queen's Advocate*) were considered in the discussion of this matter. But their Lordships concluded their consideration of the question with these observations :—

"There certainly seems no more antecedent reason why the Counts of Holland should be exempted from suit through their officers than

existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed.”

“ But whatever speculations may be made upon these points their Lordships cannot advise Her Majesty that such was the Roman-Dutch Law, unless it is shewn to them that it was so. And neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject.”

It appears to me that the true *ratio decidendi* of *Siman Appu's case* can be deduced from the following passages of the judgment :—

“ That a very extensive practice of suing the Crown has sprung up is certain. In his judgment in the case of *Fernando*, which was decided immediately before the present case came under review, Cayley, C. J., says, ‘The practice has been recognised in many hundreds of decisions, and long acquiesced in by the Crown, and so far as I am aware, has not till now been called in question.’ It was recognised by the judgment of the Court in *Fraser's case*, decided in the year 1868.”

“ In Mr. Justice Thompson's Institutes of the Laws of Ceylon, after referring to the English petition of right, he says that, the Ceylon Government having no Chancellor, a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. He then points out that, except in land cases, this action gives little more than is given by the petition of right, for no execution can issue against the Crown or against the Queen's Advocate.”

“ It is then certain that prior to 1868 there was such an established practice of suing the Crown that the legislature took it for granted and regulated it. The same state of things must have existed prior to 1856, for the Ordinance of 1868 is only a re-enactment of an earlier Ordinance of 1856. Earlier Ordinances still have been referred to, but their Lordships do not discuss them, because, though they speak of suits in which the Crown is defendant, and though it is the opinion of the Supreme Court, and is probable, that they refer to claims *ex contractu*, it is not clear that they do so.”

“ Whatever may be the exact origin of the practice of suing the Crown, it was doubtless established to avoid such glaring injustice as would result from the entire inability of the subject to establish his claims. And finding that the legislature recognised and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land.”

The reference in the first of the passages just cited to the judgment in *Fraser's case* shows that their Lordships relied on that case, not for the proposition that the Proclamation of 1799 (now chapter 12 of the Revised Edition 1956) had waived the Crown's immunity from suits upon contract, but instead only for the fact that this Court had often recognised the practice of suing the Crown. The judgment of Cayley, C.J., in *Jayawardena's case* (incorrectly referred to as that of *Fernando*) was relied on in the same way.

There is accordingly the highest judicial authority, in the decision of *Siman Appu's case* in 1884, to the effect that (as stated in the head note) : "There is no authority for saying that the Roman Dutch law of Holland, which was in force in Ceylon at the date of its conquest by the British, and has not since been abrogated, empowered the subject to sue the Government. Instead the right to sue exists because there had been a very extensive practice of suing the Crown which was recognised by the Legislature and such suits are now incorporated into the law of the land."

The learned Acting Attorney-General has suggested certain other considerations which tend to support the view that the Proclamation of 1799 was not intended to make the Roman-Dutch Law applicable to the relationship between the Crown and public servants in Ceylon. The first is that the Proclamation, in referring to the Civil and Criminal Jurisdiction of the Courts, was not intended to cover matters which are the subject of Constitutional or public law, and that the relationship between the Crown and its servants is such a matter. I do not find it necessary to decide the point thus raised, and am content to observe that an argument which invokes the Proclamation must logically include the proposition that even the right of dismissal at pleasure existed in Ceylon by virtue of Roman-Dutch Law, and not as a principle of English Law. But I see much substance in the other suggestion that, in regard to so fundamental a matter as the relationship between the Crown and its servants (many of whom must at the time have been British by birth and race), the Proclamation could not have intended that such a matter would be regulated otherwise than by the law applicable in Britain and in other territories of the British Crown. The explanation given in Thompson's Institutes that a suit against the Government had been permitted of necessity and in lieu of the English petition of right, because the Ceylon Government had no Chancellor, is one which is in all the circumstances most acceptable.

When this Court in *Fraser's case* assumed that the wages of a public servant in Ceylon, when earned, are a debt due to him, the Court in so doing did not consider the question whether this principle was a matter of Roman-Dutch Law or else of English law. But it is clear from the judgment that the Court did recognize that the power to appoint public officers in Ceylon was a power derived from, and exercised on behalf of, the Crown ; the judgment in this connection refers to the powers of appointment granted to the Governor by his letter of appointment

(presumably Letters Patent) and to Colonial Rules and Regulations (p. 321 Ram. 1863-68). The grant of such powers by the British Sovereign must fairly be presumed to have been an exercise of the Royal Prerogative under the law of England, and not to any authority of a Sovereign under Roman-Dutch law; if this were otherwise, the Court in *Fraser's case* could not have held that the power to dismiss a public officer at pleasure existed in Ceylon without first deciding that such a power existed in Roman-Dutch law. The efficacy or validity of appointments made by the executive in Ceylon was therefore referable to the law of England; and it follows in my opinion that the nature and legal effect of the relationship constituted by such appointments had also to be determined by reference to English law.

For these reasons I would hold, applying the judgment of their Lordships of 1884, that the right to sue the Crown in Ceylon upon a contract is not founded on the Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply in Ceylon. It follows that the question whether the plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon.

The question whether under English law a Civil Servant has the right to sue for earned wages, whether by way of a petition of right or otherwise, has been referred to by Judges and text writers as one of much doubt and difficulty. But the case of *High Commissioner for India v. Lall*¹ is at the least a definite pronouncement on the law on this question as applicable in British India. In that case Mr. Lall, who had been a member of the Indian Civil Service, was dismissed from service by the appropriate authority, and he claimed in the action a declaration that his removal was *ultra vires*, that he was still a member of the Indian Civil Service, and that as such he was entitled to all rights secured to him by the covenant rules and regulations issued from time to time by the appropriate authorities. After considering the provisions of s. 240 of the Government of India Act 1935, their Lordships held that there had been a breach of a provision of s. 240 which required that a civil servant shall not be dismissed unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him and that the purported removal from office of Mr. Lall was void and inoperative. They accordingly granted a declaration to that effect and to the effect that Mr. Lall remained a member of the Indian Civil Service at the date of the institution of his action.

Their Lordships thereafter considered a submission for Mr. Lall that he was entitled to recover in the action his arrears of pay from the date of the purported order of dismissal up to the date of his action. They said that "it is unnecessary to cite authority to establish that no action

¹ (1948) *A. I. R. (Privy Council)*, p. 121.

in tort can lie against the Crown and therefore any right of action must either be based on contract or conferred by Statute". Reliance was then placed on a judgment of Lord Blackburn in the Scottish case of *Mulvenna v. The Admiralty*¹ in which the matter had been discussed as follows :—

"These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant (see (1920) 3 K. B. 663, 25 R. 112 and other cases there referred to). It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a Civil Court of Justice, and that their only remedy under their contract lies in an appeal of an official or political kind."

Mulvenna's case itself concerned the question whether the salary of a civil employee of the Admiralty could be arrested in the hands of the Commissioners of the Admiralty at the instance of a person holding a decree against the employee for the payment of a sum of money. Although the Court, including Lord Blackburn, did refer to earlier decisions in which there had arisen the particular question whether the salary of a civil servant is attachable, it seems clear that Lord Blackburn's own conclusion was based firmly on the primary proposition that a civil servant has no right to remuneration which can be enforced in a civil Court. After the passage I have already cited, there occur in the judgment the following observations :—

"It further appears to me that, if this conception of the effect of public policy on the contract itself had been developed earlier, it would have led to the same conclusions in the numerous cases to which the Lord Ordinary has referred as were reached on different

¹ (1926) S. C. 842.

and, in some cases, on somewhat unsatisfying grounds. It would also have avoided the necessity for several statutory provisions applicable to the pay of particular services which must now be regarded as merely declaratory of the common law."

Their Lordships in *Lall's case* referred to the provisions applicable to public servants in India prior to the Government of India Act 1935 and to the relevant provisions of the Government of India Act 1919. Section 96B of that Act had declared that a civil servant " holds office during His Majesty's pleasure, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed ". Under sub-section (2) of s. 96B the Secretary of State for India in Council had been empowered to make rules for regulating *inter alia* the conditions of service, pay and allowances, and discipline and conduct, of the Civil Services of India. One such rule had provided certain conditions precedent to the dismissal of a civil servant such as : that he must be afforded an adequate opportunity of defending himself, that charges should be framed and communicated to the person charged, that a written defence must be entertained if made, and that an enquiry must be held if the person charged so desires. These provisions were the subject of consideration in the Privy Council in 1938. In the case of *Rangachari*¹ their Lordships held that the provision in s. 96B (1) itself which prohibited the dismissal of an officer by any authority subordinate in rank to the authority that appointed him was peremptory, and that a dismissal purporting to be made in violation of that provision was void and inoperative. But in *Venkata Rao's case*² decided on the same day, their Lordships rejected the contention that a dismissal in breach of *the rules made under s. 96B* could give rise to a right of action by the dismissed officer. Reference was made to an observation in *Gould's case*³ :—

"The argument for a limited and special kind of employment during pleasure, but with the added contractual terms that the rules are to be observed is too artificial and far-reaching."

Their Lordships regarded " the terms of the section (96B (2)) as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule Their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts by action. To give redress is the responsibility of the Executive Government." Accepting these propositions, the Privy Council decided in *Lall's case* that a public officer had no right to claim arrears of pay under his covenant, or in other words that he had no contractual right enforceable by action.

¹ (1937) *A. I. R. (P.C.)* 27.

² *Idem* p. 31.

I must note at this stage that at least until the coming into effect of the Ceylon State Council Order in Council, 1931, and perhaps even until the coming into operation of the Ceylon Constitution Order in Council 1946, the position of public servants in Ceylon was regulated in a manner similar to that which had obtained in India under the Government of India Act, 1919. Their Lordships in *Venkata Rao's case* referred to the fact that s. 96B, in sub-section (5), reaffirmed the supreme authority of the Secretary of State over the Civil Service, and relied on this fact for the opinion that rules made under that section did not confer rights enforceable by action in the Courts. A similar supreme authority was formerly vested in the Secretary of State for the Colonies over the public services of Ceylon. For much the greater period of British rule in Ceylon, the right to dismiss at pleasure was implied and recognised in the case of the public service of Ceylon, and the pay and conditions of service were regulated by, or under delegated authority from, the Secretary of State. Such rules and regulations, as also the Pension Minute applicable to the public service, were not statutory enactments, nor (unlike the Indian Rules after 1919) were they even made under empowering statutory provisions.

It is clear to me for these reasons that prior to the operation of the Ceylon Constitution Order in Council, 1946, the nature of the rights of a public servant in Ceylon was similar to that of a public servant of India, and that upon the reasoning in the Indian decisions cited above, a public servant in Ceylon had no right of redress by action in the Courts for a breach of rules and regulations prescribing the salaries and conditions of service of public officers. It would seem to follow therefore that the grounds of the decision in *Lall's case* in particular, holding that a public servant had no right to sue for his wages, were applicable also in the case of members of the public services of Ceylon.

Counsel for the plaintiff in the present appeal referred to several decisions of English and Australian Courts in support of his argument that the Scottish case of *Mulvenna* was wrongly decided, and that accordingly the decision of the Privy Council in *Lall's case* should not be followed. Certain of the English and Australian decisions, it was urged, did acknowledge the right of a public servant to sue for his earned wages. I must refer even briefly to some of these decisions.

In the case of *Carey v. The Commonwealth*¹ the Court did hold that a public servant did have the right to sue for earned remuneration. But the only precedent relied upon by the Judge in *Carey's case* in support of this alleged right was the decision in *Williams v. Howarth*². The report of this latter case, however, shows that the plea was never taken in argument that the Crown could not be sued for wages. The plea if taken would undoubtedly have succeeded, for the suit was one for wages claimed by a member of the Armed Forces of Australia who had served with the British Imperial Forces in South Africa. The only question

¹ 30 Comm. L. R. 132.

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² (1905) A. C. 551.

decided was whether payments made by the Imperial Government should be taken into account in determining whether the plaintiff had received the wages payable to him by the Australian Government. The case should not, I think with respect, have been regarded as authority for the proposition that a military or civil servant of the Crown had a right to sue for earned wages.

The case of *Lucy v. The Commonwealth*¹ was much relied on by Counsel for the plaintiff in support of the alleged right to sue the Crown on a contract of employment. The plaintiff in that case had until March 1901 held office in the Postal Department of South Australia. At that stage the Department was taken over by the Commonwealth and the plaintiff was then transferred to the Commonwealth Public Service. In 1919 the plaintiff was notified that he would be retired from the Commonwealth Public Service upon attaining the age of 65 years, and in May 1919 he was actually so retired. The plaintiff claimed that under a South Australian Act of 1874 he had acquired a right to retain office until death or removal in terms of that Act and that he had been wrongfully retired at the age of 65 years. Section 60 of the Commonwealth Public Service Act provided that an officer transferred to that Service will retain all the existing and accruing rights which he had previously as a member of the South Australian Service, and it had been held in an earlier case that this Section (despite inconsistent provision in section 74 of the Act) preserved to such an officer the right to remain in service after attaining the age of 65 years.

In these circumstances the plaintiff claimed (a) a declaration that he had been wrongfully removed from service on 11th March 1919, (b) a declaration that he was entitled to retain office until his death or until his office was determined in accordance with the South Australian Act of 1874, and (c) damages for wrongful removal or dismissal. A case stated for the opinion of the High Court, after setting out the relevant facts, submitted the question "whether the damages to which the plaintiff is entitled should be measured and ascertained by any one or more of the following considerations", and thereafter invited the Court to determine whether or not certain specified matters should be taken into account in the assessment of damages.

Despite references in the judgments to the *contract* which the plaintiff had as a member of the Public Service, it seems to me that the question whether a public servant had a right to sue the Crown for his wages was not in fact disputed in this case, for, as I have just stated, the Court was only invited to lay down the measure of damages as for a dismissal from service which was admitted to be unlawful. Indeed the note of the argument of the Counsel for the plaintiff contains this passage:—"the dismissal of the plaintiff was a breach of his statutory right and not a breach of contract; whichever it is, if the plaintiff's remedy is damages, the

¹ 33 Comm. L. R. 29.

measure is the same". I must refer however to an observation in the judgment of Higgins J. that "this position would be beyond question in a case of ordinary contract between employer and employee; and in my opinion the relation between the Commonwealth and the officer is a relation of contract (cf. *Williams v. Howarth*)". Higgins J. was the same Judge who had decided the earlier case of *Carey*, and I have already stated my opinion that he had wrongly relied on the decision in *Williams v. Howarth*.

It seems to me that *Lucy's case* is not substantially different in principle from that of *Rangachari* decided by the Privy Council in 1937. In each case the plaintiff had a right of action because he had been dismissed in breach of statutory provision, and not because he was entitled to contractual rights.

The nature of service under the Crown in Canada was considered in the judgment of the Privy Council in the case of *Reilly v. the King*¹. The suppliant had in 1928 been appointed a member of the Federal Pension Appeal Board for a period of five years. In May 1930 the pension statutes were amended and in consequence the Pension Appeal Board was abolished, and a new Tribunal established in its place. Mr. Reilly was not appointed to the new Tribunal, and in October 1930 he was requested to vacate the premises which he had occupied in pursuance of his office. The following observations of Lord Atkin are important for present purposes:—

"Both Courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but apparently on different grounds. Maclean J. concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract: and the foundation of the petition failed. Orde J.'s judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.

Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould v. Stuart*. That was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause.

¹ (1934) *A. C.* 176.

In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined."

The dicta of Lord Atkin in *Reilly's case* received careful examination by the Supreme Court of South Africa in the case of *Sachs v. Donges*¹ in which it was sought to equate the case of the revocation of a passport to the Crown's right to terminate at pleasure the employment of a public officer. Referring to Lord Atkin's statement that "if the terms of the appointment definitely prescribe a term, and expressly provide for power to determine for 'cause', it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded", two Judges of the South African Court thought it clear that Lord Atkin only contemplated cases of appointments under a statutory power, where the statute itself by implication excluded the prerogative right of dismissal at pleasure. Van den Heever, J.A. said in this connection:—"Once it is established that an act is the exercise of discretionary executive power not regulated by statute *cadit quaestio*, the subject's redress, if any, is political, not judicial." Centlivres J. expressed his disagreement with the construction placed on Lord Atkin's dictum in the case of *Robertson v. Minister of Pensions*² where Lord Denning had stated that "in regard to contracts of service, the Crown is bound by its express promises as much as any subject". Let me with great respect state my own reasons for disagreeing with that construction.

In the passage cited above, Lord Atkin first referred to a judgment in which Orde J. in the Canadian Supreme Court, seemed "to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure". Lord Atkin then expressed inability to accede to this view of the contract, *if contract there be*. His subsequent statement, that, in certain cases, "any implication of a power to dismiss at pleasure is excluded", is explained by his reference to the cases of "numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause". This reference read together with the reference to *Gould v. Stuart*³, indicate that Lord Atkin had in mind only cases in which the power to dismiss at pleasure

¹ (1950) (2) *S. A. L. R.* 265.

² (1948) 2 *A. E. R.* 767.

³ (1896) *A. C.* 575.

becomes excluded by contrary provision in a statutory power of appointment. Had he intended to say that the power could be excluded *by contract*, he would surely not have failed to refer to *de Dohse v. Reg*¹ and to *Dunn v. Macdonald*², both cases in which the contrary opinion had been strongly expressed.

In *Gould v. Stuart* itself, Lord Hobhouse, in delivering the judgment of the Privy Council observed that “servants of the Crown hold their offices during pleasure ; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service”. But the case itself concerned an office the tenure of which was regulated by the Civil Service Act of New South Wales, the provisions of which were inconsistent with the power to dismiss at pleasure. The power of dismissal being thus excluded by statute, it was not material to decide the precise base on which the power rested. Moreover, it is not easy to understand why an arbitrary power of dismissal is to be implied in a contract of employment except upon a supposition that such a power exists *aliunde*. And if such a power does exist, it is only the prerogative to which the power is fairly referable. With much respect, therefore, I doubt whether the dictum of Lord Hobhouse can now be regarded as authority for the proposition that the terms of the engagement of servants of the Crown impose on the Crown contractual obligations, the breach of which may properly be the subject of dispute in Petitions of Right or (in Ceylon) in suits against the Attorney-General.

I do not consider it useful to refer to other cases cited during the argument, many of which were concerned with alleged wrongful dismissals of servants of the Crown. It suffices for me that we have not been referred to any decision holding, despite objection directly taken on behalf of the Crown, that a Petition of Right or civil suit lies against the Crown to enforce the performance of the terms of the engagement of a servant of the Crown, not being terms laid down by statute. The Ceylon decision in *Fraser's case* is thus quite exceptional.

The decisions of the Privy Council in the appeals from India lay down clearly the principle that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denies to this plaintiff a right to sue for the increment alleged to be due to him under the Minutes.

There remains one possibility to which I must advert, namely whether the provisions of the Ceylon Constitution have affected the operation in Ceylon of the principle formerly applicable.

¹ (1897) 66 L. J. Q. B. 422.

² (1897) 66 L. J. Q. B. 423.

Section 57 of the Order in Council declares that (with some exceptions not here relevant) every person holding office under the Crown holds the office during Her Majesty's pleasure. Sections 58 and 60 establish a Public Service Commission, and vest in the Commission "the appointment, transfer, dismissal and disciplinary control of *public officers*", i.e., of persons holding a paid office as a servant of the Crown in respect of the Government of Ceylon (*vide* s. 3, definition). Section 61 authorises the Commission to delegate any of its powers, subject to the right of appeal to the Commission itself. Thus the powers of appointment and dismissal, which were those of the Sovereign in early English law, are now exercisable by the Commission. It is not disputed that the plaintiff in this case is a public officer within the meaning of these provisions.

Neither in Part VII of the Order in Council, under the title "The Public Service", nor in any other provision of the Order, is there express statutory declaration vesting in any specified authority the power to prescribe the salaries and conditions of service of public officers. But Part V, which is entitled "The Executive", vests in Ministers the subjects and functions which may be assigned to them by the Prime Minister. The subject of "the public service" has been so assigned to the Minister of Finance, and I have no difficulty in assuming that the Minutes and Circulars referred to in this case, which were issued by the Secretary to the Treasury or his Deputy, were in fact issued under the authority of the Minister of Finance. Under s. 51, the Secretary to the Treasury, who is also the Permanent Secretary to the Ministry of Finance, exercises control over the departments of Government in charge of his Minister and is thus the head of the Public Service, subject only to the special powers reserved by s. 60 to the Public Service Commission. The Minister of Finance, or his Permanent Secretary, in the exercise of their powers of control and administration of the public service, have necessarily to adhere to decisions of Parliament, particularly those decisions which are incorporated in the Appropriation Acts which appropriate funds for various public purposes; they have also to adhere to decisions of the Cabinet, which under s. 46 of the Order in Council is charged with the general direction and control of the government of the Island. There has been no suggestion during the argument of this appeal that the act of the plaintiff's head of department in withholding the plaintiff's increment in any way infringes or usurps powers which under the Constitution are vested in Parliament, the Cabinet, the Public Service Commission, or the Minister of Finance. The head of department acted under the provisions of a Circular issued by an authority fully competent to issue it.

I find nothing in the relevant provisions of the Constitution (which have just been examined) which can in any way be construed as altering or affecting, either expressly or by implication, the principle that the terms of a public officer's engagement to serve the Crown in Ceylon do not entitle him to institute a suit to recover earned wages or to enforce the

terms of his engagement. The case of *Silva v. The Attorney-General*¹ is easily distinguishable, for we are not here concerned with anything resembling the dismissal from service of a public officer by an authority not legally competent to dismiss him.

Counsel for the plaintiff argued that, although the Crown or the Executive Government in Ceylon has a power freely to alter the terms and conditions of service prescribed in the relevant minutes in force at the time of the plaintiff's promotion to the Executive Clerical Class, that power was unlawfully exercised when the Treasury Circular No. 560 was issued in December, 1961. The ground of this argument was that the Circular was issued for the purpose of the implementation of the Official Language Act, No. 33 of 1956. Referring to the terms of the Circular itself, and to those of a Cabinet memorandum containing directions as to the implementation of that Act, Counsel submitted that the Treasury Circular had to be issued under the compulsion of the Act ; and, relying upon certain decisions in the United States, he further submitted that anything done under the compulsion of an invalid statute is itself invalid, despite the fact that what is done may be valid if done in the exercise of some ordinary contractual right or other power.

These submissions regarding the Treasury Circular depend on Counsel's other submission that the Official Language Act of 1956 was *ultra vires* on the ground that in enacting it Parliament transgressed the prohibitions against discrimination contained in Section 29 of the Constitution. Indeed the learned District Judge who heard the instant case has held the Act to be void on that ground. In considering whether this Court should now make any pronouncement as to the validity of the Act of 1956, I take note of the reluctance of the American and Indian Supreme Courts to make such pronouncements. The principle is thus expressed in Cooley, *Constitutional Limitations* (8th Ed. p. 332) :—

“ It must be evident to anyone that the power to declare a Legislative Enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.”

In *Burton v. United States*² it was observed that “ It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of a case ”. Again, in *Silver v. Louis Ville N. R. Co.*³ the Court stated that if a case could be decided on one of two grounds, one involving a constitutional question, and the other a question of statutory construction or general law, the Court will decide only the latter.

¹ (1958) 60 N. L. R. 145.

² 196 U. S. Reports at p. 295.

³ 213 U. S. Reports at p. 191.
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In the instant case, it is not even clear whether the question of the compulsion of a statute does arise. I have already reached the conclusion that under our Law a public servant has no right to sue for his wages. Accordingly the plaintiff is not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant minutes and regulations had not been altered or modified by the Treasury Circular No. 560.

The position of the Crown here is not that there was an alteration in the terms and conditions of service in consequence of which the plaintiff has become disentitled to the increment. The Crown's position is that the plaintiff cannot sue for the payment of the increment, even if the minutes and regulations provide for such a payment. Since such in my opinion is the correct position in law, this Court should not now venture to rule upon the submissions as to the invalidity of the Language Act. As a note of caution I must say also that the ruling on that submission made by the learned District Judge in this case must not be regarded in any way as a binding decision.

We did not call upon the learned Acting Attorney-General to submit his arguments on the question of the validity of the Language Act. Instead, at the close of the hearing of this appeal, I indicated my intention that if our findings on the other issues arising in this case necessitate consideration of that question, I would in exercise of my powers under Section 51 of the Courts Ordinance refer the question for the decision of a Bench of five or more Judges. That course is not now necessary; but I should here express the firm opinion that a question of such extraordinary importance and great difficulty, if and when it properly arises for decision, must receive consideration by a Bench constituted under Section 51.

The judgment and decree of the District Court are set aside. I do not in the circumstances make any order as to the costs in the District Court, but the plaintiff must pay the costs of this appeal.

G. P. A. SILVA, J.—I agree.

Judgment and decree set aside.

1965 *Present : Tambiah, J., and Abeyesundere, J.*

W. A. BUYZER and others, Appellants, and P. G. ARIYARATNA and another, Respondents

S. C. 549/1962—D. C. Matara, 1150/L

Civil Procedure Code—Section 547—Suit for recovery of property left by a testator—Failure of plaintiff to produce probate—Action not maintainable.

Where a person sues for the recovery of immovable property and bases his title on the Last Will of a person whose estate amounted to or exceeded in value Rs. 2,500, section 547 of the Civil Procedure Code debars him from maintaining the action unless he produces the probate.

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, Q.C., with W. D. Gunasekera and B. Eliyatamby
for Plaintiffs-Appellants.

A. F. Wijemanne, for 1st Defendant-Respondent.

February 1, 1965. TAMBIAH, J.—

The plaintiffs-appellants brought this action for a declaration of title to the land described in the schedule to the plaint and for an order to eject the defendant from the said premises. He based his title on an alleged joint Last Will said to have been executed by Pannigalagamage Don Salaman de Silva and Margaret Buyzer in deed No. 3465 dated 9th February, 1930. The probate has not been produced during the course of the trial. Section 547 of the Civil Procedure Code enacts:

“No action shall be maintainable for the recovery of any property, movable or immovable, in Ceylon belonging to or included in the estate or effects of any person dying testate or intestate in or out of Ceylon, where such estate or effects amount to or exceed in value the sum of two thousand five hundred rupees, unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executer or administrator of such testator or intestate ;”

Section 547 of the Civil Procedure Code is a bar for maintaining this action where a person claims title from the deceased and relies on a will unless he produces the probate. It was brought to our notice that in view of the ruling in 48 N. L. R. page 566 this section is no longer in operation. Whatever may be the historical reason for enacting this section it is still on the statute book and a Court of Law cannot ignore the provisions of Section 547.

Therefore the learned judge should not have proceeded with the action. Mr. Jayewardene submitted that the only order the learned District Judge could have made is to lay by the action but it seems to me that it is open to the District Judge to dismiss the action for not following the imperative provisions found in Section 547 of the Civil Procedure Code. In this case I think the ends of justice would be met if the plaintiffs' action is dismissed on the footing that he failed to comply with Section 547 of the Civil Procedure Code. Since this action is being dismissed on the technical ground that order should not operate as *res judicata* and I give him the opportunity to file a separate action.

I set aside the order of the learned District Judge and dismiss the plaintiffs' action but I give him an opportunity to file a fresh action.

The 1st defendant-respondent is entitled to the costs of this appeal. The respondents are entitled to costs of trial.

ABEYESUNDERE, J.—I agree.

Action dismissed.

1967

Present : G. P. A. Silva, J.

K. A. MARTIN, Appellant, and KANDY POLICE, Respondent

S. C. 547/67—M. C. Kandy, 50042

Price controlled article—Sale at excessive price to a decoy sent by the Police—Punishability—“Sale by retail”—“Consumption and use”—Control of Prices Act (Cap. 173), ss. 4 (1), 8.

The sale of a price-controlled article to a decoy employed by the Police for detection of offences under the Control of Prices Act is a sale by retail for the purposes of the Act and an Order made thereunder. Such a sale is a sale for “consumption and use” within the meaning of the relevant Price Order.

APPEAL from a judgment of the Magistrate's Court, Kandy.

Nihal Jayawickrema, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, with Faisz Mustapha, Crown Counsel, for the Attorney-General

Cur. adv. vult.

October 27, 1967. SILVA, J.—

The accused-appellant, a trader in Kandy, was charged with having on the 24th October, 1966 sold a pound of potatoes for 38 cents being a price 6 cents in excess of the maximum retail price at which the article could have been sold according to the relevant Price Order applicable to the article. The evidence on which the prosecution relied consisted of that of a Sub-Inspector of Police who made the detection with the help of a decoy who was sent by him with a marked rupee note with instructions to purchase a pound of potatoes from the boutique run by the accused. The decoy, a labourer residing at Peradeniya, testified to the fact of having gone to the boutique of the accused with the rupee note handed to him by the Sub-Inspector and having purchased a pound of potatoes for which he was charged 38 cents. The relevant Price Order showed that the maximum retail price at which a pound of potatoes could be sold was 32 cents. Although these facts were contested in

the lower court counsel for the appellant in this court confined himself to the point of law that a sale to a decoy was not a sale by retail which, in his submission, meant a sale for consumption or use only. In other words, his submission was that, in order to succeed, the prosecution had to prove, among other things, that the alleged excess price in this case was charged by the accused in respect of a sale by retail and in view of the definition of a sale by retail contained in (iii) (b) of the Price Order the prosecution had failed to prove one element of the offence, namely, that the pound of potatoes was sold by the accused for the purpose of consumption or use.

The question that arises for consideration therefore is whether the sale of a price controlled article to a decoy employed by the Police for detection of offences under the Control of Prices Act is a sale by retail for the purposes of the Act and an Order made thereunder. In order to determine this question it is necessary to appreciate the purpose of the Control of Prices Act (Chapter 173) and to analyse the wording of the relevant sections. The words of section 4 (1) which empower the Controller to make Orders fixing the maximum prices and prescribing the conditions of sale are very significant in this regard. This section provides that if it appears to the Controller that there is or is likely to arise in any part of Ceylon any shortage of any article or any unreasonable increase in the price of any article he may by Order fix the maximum price (both wholesale and retail) above which the article shall not be sold and also prescribe the conditions of the sale of that article including conditions as to the time and place of the sale and the quantity and quality of the article to be sold. Section 8 makes it a punishable offence for any person to act in contravention of such an Order. The Price Order made by the Controller in terms of section 4 with which we are now concerned is published in *Government Gazette* No. 14716/7 of 12.10.1966. Among other articles sought to be controlled by this Order are potatoes. For the purpose of the Order, any sale of any quantity of the articles enumerated for the purpose of resale or the sale of any quantity of one hundredweight gross or more at a time is to be deemed a sale by wholesale and any sale of any quantity less than one hundredweight gross for the purpose of consumption or use is to be deemed to be a sale by retail.

It seems to me on a reading of section 4 and the Order that the sole object thereof is to protect society against unscrupulous traders and to impose a price restriction on such traders who sell the article concerned in order to ensure that no sale takes place at a price above the maximum prescribed in the Order. In doing so the legislature had necessarily to lay down two prices, one a wholesale price which covered a sale by any person for resale and a sale of more than one hundredweight and another a retail price at which the article should reach the consumer. The wholesale price would of course be slightly lower than the retail price as the retailer has necessarily to incur some further expenditure in the distribution of the article after purchasing it from the wholesaler. In making

this Order, the object of the legislature was to distinguish between a sale by wholesale and a sale by retail and the former was defined as a sale for resale or a sale of more than one hundredweight which too would presumably be for resale while the latter was defined as a sale for consumption or use. The purpose of defining a sale by retail as one for consumption or use was in my view only to draw this distinction and not to protect a seller from the penalties attaching to sales above the controlled price whenever a small quantity of the article was purchased by someone for a purpose other than consumption as food.

Secondly, it is to be noted that in both these definitions the accent is laid on the *sale* over which only the seller has control and not on the purchase over which the buyer will have control. It seems to me that the question whether an offence against the Order has been committed must be considered from the point of view of the intention of the seller at the time of the sale of the article and the question to be asked is whether or not he intended to effect a sale for the purpose of consumption or use or for some other purpose when he accepted the money from the decoy for a pound of potatoes and delivered it to him. The intention of the buyer, and the purpose for which he is purchasing the article, which the seller cannot reasonably be expected to be aware of, is not a consideration that affects the question as to the nature of the sale.

Thirdly, the word “*use*” in the phrase “for the purpose of consumption or use” is so comprehensive that it can cover almost any conceivable purpose other than consumption as food. In that view of the meaning attributable to this word, the use of the pound of potatoes by the decoy for a purpose for which the Police required it, cannot be said to fall outside the purposes contemplated by the section. Although counsel did not advance that argument another possible construction of these words is that they were used synonymously for expressing the same thing, namely, consumption or use as food. I do not however think that it was necessary for the legislature to use the second word redundantly in the context as the word consumption is quite adequate to express the meaning that is intended to be conveyed thereby. To give any other construction to the words for consumption or use in this Order would in my view defeat the clear object of this legislation.

A converse test that may be applied to determine this matter is to ask oneself the question as to what the accused was indulging in when he accepted the 38 cents and released a pound of potatoes to the decoy, if, as counsel for the appellant submitted, he did not indulge in a sale by retail. It is reasonable to think that a person who stocked potatoes and parted with them for money could only do one of two things depending on the quantity he disposed of, namely, a sale by wholesale or a sale by retail. The sale in the present case being clearly not one by wholesale there is no other sale which can be conceived of, either according to the definition in the Order or otherwise, apart from a sale by retail. This process of reasoning too helps one to deduce that the sale by the accused was a sale by retail particularly when the word “*use*” in the definition does not necessarily preclude that interpretation.

I have examined the cases of *Brierly v. Phillips* and *Brierly v. Brear*¹ but I cannot say that they are very helpful in deciding the question at issue before us. Nor do I think that the other case cited, *Cooke v. the Governor and Company of the New River*², has any application to the immediate question involved. Further, the employment of decoys being a course resorted to in many countries for the detection of offences such as the one before us, the inability of counsel to cite in his favour a case where a similar point has been considered is also a factor that makes me feel that the point raised in this case is without substance.

For all the aforesaid reasons the appellant's contention fails and the appeal is therefore dismissed.

Appeal dismissed.

1967 Present : **H. N. G. Fernando, S.P.J., T. S. Fernando, J., and Abeyesundere, J.**

T. B. M. HERATH, Appellant, and W. M. SENAVIRATNE and another, Respondents

Election Petition Appeal No. 12 of 1966—Electoral District No. 47 (Walapane)

Election petition—Corrupt practice—False statements made at an election meeting concerning the unsuccessful candidate—Police reports in proof of such statements—Admissibility in evidence—Evidence Ordinance, ss. 35, 160—Amendment of particulars—Discretion of Court to allow it—Scope—Election Petition Rules, Rule 5.

(i) A police officer took down at an election meeting rough notes of the speeches made at the meeting and subsequently prepared from those notes a report for transmission to the Officer-in-Charge of the Station. After the report was prepared the rough notes were destroyed.

Held, that the Police report was not admissible in evidence under Section 35 of the Evidence Ordinance in proof of statements made by the speakers at the meeting. Such a report is not a “book, register or record” within the meaning of that Section.

Wimalasara Banda v. Yalegama (69 N. L. R. 361) followed.

(ii) Towards the close of the case for the petitioners-respondents, after some 10 dates of trial, Counsel appearing for them moved, in consequence of a statement made by the respondent-appellant during his cross-examination, to amend the particulars by adding a new charge of making a false statement concerning the character of the opposing candidate. This amendment was allowed by the Election Judge without appreciating the gravity of the prejudice to the appellant which arose upon his being required to face a new charge of which he had no warning earlier.

Held, that Rule 5 of the Election Petition Rules which provides that particulars may be ordered “to prevent surprise and unnecessary expense, and to secure a fair and effectual trial” does not permit the Election Judge to admit a new particular which is substantially a new charge never contemplated in the original petition.

Semble : Leave to amend particulars may be allowed only if it appears upon affidavit that the failure to furnish the particulars in due time had been *bona fide*. In practice the existence of good faith must be established by affidavit.

ELECTION Petition Appeal No. 12 of 1966—Electoral District No. 47 (Walapane).

Colvin R. de Silva, with K. Shinya, Raja Bandaranayake, Jayatissa Herath, and Nihal Jayawickreme, for Respondent-Appellant.

Sunil de Silva, in support of the application for a postponement by Petitioners-Respondents.

Cur. adv. vult.

January 16, 1967. H. N. G. FERNANDO, S.P.J.—

The appellant was elected Member of Parliament for Walapane at the General Election held in March 1965. His election was held to be void following an election petition on the ground that the appellant and three other persons, being agents of the appellant, had committed corrupt practices in connection with the election. The corrupt practice in each case consisted of the making of false statements of fact in relation to the personal character or conduct of the unsuccessful candidate.

The learned Election Judge has stated in his judgment that in the case of this petition, the petitioners relied only on Police reports in support of the charges that the alleged false statements had in fact been made. The summary of the evidence relating to the procedure according to which these reports were prepared establishes that the practice in the electorate had been for a police officer to take down at an election meeting rough notes of the speeches made, and subsequently to prepare from those notes a report for transmission to the Officer-in-Charge of the Station, and that after the report was prepared the rough notes were destroyed.

The learned Election Judge was clearly of opinion that these reports were admissible in evidence under section 35 of the Evidence Ordinance. I have considered in the Rattota Election Appeal (see S. C. Minutes of 20th December 1966)¹ the question whether such a report "is a book, register or record" within the meaning of section 35, and have there stated my reasons for holding that it is not. Moreover, it is perfectly clear that in the present case the reports were not used to refresh memory, or to enable a witness to give evidence in terms of section 160 of the Evidence Ordinance. The reports were therefore improperly admitted, and it follows that there was no legal evidence to establish that the several statements alleged to have been made had in fact been made by the appellant and his agents. The findings that corrupt practices had been committed were thus erroneous in law.

In the case of one charge which the learned Election Judge held to be established, there was material, other than a Police report, relied upon for the finding that the appellant had made a false statement of fact concerning the unsuccessful candidate.

In the course of the evidence given by the appellant at the trial he admitted that he had at an election meeting made the following statement:—"I will prove that Mr. Ramanayake (the opposing candidate) is a Christian. Why did he not vote at the election of a Basnayake Nilame?" The learned trial Judge held that this statement was false because he reached the conclusion that Mr. Ramanayake was a Buddhist at the time that the statement was made although he had been the son of a Christian Minister, and had been a Christian until sometime in 1962. The Judge further held that this statement contained an innuendo that Mr. Ramanayake had been masquerading as a Buddhist, and therefore constituted a statement affecting his character or conduct.

¹ (1966) 69 N.L.R. 361 (*Wimalasara Banda v. Yalegama*).
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In view of the admission by the appellant that he made the alleged statement, and of the conclusions of the trial Judge as to its falsity and the innuendo, I propose to assume for present purposes (despite the lack of the benefit of argument on behalf of the respondents to this appeal) that the improper admission of the relevant Police report does not vitiate the finding that the statement was in fact made by the appellant.

The Election Petition in this case was filed on 17th April 1965, and the particulars relating to the charges were furnished on 23rd February 1966. Those particulars did not refer to any alleged statement concerning the question whether Mr. Ramanayake was a Christian or a Buddhist. But apparently with the object of testing the credit and the honour of Mr. Ramanayake at the trial, Counsel for the appellant attempted to show that Mr. Ramanayake had posed as a Buddhist while in fact being a Christian. This he did by producing the Personal File contained in a Government Department in which Mr. Ramanayake had been employed ; there was ample material in the file to show that in the year 1962 and earlier Mr. Ramanayake declared himself to be a Christian ; and Counsel succeeded also in proving that Mr. Ramanayake's father had been a Minister of a Christian religion. Mr. Ramanayake by his evidence apparently succeeded in satisfying the learned Election Judge that he had changed his religion, and had become a Buddhist after some date in 1962.

Towards the close of the case for the petitioners, after some 10 dates of trial, Counsel for the petitioners moved on 29th April 1966 to amend the particulars of alleged false statements by adding the particular that the appellant had made a false statement that Mr. Ramanayake was a Christian. This amendment was allowed by the learned Election Judge, and that is how the charge that this statement had been made came into issue at the trial. In allowing the amendment the learned Judge referred to Rule 5 of the Election Petition Rules which provides that particulars may be ordered "to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial", and he was satisfied that the appellant would not be prejudiced by the admission of the new particular, which was substantially a new charge never contemplated in the original petition.

Counsel for the appellant referred to certain English decisions to the effect that leave to amend particulars may be allowed only if it appears upon affidavit that the failure to furnish the particulars in due time had been *bona fide*, and that in practice the existence of good faith must be established by affidavit. In the instant case although Counsel for the petitioner declared his intention to furnish such an affidavit it was not ultimately furnished.

But there is another ground which compels me to hold that the learned Election Judge wrongly exercised his discretion to allow this amendment. He failed to take account of the fact admitted by Mr. Ramanayake that he had been a Christian until 1962 and to realise that the question of fact

actually involved was one quite difficult of solution, namely whether Mr. Ramanayake had both ceased to be a Christian sometime in 1962, and also commenced thereafter to be a Buddhist. Had the appellant and his advisers been aware in February 1966 (when the particulars were furnished) or even when the trial commenced on 5th April 1966, that the issue of fact whether Mr. Ramanayake was still a Christian early in March 1965 would affect the appellant's due return and his franchise rights, many inquiries might have been successfully made with a view to establishing the truth of the statement that Mr. Ramanayake was a Christian. Indeed the burden of proving the falsity of that statement lay on the petitioners in this case, and much might have been done on behalf of the appellant in rebuttal of Mr. Ramanayake's version, if the vital importance of the question had been known before the trial commenced. Conscious of the possibility of prejudice to the appellant, the learned Judge indicated that he would permit the further cross-examination of witnesses previously called by the petitioners. But the Judge failed to appreciate the gravity of the prejudice to the appellant which arose upon his being required to face a new charge of which he had no warning until the closing stage of the petitioners' case. It was one thing for the appellant to hope to shake the credit of Mr. Ramanayake by an attempt to show that he had posed as a Buddhist ; it was quite another for the appellant, at the risk of forfeiting his seat in Parliament, to have to substantiate a former statement that Mr. Ramanayake had been a Christian.

I am satisfied in the circumstances that the appellant did not have a fair trial on the new charge, and that the Judge erred in law in admitting the charge.

For these reasons I would reverse the determination of the Election Judge, and hold that the appellant Tikiri Banda Mudiyanselage Herath *alias* Herath Mudiyanselage Tikiri Banda was duly elected as the Member for Walapane at the election held on 22nd March, 1965. The respondents to this appeal will pay to the appellant the taxed costs of the appeal and of the trial of the petition. I further direct that the report of the Election Judge dated July 29, 1966 and made in terms of section 82 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, should not be transmitted to the Governor-General.

T. S. FERNANDO, J.—I agree.

ABEYESUNDERE, J.—I agree.

1967

Present : T. S. Fernando, J., and Alles, J.

A. S. M. HASSAN, Petitioner, and THE CONTROLLER OF IMPORTS AND EXPORTS, Respondent

S. C. 453 of 1966—Application for Writs of Certiorari and Mandamus

Import and Export (Control) Act (Cap. 236)—Sections 2 and 3—Import (Licensing) Regulations, 1963, Regulation 2—Issue or cancellation of licences thereunder—Controller's power is purely executive and not judicial—Licensee need not be heard before his licence is cancelled—Natural justice—Certiorari.

Regulation 2 of the Import (Licensing) Regulations, 1963, made by the Minister under section 2 of the Import and Export (Control) Act, reads as follows:—

“ No person shall import goods of any description into Ceylon except under the authority of a licence granted by the Controller and subject to such conditions as may be specified therein. ”

Held, that Regulation 2, more especially when it is read with a Notice that “the Controller may at his discretion refuse to register any application or cancel any registration already effected”, confers on the Controller the widest possible powers in the matter of the issuing of licences. In issuing licences or cancelling licences already issued he is performing no more than a purely executive or administrative function answerable only to the Minister who appointed him and who in turn is answerable to Parliament in respect of the administration of the Act by officers appointed by him. As the Controller has no duty to act judicially, he is not bound to afford a person an opportunity of showing cause against the cancellation of a licence already issued to him. Accordingly, *certiorari* does not lie to quash an order made by the Controller cancelling the registration of a person as a Ceylonese Trader.

APPLICATION for writs of *certiorari* and *mandamus* against the Controller of Imports and Exports.

H. W. Jayewardene, Q.C., with *S. Sharvananda, N. Kasirajah* and *C. Chakradaran*, for the petitioner.

H. L. de Silva, Crown Counsel, with *P. Naguleswaran*, Crown Counsel, for the respondent.

Cur. adv. vult.

July 31, 1967. T. S. FERNANDO, J.—

The Import and Export (Control) Act (Cap. 236) which came into force on 8th April 1955 for the purpose of providing for the control, *inter alia*, of the importation and exportation of goods made provision in section 3 thereof for the appointment of officers (including a Controller of Imports

and Exports) for the purpose of the said Act. By section 2 (1) of the Act the Minister is empowered to make, with the approval of the Cabinet of Ministers, regulations providing for the prohibition or regulation of the importation or exportation of goods of any specified description; by section 2 (2) he is empowered to make, with similar approval, regulations (i) restricting to persons of any prescribed class or description the issue of licences required by any scheme of control that may be introduced, (ii) specifying the persons or authorities by whom and the circumstances in which licences may be issued, refused, cancelled or suspended, and (iii) providing for a right of appeal to the Minister against any decision of the Controller; and section 2 (4) requires the regulations that are made under section 2 to be published in the *Gazette* and provides for the date on which they shall come into force. The regulations are required to be brought before both Houses of Parliament for approval, and any regulation which fails to receive such approval is deemed to be rescinded as from a date indicated in section 2 (4).

The Minister, on 10th January 1963, acting in terms of section 2, made certain regulations called the Import (Licensing) Regulations, 1963 (published in *Gazette* No. 13,477 of 11th January 1963), and regulation 2 of these Regulations is reproduced below:—

“No person shall import goods of any description into Ceylon except under the authority of a licence granted by the Controller and subject to such conditions as may be specified therein.”

It is not disputed that of the schemes of control introduced by the Controller one was the restriction to a particular class of persons described as Ceylonese Traders of the issue of licences to import goods described as “Ceylonised Goods” from certain areas described as “Ceylonised Areas”. As part of that scheme the Controller published in *Gazette* No. 14,152 of 27th August 1964 a notice R1 described as Import Control Notice No. 18 of 1964 calling for applications for registration as Ceylonese Traders. It was expressly declared in the said notice that “the Controller may at his discretion refuse to register any application or cancel any registration already effected”, and that “an appeal against the decision of the Controller should be lodged with the Minister within a period of ten days from the date of communication of the decision”. The petitioner on 4th September 1964 made an application for registration pursuant to this notice and received from the Controller letter P1 of 6th January 1965 informing him that he is registered provisionally as a Ceylonese Trader for 1965 for the purpose of trading with “Ceylonised Areas” and in respect of “Ceylonised Goods”.

Under the scheme of control allocations of import quotas were to be made to registered Ceylonese Traders based upon their declared imports of the respective classes of goods during certain specified previous years. The petitioner, after his provisional registration P 1, received licences to import certain goods, but was informed by the Controller by letter P 2

of 22nd April 1965 that, as certain specified customs certificates submitted by him to substantiate his statements of import declarations have been found to contain untrue particulars, the issue of import allocations and licences to him is being stopped with immediate effect. P2 was followed by letter P 4 of 17th May 1965 in which the Controller informed the petitioner that the certificate of provisional registration of 6th January 1965 is cancelled as he had obtained import quotas by making false declarations.

The petitioner appealed unsuccessfully to the Minister against this order of the Controller, and on 2nd November 1966 made this present application seeking the issue by this Court of mandates in the nature of Writs of *Certiorari* and/or *Mandamus* quashing (by way of *certiorari*) the order (1) of cancellation of his provisional registration as a Ceylonese Trader and (2) of cancellation of the import allocations and licences issued to him and directing (by way of *mandamus*) the Controller (1) to restore his registration and (2) to restore to him the cancelled allocations and licences, and also to issue to him all allocations and licences he may be entitled to in the future by virtue of his registration as a Ceylonese Trader. The delay in seeking the intervention of this Court is explained by the circumstances that the petitioner had first to exhaust the other remedy of appeal to the Minister available to him and that the Minister made his order only as late as October 1966.

We are now in the year 1967 and, even if the petitioner could have satisfied us that there is here a case meriting the intervention of this Court, *Mandamus* is of no avail to direct the Controller to restore the cancelled 1965 licences inasmuch as an order to that effect would now prove futile. Fully appreciating the position resulting from the long delay, Mr. Jayewardene stated that the petitioner would be content if the order of cancellation of his registration as a Ceylonese Trader is quashed because, as he stated, the issue of allocations and licences follows and is dependent on the maintenance of the registration which is the recognition of the petitioner's status.

It is not disputed by the Controller that he did not afford the petitioner an opportunity of showing cause against the cancellations of the licences and the registration. A failure to observe the well-known rule of natural justice is therefore admitted, but it is the position of the Controller that the rule does not require to be observed in this case where he had no duty to act judicially. Whether there was such a duty must ultimately depend on an interpretation of the relevant statute and regulations having the force of law. The only law governing the issue of import licences is to be found in the Import (Licensing) Regulations earlier referred to by me. Regulation 2 which I have reproduced above confers on the Controller the widest possible powers in the matter of the issuing of licences. In issuing licences or cancelling licences already issued he is performing no more than a purely executive or administrative function, answerable only to the Minister who appointed him

and who in turn is answerable to Parliament in respect of the administration of the Act by officers appointed by him. While the power conferred on the Controller of Imports bears a close resemblance to the power given by the relevant regulations to the Controller of Textiles and examined by the Privy Council in the case of *Nakkuda Ali v. Jayaratne*¹, it may be described as even less fettered than the power given to the latter. In *Nakkuda Ali's case* the power of the Controller of Textiles to cancel a licence was conditioned—see Regulation 62—by the Controller having “reasonable grounds to believe that the dealer is unfit to be allowed to continue as a dealer”. Here the power of the Controller of Imports is unconditioned at any rate by law. I must of course presume that officials of this rank act with due responsibility and, even where they are taking purely executive or administrative action, it must not be assumed that they are free to act unfairly. While I would welcome the day when the rules of natural justice are observed even in the performance of purely executive action, I cannot overlook the circumstance that the law has hitherto not recognised the existence of such a duty; and, indeed, in all probability there will always remain certain classes of executive action where it would be impracticable to defer such action until the party to be affected is heard in opposition thereto.

It was apparent at the very outset of the argument before us that the petitioner had to fail unless he could satisfy us that *Nakkuda Ali's case (supra)* was not applicable. It is a decision of the highest appellate Court of this Country and is binding on us. The position there was that dealings in textiles were restricted to such persons as held textile licences issued by the Controller of Textiles, and in effect a dealer who could not get or who lost a textile licence was out of the textile business so long as the scheme continued in operation. As Lord Radcliffe put it—see p. 463—“In truth when he (the Controller) cancels a licence he is not determining a question; he is taking executive action to withdraw a privilege”. It is undoubtedly correct, as Mr. Jayewardene submitted, that this decision has been the subject of some criticism from academic lawyers, one of whom referred to it as ushering in the twilight of natural justice². In a court of law, however, it is a decision of very high authority and in a Ceylon court it remains of the highest and binding authority.

Our attention was invited also to certain criticisms of this case in the judgments of the House of Lords in *Ridge v. Baldwin*³. It must, however, be noted that only Lord Reid of the five judges who heard that case doubted—see p. 79—the correctness of the *Nakkuda Ali* decision. Lord Evershed dissented—see p. 94—from the view taken by Lord Reid that the decision ought not to be followed. The only other judge who referred to it, Lord Hodson, expressed no definite view—see p. 133—preferring, as he said, to “retreat to the last refuge of one confronted

¹ (1950) 51 N. L. R. 457. ² Professor H. W. R. Wade in (1951) 67 L. Q. R. at 103.

with as difficult a problem as this, namely, that each case depends on its own facts". In the recent case of *Durayappah v. Fernando*¹, Lord Upjohn, giving the reasons of the Privy Council and referring to Lord Reid's analysis of the case of *Rex v. Electricity Commissioners*² in *Ridge v. Baldwin* (*supra*) stated that "it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case or with his criticism of the *Nakkuda case*".

Mr. Jayewardene finally sought to gather some support for the petitioner from the decisions in what are called the Livelihood Cases, particularly those of *Lawlor v. Union of Post Office Workers*³ and *Nagle v. Feilden*⁴. The first of these is not, in my opinion, an authority relevant to the application before us because the claim there rested on contract; and, in the second, what the Court of Appeal had before it was an appeal from an order made in Chambers dismissing an appeal from an order of a Master in Chambers striking out a plaintiff's statement of claim. Lord Denning M.R. expressly stated there that he does not decide the question but merely that there was a serious question for determination. More to the point is the case of *Russell v. Duke of Norfolk*⁵, where the Court of Appeal held that, assuming that the application for a licence and the licence itself together constituted a contract to permit the trainer to act as such, the stewards had power under the contract in their unfettered discretion to withdraw the trainer's licence without any inquiry at all, and it was impossible consistently with an unfettered and absolute discretion to imply a term in the contract that an inquiry, if held, should be in accordance with natural justice.

A proper construction of Import Control Notice R1 and of the other relevant notices leaves no room for doubt that the discretion of the Controller in regard to the registration of persons as Ceylonese Traders and the issue of allocations and licences is of such a plenary kind that, as learned Crown Counsel submitted, a right to a hearing of any kind before cancellation can be effected is ruled out. In respect of both matters the Controller is taking pure executive action, and the decision of *Nakkuda Ali's v. Jayaratne* (*supra*) is a sufficient answer to the petitioner's claims on this application.

Although what I have pointed out above is sufficient to dispose of the application before us, I should, nevertheless, like to refer also to two authorities of a persuasive character brought to our attention by Crown Counsel. The first is a decision of the High Court of Australia in *Metropolitan Meat Industry Board v. Finlayson*⁶ that dealt with an application for a writ of *mandamus* commanding the Meat Industry

¹ (1966) 69 N. L. R. 265.

⁴ (1966) 1 A. E. R. 694.

² (1924) 1 K. B. 171.

⁵ (1949) 1 A. E. R. 109.

³ (1965) 1 A. E. R. 353.

⁶ (1916) 22 C. L. R. 340.

Board to hear and determine according to law an application for its consent for the slaughtering of cattle. Section 19 of the Meat Industry Act, 1915 (H. S. W.), provided that “ no person shall, except with the consent of and under the conditions prescribed by the Metropolitan Meat Industry Board, within the Metropolitan abattoir area, slaughter any cattle or dress any carcase for human consumption, except at a public abattoir ”. Section 20 provided that “ The consent of the Board, under the last preceding section, may be given in such form, and subject to such terms and conditions as the Board may in its absolute discretion determine ”. The High Court held that under those sections the Metropolitan Meat Industry Board have an absolute and unfettered right to grant or withhold their consent, and, therefore, that on an application for their consent they need not give reasons for withholding it, or, before determining whether to grant or withhold it, inform the applicant of any objection which they think stands in his way so that he may have an opportunity of meeting it. The second is a decision of the King’s Bench Division, *R v. Barnstaple Justices, ex parte Carder*¹, which has a particular bearing on a scheme like that for registration of Ceylonese Traders outlined in Notice R1 preparatory to the issue of allocations and licences, the notice itself being something that is not provided by law. The Cinematograph Act of 1909 empowered county councils and justices of the peace to grant licences to persons to use “ premises specified in the licence ” for the purposes of a cinema, subject to certain terms, conditions and restrictions. A practice was stated to be in existence whereby, in cases where it was intended to erect premises for use as a cinema, justices were asked to approve the plans of the building to be erected, and thereby honourably to commit themselves or their successors to grant the licence after completion of the premises. On application made for writs of *certiorari* and *mandamus*, it was held by the Court that the Act gave no power to grant licences except in respect of premises actually in existence, and that the practice was beyond the powers given by the Act, and unenforceable. Lord Hewart, L.C.J. there stated that it is impossible to contend that justices, in sitting for the preliminary purpose of considering plans of a building not yet constructed, are engaged in a judicial proceeding such as may be brought to the notice of the court for the purpose of obtaining the issue of a prerogative writ of *mandamus* or of *certiorari*, and that the application was one in respect of an essentially extra-judicial proceeding.

The above considerations have compelled me to dismiss this application.

In regard to costs, it is right to mention that there are before us seven other similar applications preferred by other applicants seeking to quash similar cancellations. I refer to S. C. Applications 454 to 457 and 493 to 495 of 1966. Counsel appearing for the respective parties there are the same as counsel on this application. They were agreed that these

seven applications should abide the result of Application No. 453. An order in respect of them is being made separately today ; but in respect of all eight applications we order that the Controller will be entitled to costs as on one application alone, such costs being borne in equal shares by each of the eight applicants. Accordingly we order the applicant in No. 453 to pay the Controller one-eighth of his taxed costs.

ALLES, J.—I agree.

Application dismissed.

1965

Present : T. S. Fernando, J., and Alles, J.

M. M. MUTTUWAPPA and others, Appellants, and THE EASTERN SHIPPING CORPORATION LTD., Respondent

S. C. 147 (Inty.) of 1964—D. C. Colombo, 51911/M

Civil Procedure Code—Section 423—Commission to examine a witness outside Ceylon—Scope of Court's discretionary power to refuse it.

Where the evidence of a witness residing outside Ceylon is admittedly vital for the decision of an action, section 423 of the Civil Procedure Code does not give any discretionary power to the Court to refuse the issue of a commission on the ground of the absence of a reason for the witness's inability to come to Ceylon.

APPEAL from an order of the District Court, Colombo.

C. Ranganathan, Q.C., with K. Thevarajah, for the plaintiffs-appellants.

J. W. Subasinghe, for the defendant-respondent.

Cur. adv. vult.

September 15, 1965. T. S. FERNANDO, J.—

This is an appeal from an order refusing an application for the issue by the District Court of Colombo of a commission for the evidence of a witness for the plaintiffs to be recorded in Australia.

The action has been instituted by the plaintiffs, the consignees of a shipment of 200 cases of apples shipped in a vessel owned by the defendant for carriage from Fremantle to Colombo. The plaintiffs allege that, in breach of the agreement between them and the defendant, the vessel, instead of sailing direct from Fremantle to Colombo, was diverted by its master to the port of Trincomalee resulting in a delay which rendered the apples unfit for human consumption and which caused the plaintiffs to suffer loss in a sum of Rs. 10,973.53 which they sought in this action to recover from the defendant.

At the stage of framing the issues to be tried in the action, the trial judge accepted an issue in the following form :—

Issue 2 (b)—Did the defendant represent to the said shippers and/or plaintiffs that the said ship would sail direct from Fremantle to Colombo for discharge of the said apples ?

The trial was then refixed for the 19th August, 1963. On the 28th June, 1963, the plaintiffs moved that a commission be issued for the recording in Australia of the evidence of one W. G. Adamson whom they alleged was the person who made all the shipping arrangements in Australia in connection with the shipment. They attached to their motion a copy of their letter to Adamson in which they had informed him his evidence was important and vital and inquired from him what his fees would be for coming over to Ceylon for the taking of his evidence at the trial. Adamson replied to this letter to say that it will not be possible for him to travel to Ceylon, but that he would be prepared to attend in Perth, Australia, if arrangements could be made for his evidence to be recorded there.

Before the learned District Judge and before us counsel for both sides admitted that Adamson's evidence was vital for the decision of this action. It should not be overlooked that there is no procedure available for compelling Adamson to come to Ceylon to testify in a civil action. Section 423 of the Civil Procedure Code vests a discretion in a court to issue, on application thereto, a commission for the examination of a person resident outside Ceylon when the court is satisfied that his evidence is necessary. The learned District Judge declined to issue the commission substantially on the ground that no reason has been given for the inability of the witness to come to Ceylon. It is correct to say that Adamson's reason for his inability to come to Ceylon is not expressly disclosed in the correspondence between him and the plaintiffs. Even if that reason cannot be so inferred (and I am far from saying that it cannot be), it is plain that the witness is not willing to come and there is no law to be invoked which can compel him to come here. I am in agreement with the argument of counsel for the appellants that, where section 423 vests a discretion in the court to issue a commission even where the evidence of a witness merely is necessary, it is impossible to sustain the contention that that discretion should be exercised so as to refuse the issue of a commission where it is conceded that the evidence is not merely necessary, but indeed vital. It must also be mentioned that the present case is not one where it is plain that it is essential for the witness to be cross-examined before the trial judge. The party needing the evidence of the witness, of course, takes the risk of the weight that might otherwise attach to the evidence being affected by the absence of the witness in the proceedings taken in the presence of the trial judge.

In my opinion it is necessary for the purposes of justice being done between the parties to secure the evidence admitted in this case to be vital. The refusal to issue the commission appears to have been

exercised on a wrong principle, *viz.* on the ground of the absence of a reason for the witness's inability to come to Ceylon, and is therefore reviewable by this Court.

I would set aside the order appealed from and remit the case back to the District Court with a direction that a commission do issue at the expense of the plaintiffs to such a court or person as the trial judge may deem fit for the evidence of the witness concerned to be taken. The plaintiffs will be entitled to the costs of this appeal and of the argument on the point in the District Court.

ALLES, J.—I agree.

Order set aside.

1965

Present : Sri Skanda Rajah, J.

T. E. MACK, Appellant, and L. M. MACK, Respondent

S. C. 1008/1964—M. C. Colombo, 31736/AMC

Maintenance—Provisional maintenance order made in the United Kingdom—Enforcement of it in Ceylon—Scope—Maintenance Orders (Facilities for Enforcement) Ordinance (Cap. 92), s. 6.

Where a court in England has made against a father residing in Ceylon a provisional order concerning the maintenance and custody of his children, that part of the order concerning maintenance may be enforced in Ceylon in accordance with the provisions of section 6 of the Maintenance Orders (Facilities for Enforcement) Ordinance.

APPEAL from an order of the Magistrate's Court, Colombo.

E. A. G. de Silva, with B. T. Eliyatamby, for Defendant-Appellant.

J. W. Subasinghe, for Applicant-Respondent.

Cur. adv. vult.

January 13, 1965. SRI SKANDA RAJAH, J.—

This appeal is from an order made by the learned Chief Magistrate of Colombo in respect of a provisional order for maintenance of the defendant-appellant's two children made in the United Kingdom and sought to be enforced by the Magistrate's Court of Colombo within whose jurisdiction the defendant father is said to be resident.

The appellant contends that—

1. the Magistrate's Court of Colombo has no jurisdiction to enforce this order;
2. the English Court had no jurisdiction to transmit this case to the Ceylon Courts;
3. where there is a valid marriage in existence the father is the guardian of the child, unless it is detrimental to the welfare of the child;
4. the Magistrate's Court of Colombo should not have confirmed the order because it is against natural justice and the public policy in Ceylon.

What the Magistrate's Court of Colombo is called upon to enforce is that part of the order concerning maintenance and not that part regarding custody of the children. It is conceded that the English Court had jurisdiction to make an order for maintenance when it made order for the custody of the children, to make which it had undoubtedly jurisdiction. The order that was made by the English Court is divisible: The order for maintenance was the main order and the order for custody was incidental thereto.

The Maintenance Orders (Facilities for Enforcement) Ordinance (Cap. 92) deals with the enforcement of maintenance orders. Section 6 confers jurisdiction on Magistrates' Courts in Ceylon to enforce such provisional orders for maintenance. The evidence given by the applicant wife and that of the defendant would show that the defendant lives in Sunethra Lane, Thimbirigasyaya, Colombo 5, within the jurisdiction of the Magistrate's Court of Colombo. I would hold that the Magistrate's Court of Colombo has jurisdiction to enforce this order and that the English Court had jurisdiction to transmit the order for enforcement by the Ceylon Courts.

The defendant as father may be the natural guardian of the children. That would entitle him to get their custody by proper means subject to their welfare which is the paramount consideration. But as long as they are in the applicant's custody by a lawful order made by the English Court and the defendant has neglected to maintain them he is liable to pay maintenance. Section 6 (2) restricts the defences that can be raised by the defendant to what could have been raised in the original proceedings in England had he been a party thereto. No other defence can now be raised. This provision also indicates that the order in question could have been lawfully made by the English Court without his being even made a party to the proceedings. That is why the order is only provisional and needs the confirmation by the Magistrate's Court of

Colombo, after the defendant is afforded the opportunity of being heard so that he may not complain that the *audi alteram partem* rule has been violated. For these reasons the second and third objections too fail.

The amount of maintenance ordered by the English Court is £2 per week. That is not too large an amount. Therefore, I would set aside the Magistrate's order regarding the variation of the amount and confirm the original provisional order for maintenance.

Provisional order for maintenance confirmed.

1967 *Present : Sirimane, J., and Siva Supramaniam, J.*

S. Y. ISSADEEN, Appellant, and M. I. M. ATHEEK
and others, Respondents

S. C. 87/65 (Inty.)—D. C. Matara, 7056

Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956—Section 39 (1) (2)—Inapplicability thereof to a proceeding in respect of an earlier decree of Court resulting in a Muslim Charitable Trust—Interpretation Ordinance (Cap. 2), s. 6 (3) (c).

Where, after the Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956, came into force, an application is made to a Court to fill a vacancy in the office of trustee in terms of a scheme of management drawn up and approved by that Court earlier under the repealed Muslim Intestate Succession and Wakfs Act, No. 10 of 1931, in respect of a Muslim Charitable Trust, section 6 (3) (c) of the Interpretation Ordinance renders it unnecessary to commence proceedings in a new action with a certificate from the Commissioner appointed under the new Act No. 51 of 1956. Sub-sections (1) and (2) of section 39 of the new Act were meant to apply to a proceeding relating to a Muslim Charitable Trust which has commenced when there has been no order or decree made by a Court earlier relating to such a trust.

APPEAL from an order of the District Court, Matara.

M. T. M. Sivardeen, for 1st respondent-appellant.

N. E. Weerasooria, Q.C., with *N. E. Weerasooria (Junior)*, for petitioners-respondents and 2nd respondent-respondent.

Cur. adv. vult.

June 11, 1967. SIRIMANE, J.—

A scheme for the management of a Muslim Charitable Trust has been drawn up and approved by the Court in these proceedings in or about March, 1933, under the Muslim Intestate Succession and Wakfs Act, No. 10 of 1931, which has now been repealed.

This scheme has been amended from time to time, and Counsel are agreed that the last of such amendments was in 1949.

The amended scheme appears in volume 4 of the record. By its terms it appoints two trustees, one to represent the descendants of the son of the author of the trust and the other to represent the descendants of his daughter. These two trustees were the 1st respondent and T. S. M. Ibrahim.

Ibrahim has died, and the present application was made to Court by the petitioners (who are described by the learned District Judge as "persons interested in the trust") to fill the vacancy, by the appointment of the second defendant as co-trustee.

The learned District Judge allowed this application, and in this appeal against that order it was urged that under the provisions of the new Muslim Mosques and Wakfs Act, No. 51 of 1956, it was incumbent on the petitioners to commence proceedings in a new action with a certificate from the Commissioner appointed under that Act. Our attention was drawn to section 39 (2) which provides that no action other than one instituted by the Commissioner shall be entertained by the District Court unless the plaint is accompanied by a certificate under the hand of the Commissioner that the action has been approved by the Board. Section 39 (1) enacts that, subject to the provisions of subsection 2, the Commissioner or any five persons interested in the trust may *institute an action to obtain a decree* for certain purposes, for example, for the appointment of trustees or the settlement of a scheme for the management of a trust.

I am of the view that this section in the new Act was meant to apply to a proceeding relating to a Muslim Charitable Trust which has commenced when there has been no order or decree made by a Court earlier relating to such a trust.

In this case, as pointed out by Counsel for the respondents to this appeal, there is already a decree or order made on 8.10.49 approving a certain scheme.

Para. 11 of that scheme makes provision for the filling of vacancies in the office of trustee when the need arises.

The present application by the petitioners is no more than an application to the Court to give effect to its decree adopting the scheme of 8.10.49.

A somewhat similar application in these very proceedings had come up in appeal before this Court on 3.2.1938 (S.C. 138). That, too, was an application by certain petitioners for the appointment of two trustees according to the scheme that was in force at that time. Objection had been taken to that application on the ground that leave of Court, as required by section 16 (1) of the repealed Ordinance, No. 10 of 1931, had not been obtained before such application was made. The District Judge overruled the objection. In appeal, Poyser, J. said : "The petition of the 23rd July, 1936, can, in my opinion, be regarded as an application to the District Court by interested parties to give effect to the order of the 18th of March, 1933, by filling vacancies among the Trustees which have occurred."

I think the learned District Judge was right in taking the view that the present application was one in a proceeding which was pending and that the provisions of section 6 (3) (c) of the Interpretation Ordinance, Chapter 3, would apply.

The appeal is dismissed with costs.

SIVA SUPRAMANIAM, J.—I agree.

Appeal dismissed.

1967

Present : Alles, J.

**THE HIGHLAND TEA CO. OF CEYLON LTD. and another, Appellants,
and THE NATIONAL UNION OF WORKERS, Respondent**

S. C. 56-57/1967—Labour Tribunal Case No. 9/682

Estate Labour (Indian) Ordinance—Section 23 (1)—Lawful termination of a labourer's contract of service—Termination of his wife's contract of service thereafter despite joint statement by husband and wife—Remedy of the wife—Power of a Labour Tribunal to grant compensation to her—Meaning of the word "labourer"—Industrial Disputes Act, s. 31 D (2).

Where, after the contract of service of an estate labourer has been lawfully terminated, a joint statement in terms of the proviso to section 23 (1) of the Estate Labour (Indian) Ordinance is submitted to the employer by the discharged labourer and his wife, wishing that the services of the wife, who is already under a contract of service on the estate, be continued, the employer is not bound to continue the employment of the wife. Consequently, the wife, if her services are lawfully terminated, cannot claim as a matter of right to be re-instated by a Labour Tribunal. It is, however, open to the Tribunal to grant her equitable relief by making an order for the payment of a sum of money as compensation.

The benefits of the Estate Labour (Indian) Ordinance are available to a person who is born in Ceylon of parents who are of Indian origin and who becomes a citizen of this country by registration.

APPEAL from an order of a Labour Tribunal.

L. Kadirgamar, for the respondents-appellants.

N. Satyendra, for the applicant-respondent.

Cur. adv. vult.

September 29, 1967. ALLES, J.—

The respondent Union filed an application on 11.10.66 before the Labour Tribunal on behalf of one Iruthayam, wife of Muthiah, alleging that the termination of her services by the appellants was without valid reason and praying, *inter alia*, for her re-instatement. On 8th April, 1967, after hearing the submissions of the legal representatives of the parties concerned, the President made order that the termination of Iruthayam's services was wrongful but without ordering re-instatement he directed the appellants to pay her a sum of Rs. 300 as compensation. The present appeal to this Court is made under section 31D (2) of the Industrial Disputes Act and has raised several questions of law. It has been submitted by Counsel for the appellants that the learned President erred in law when he held that the termination of the contract of employment of the said Iruthayam was wrongful when a joint statement had been filed under section 23 of the Estate Labour (Indian) Ordinance ; that the said Ordinance did not apply to her as she was a citizen of Ceylon and that the relief granted to Iruthayam was not of a nature that was authorised under the provisions of the law.

There is no dispute that the services of Muthiah were properly terminated by the appellants and that termination has been justified by the order made by the Tribunal in his case. It is also admitted that thereafter a joint statement under the proviso to section 23 (1) of the Estate Labour (Indian) Ordinance has been tendered to the Superintendent signed by Muthiah and Iruthayam but that no work has been given to Iruthayam and that her services have been terminated by the Superintendent, the 2nd appellant.

The Estate Labour (Indian) Ordinance (hereafter referred to as the Ordinance) was enacted in 1889 and was intended to consolidate the law relating to Indian labourers employed on Ceylon estates. The Ordinance applied to emigrants from India who emigrated to Ceylon to work on Ceylon estates and the definition of the word 'labourer' in the Ordinance clearly indicated that it applied to persons of Indian origin. My Lord the Chief Justice in *Superintendent, Oakwell Estate, Haldumulla v. Lanka Estate Workers Union*¹ has held that the Ordinance applied not only to actual emigrants from India but also to children of emigrants born in Ceylon. With that observation, I am in respectful agreement.

¹ (1963) 65 N. L. R. 429 at 430.
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Indeed the provisions of the entire Ordinance in regard to the payment of wages, the contracts of service, the maintenance of registers, the provisions of accommodation for the labourers and the forms to be forwarded to the Emigration Commissioner justify the observation that the main object of the Ordinance was to safeguard the interests of the Indian immigrant labourer. Section 23 was intended to preserve the family unit of the labourer and reads as follows :—

“ At the time when any labourer lawfully quits the service of any employer, it shall be the duty of that employer to issue to that labourer a discharge certificate substantially in form II in Schedule B, and, where at such time the spouse or a child of such labourer is also a labourer under a contract of service with that employer, it shall be the duty of the employer, subject as hereinafter provided, to determine such contract and to issue a like certificate to such spouse or child :

Provided that where such spouse or child wishes to continue in service under such contract and produces to the employer a joint statement signed by both husband and wife to that effect, nothing in the preceding provisions of this subsection shall be deemed to require the employer to determine such contract or to issue a discharge certificate to such spouse or child.”

Under the main section, there is a duty imposed on the employer of a labourer, who lawfully quits his service, to issue him a discharge certificate and when the spouse or child of such a labourer is also under a contract of service there is a further duty cast on him to issue a discharge certificate to such spouse or child as well. There is therefore a corresponding right in the labourer or the spouse in such a case to claim that they are entitled to receive such certificates. The breach of this duty is punishable as an offence under section 23 (2). Under the proviso, when a joint statement is filed the law imposes no duty on the employer to continue the employment of the spouse or to refrain from issuing a discharge certificate. The terms of the employment of the spouse in such a case would be governed by the common law. Consequently, the spouse of a labourer whose services have been lawfully terminated cannot claim as a matter of right in such an event to be re-instated. There may be good grounds why the employer is unable to re-instate the spouse of such a labourer. Quite apart from the desirability of maintaining the family unit, an employer may find it difficult to provide accommodation for the spouse, particularly if she is the wife, and as in the instant case it may become necessary in the interests of discipline not to order re-instatement. These are matters, particularly in the present state of labour relations, which should be left to the discretion of the employer and subject to review by a Labour Tribunal. This view is not necessarily in conflict with the view expressed by my brother T. S. Fernando, J. in the *High Forest* case¹. In that case no joint statement was filed and my brother held, if I may

¹ (1963) 66 N. L. R. 14.

say so with respect, correctly, that when the wife's contract was determined in consequence of the lawful termination of the husband's services it was not open to a Labour Tribunal to grant just and equitable relief to the wife. Such a course the learned Judge remarked would be "in conflict with the law as declared by the legislature and as interpreted by the Courts".

In the concluding part of the present order the President has stated as follows :—

"In making an order of reinstatement, I should take into consideration the fact that this Tribunal has justified the termination of this worker's husband's services for gross misconduct so that if I decide to reinstate her, I cannot deprive her husband of a legitimate right to visit and live with his wife in the estate. This position, in my view, would create a very anomalous situation and would not be conducive to a harmonious relationship. It would, in other words, nullify the effect of my order made in respect of the husband. It could even lead to a very serious breach of discipline as the man unwanted by the Superintendent is again within the precincts of the estate, probably spreading discontent and disharmony amongst the peaceful and peaceloving set of innocent workers.

I am of the sincere opinion that I would be failing in my duty if I were to reinstate this woman even with the most stringent conditions attached to such an order.

For the reasons stated above, I hold that the dismissal is wrongful but I refrain from making an order of reinstatement. Instead, taking into consideration the period of service, i.e., from August, 1961, I order the respondent to pay to the worker concerned, a sum of Rs. 300 as compensation."

The facts in the present case therefore are different from the facts in the *High Forest* case and in the view that I have taken of the circumstances of the instant case, it was open to the President to make an order that was just and equitable.

The only other point raised in this appeal was whether the Ordinance applied to Iruthayam who was born in Ceylon and admittedly was a citizen of Ceylon by registration. I do not think that the fact that a person who is born in Ceylon of parents who are of Indian origin—(I assume this to be the case since a joint statement was filed under section 23)—and who has become a citizen of this country by registration precludes such a person from enjoying the benefits of the Ordinance. There is nothing to prevent an Indian emigrant or the child of one acquiring citizenship rights in this country and at the same time claiming the benefits under the Estate Labour (Indian) Ordinance.

I am therefore of the view that the termination of the services of Iruthayam by the 2nd respondent-appellant was not wrongful or unlawful and I would set aside the order of the President declaring it to be such.

I also hold that the President has not erred in law in making the order of compensation in this case which is an order which he was entitled to make under the provisions of the law.

Since the appellants have succeeded in the declaration which they have sought that the order terminating Iruthayam's services was not wrongful, I dismiss the appeals without costs.

Appeals dismissed.

1967

Present : Alles, J., and Siva Supramaniam, J.

S. ARUNASALAM *et al.*, Appellants, and C. AYADURAI *et al.*, Respondents

S. C. 12/1966 (Inty.)—D. C. Point Pedro, 8184

Thesavalamai—Thediatheddam—Immovable property purchased by husband in his favour—Consideration paid out of loan raised by husband and wife jointly—Death of wife thereafter intestate—Devolution of the acquired property—Jaffna Matrimonial Rights and Inheritance Ordinance, ss. 23, 26.

A person, who was subject to the Thesavalamai, married in 1949. In 1957, during the subsistence of the marriage, he purchased a land in his favour out of monies raised by way of a loan in respect of which he and his wife were jointly and severally liable. As security for the loan, he mortgaged the property which he purchased and the wife mortgaged certain lands which she had received by way of dowry at the time of her marriage. The wife died in 1959, intestate and issueless, leaving behind as her heirs her father, two brothers and a sister.

Held, that the property bought in 1957 fell under the category of Thediatheddam and both spouses were equally entitled to it.

“Where a property is purchased during the subsistence of marriage by a spouse subject to the Thesavalamai out of a loan raised jointly by both spouses, the property so acquired will fall under the category of Thediatheddam and both spouses will be equally entitled thereto. The fact that the security granted for the loan is a mortgage of the separate property of either spouse will not render the loan so raised the separate property of that spouse. Nor will the property purchased become the separate property of that spouse. If the property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse.”

Held further, that one half of the half share of the acquired property which belonged to the deceased wife as her Thediatheddam devolved on the surviving spouse while the remaining half of that half share devolved on the heirs of the deceased. Under section 23 of the Jaffna Matrimonial Rights and Inheritance Ordinance one half of the remaining half share devolved on the father of the deceased, and under section 26 the balance half share devolved equally on the brothers and sister of the deceased.

“Ordinance No. 58 of 1947, however, effected a vital change when it repealed the provision that Thediatheddam was property common to the two spouses and that on the death of either spouse one half remained with the survivor and the other half vested in the heirs of the deceased and introduced instead a new concept of the Thediatheddam of each spouse and provided that one-half of the Thediatheddam which belonged to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. The Thediatheddam which belonged to the surviving spouse remained unaffected by the death of the other spouse.”

APPEAL from a judgment of the District Court, Point Pedro.

C. Chellappah, for the plaintiffs-appellants.

No appearance for the defendants-respondents.

Cur. adv. vult.

January 19, 1967. SIVA SUPRAMANIAM, J.—

This appeal raises the question of the rights of a husband governed by the Thesawalamai in regard to immovable property purchased by him in his favour during the subsistence of marriage out of monies raised by way of loan jointly by both husband and wife.

The 1st plaintiff who is subject to the Thesawalamai married one Sivakolunthu in 1949. In 1957 he purchased in his favour on deed P12 an undivided share out of the land which forms the subject of partition in this case. The consideration for the purchase was obtained by the 1st plaintiff and his wife Sivakolunthu raising a loan on bond P13 from certain third parties. Both spouses were jointly and severally liable on the bond. As security for the loan the 1st plaintiff mortgaged the share which he purchased on P12 and the 2nd plaintiff mortgaged certain lands which she had received by way of dowry at the time of her marriage. Sivakolunthu died in 1959, intestate and issueless, leaving behind as her heirs her father (the 8th defendant), two brothers (the 7th and 9th defendants) and a sister (the 2nd plaintiff, who subsequently married the 1st plaintiff).

The 7th, 8th and 9th defendants contend that since the loan out of which the consideration for the purchase was paid was obtained by mortgaging the dowry properties of the deceased Sivakolunthu, the consideration should be regarded as the separate property of Sivakolunthu and the 1st plaintiff consequently held the share purchased by him on P12 in trust for Sivakolunthu and that on Sivakolunthu's death the title devolved on the 7th, 8th and 9th defendants, to the exclusion of the 1st and 2nd plaintiffs. This contention has been upheld by the learned trial Judge.

In upholding the said contention the learned Judge has failed to take into consideration the following matters :—

- (i) That under the mortgage bond P13 the 1st plaintiff was himself a co-obligor and the security given for the loan consisted not only of the dowry properties of Sivakolunthu but also of the land purchased by the 1st plaintiff on P12 ;
- (ii) That the mortgage debt was paid and settled subsequently by the 1st and 2nd plaintiffs ; and
- (iii) That under s. 26 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 (hereinafter referred to as the Ordinance) the 2nd plaintiff was also an heir to the estate of her deceased sister.

Where a property is purchased during the subsistence of marriage by a spouse subject to the Thesawalamai out of a loan raised jointly by both spouses, the property so acquired will fall under the category of Thediatheddam and both spouses will be equally entitled thereto. The fact that the security granted for the loan is a mortgage of the separate property of either spouse will not render the loan so raised the separate property of that spouse. Nor will the property purchased become the separate property of that spouse. If the property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse. The learned Judge was therefore wrong in holding that the consideration for the purchase of the share on P12 was the separate property of Sivakolunthu and that the 1st plaintiff held the whole of the share in trust for Sivakolunthu. Only one-half of that share was Thediatheddam which belonged to Sivakolunthu.

The next matter for decision is the question of devolution of that half share on Sivakolunthu's death. S. 20 (1) of the Ordinance, before it was amended by Ordinance No. 58 of 1947, provided that "the Thediatheddam of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto", and section 20(2) provided that "... one half of the joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased...". Ordinance No. 58 of 1947, however, effected a vital change when it repealed the provision that Thediatheddam was property common to the two spouses and that on the death of either spouse one-half remained with the survivor and the other half vested in the heirs of the deceased and introduced instead a new concept of the Thediatheddam of each spouse and provided that one-half of the Thediatheddam which belonged to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. The Thediatheddam which belonged to the surviving spouse remained unaffected by the death of the other spouse.

One-half of the half share of the extent bought on P12 which belonged to Sivakolunthu as her Thediatheddam therefore devolved on the 1st plaintiff while the remaining half share devolved on her heirs. Under s. 23 of the Ordinance one-half of the remaining half share devolved on Sivakolunthu's father, the 8th defendant, and under s. 26 the balance half share devolved equally on the 2nd plaintiff and the 7th and 9th defendants.

After Sivakolunthu's death, the title to the extent of land purchased by the 1st plaintiff on P12 was therefore as follows :—

1st plaintiff....3/4th share.

2nd plaintiff....1/24th share.

7th defendant....1/24th share.

8th defendant....1/8th share.

9th defendant....1/24th share,

The learned Judge was wrong in holding that the 1st and 2nd plaintiffs were not entitled to any share of the extent purchased on P12. By deed P18 the 4th plaintiff obtained valid title only to the shares to which the 1st and 2nd plaintiffs were entitled out of the whole land.

I set aside the interlocutory decree entered in this case and direct that a fresh decree be entered on the footing of the devolution of title set out above in respect of the extent of land purchased by the 1st plaintiff on P12.

The 7th, 8th and 9th defendants will pay the plaintiffs-appellants their taxed costs of contest in the lower Court as well as their costs in appeal. All other costs will be as already determined by the trial Judge.

ALLES, J.—I agree.

Decree set aside and a fresh decree entered.

1967 *Present : H. N. G. Fernando, C.J., Tambiah, J., and Siva Supramaniam, J.*

L. EDRICK DE SILVA, Petitioner, and **L. CHANDRADASA DE SILVA**, Respondent

ELECTION PETITION APPEAL No. 16 OF 1966

Election Petition No. 4 of 1965—Balapitiya (Electoral District No. 55)

Election petition—Status of petitioner to present petition—Standard of proof required—Same as in a civil action—Burden of proof—Factum probandum—Petitioner's evidence thereon uncontradicted—Duty of Court to take that circumstance into account—Criminal Procedure Code, ss. 162, 191, 234 (1)—Civil Procedure Code, ss. 147, 163—Evidence Ordinance, s. 3—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 79.

In an election petition, where the only question to be determined was whether in terms of section 79 of the Ceylon (Parliamentary Elections) Order in Council the person who presented the petition had a right to vote at the election to which the petition related, or in other words whether the name of that person was entered on the register of electors for Electoral District No. 55 in operation under the Order in Council at the time of the holding of the General Election in March 1965—

Held : When it is necessary to adduce proof of the status of a petitioner in an election petition, the standard of proof is the same as that required under our law in civil actions. Principles of the criminal law as to proof of guilt, which are reinforced by provisions such as sections 162, 191 and 234 (1) of the Criminal Procedure Code, are not applicable.

A petitioner need not adduce proof of status unless and until such proof is demanded by objection taken by the respondent. Such proof may be demanded before the close, or at the close, of the petitioner's case.

The objection as to proof of status constitutes a formal submission to the Court that there has not been evidence to prove the petitioner's qualification as such, plus a motion that the petition be dismissed if such proof is not adduced. But where there is evidence on record which, if believed, is ample proof of the petitioner's qualification to present the election petition, the burden would shift to the respondent if he challenges the evidence of status.

Where the petitioner has led evidence sufficient in law to prove his status, i.e., a *factum probandum*, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner. There is then an additional "matter before the Court", which the definition in section 3 of the Evidence Ordinance requires the Court to take into account, namely, that the evidence led by the petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law.

The petitioner's name in the caption of his petition was given as "Luwisdura Edrick de Silva". The petition purported to be signed by the petitioner, but the signature was written as "L. Adrich de Silva". The evidence of certain witnesses called for the petitioner showed that the person whose signature

appeared in the petition was the person named in the caption, and that that person was "Luwisdura Edrick de Silva" who was registered in the Electoral List as a voter. The evidence of those witnesses was not contradicted. After the close of the petitioner's case, Counsel for the respondent raised an objection to the continuance of the hearing of the petition on the ground that the petitioner had not proved his status to maintain the petition. The Election Judge upheld the objection and dismissed the petition.

Held, that the failure of the Election Judge to take account of the uncontradicted evidence of the aforementioned witnesses was a non-direction amounting to a misdirection in law which vitiated the conclusion of fact reached ultimately by the Judge.

Obiter : "Section 147 of the Civil Procedure Code permits an issue of law to be disposed of as a preliminary issue, but it does not permit the same issue to be decided more than once. Hence, even if it was permissible for respondent's Counsel in this case to request a determination on the matter of status at the stage when he made it, that request disentitles him from leading any further evidence to disprove the status."

ELECTION Petition Appeal No. 16 of 1966—Balapitiya (Electoral District No. 55),

C. Thiagalingam, Q.C., with *M. L. de Silva* and *R. D. C. de Silva*, for the Petitioner-Appellant.

Colvin R. de Silva, with *K. Shinya*, *Nimal Senanayake*, *Mrs. Sarath Muthetuwegama*, *Hannan Ismail* and *Nihal Jayawickrema*, for the Respondent.

Cur. adv. vult.

13th September, 1967. H. N. G. FERNANDO, C.J.—

The election of the respondent as member for Electoral District No. 55 Balapitiya at the General Election held in March 1965 was challenged in this petition on various grounds set out therein. After the close of the petitioner's case, Counsel for the respondent raised an objection to the continuance of the hearing of the petition on the ground that the petitioner had not proved his status to maintain the petition. After hearing argument the learned Election Judge made order dismissing the petition on that ground. This appeal was against the order of dismissal. The appeal was allowed by order made on 25th August 1967 and I now state my reasons.

The question whether the petitioner had a status to maintain the petition is referable to Section 79 of the Ceylon (Parliamentary Elections) Order in Council. For the purposes of the present case the only question to be determined is whether in terms of Section 79 the person who presented the election petition had a right to vote at the Election to which the petition related, or in other words whether the name of that

person was entered on the register of electors for Electoral District No. 55 in operation under the Order in Council at the time of the holding of the General Election in March 1965. That register has been produced marked P54.

There were a number of matters in evidence upon which the petitioner relied as being in law sufficient to prove that the name of the person who presented the petition in this case was entered in the entry P54A in the register P54. The argument for the petitioner in the appeal has been substantially that the conclusion reached by the trial Judge on the available evidence must be reversed on grounds of law.

Counsel appearing for the respondent in appeal argued at one stage that in election law the requirement of proof beyond reasonable doubt, which applies in respect of charges made in a petition, applies equally for the purposes of proving the qualification of a person to be the petitioner in such a petition. The unsoundness of this argument is easily demonstrated.

Rogers (Vol. 2, p. 215) refers to the *Walsall* case decided in 1892, the report of which is unfortunately not available to us, and states that the burden of proving that a petitioner does not possess the requisite qualification is on the respondent. This statement was considered in *Abeywardena v. Dharmapala* ¹, by Swan J., who rejected the contention that there is “a presumption that a person who files an election petition is qualified so to do, and if his status is challenged it is for the respondent to prove that he is disqualified.” Swan J. added the following observations:—

“There may be occasions where the burden might shift to the respondent to prove that the petitioner is disqualified. If, for instance, the petitioner gave evidence and said that he had voted and pointed to the fact that his name appeared on the Electoral Register as a duly qualified voter, and the respondent challenged his status, or contended that he was disqualified, or that he was not the person who was duly registered although his name appeared on the Electoral Register but that the person registered was somebody else residing in the same village and bearing the same name, then the burden would be on the respondent to prove the facts he alleges.”

I agree entirely with the views which Swan J. expressed. But I note that, in the case which he decided, Counsel for the respondent referred to the matter of the absence of proof of the petitioner's status *at the close of the petitioner's case* (cf. the first line of the order at p. 138). This means that reference to this matter of status was made after Counsel for the petitioner had formally closed his case; nevertheless Swan J. both at the stage when the reference was made and at the stage when he made his order, called upon the petitioner's Counsel to lead evidence as to the petitioner's status (cf. the last sentence in the order). Swan J. first rejected the contention that an objection (as to the absence of proof of

¹ (1953) 55 N. L. R. 138.

status) must be taken at the commencement of the trial, and also the contention that the motion need be in writing. I cite again from his order :—

“ I do not think, as Mr. Nadarasa argued, that a substantive motion must necessarily be a motion in writing. In my opinion a substantive motion is one of real importance. I am unable to agree with Mr. Nadarasa that it must be taken *in limine* before the trial and if not so taken must be deemed to have been waived. In *East Cork* 6 O’M. & H. 361 the objection that the petitioner’s status had not been proved was taken at the close of the whole case so that the petitioner had no opportunity to meet it. It was therefore properly over-ruled. I consider the application of Mr. Wikramanayake made at the close of the petitioner’s case to have the petition dismissed unless evidence was led to prove the petitioner’s qualification to file the petition to be a substantive motion and that it has not been made so late as to entitle me to reject it.”

Thus the order (1) affirmed the correctness of the *East Cork* decision that an objection, that the petitioner’s status has not been proved, must be over-ruled if taken only at the end of the whole case ; and (2) held that, if the objection is taken before the close, or at the close, of the petitioner’s case, the petitioner can then lead evidence in proof of status. In the situation at (1) above, there is in fact no proof at all of the petitioner’s status ; but this fact will not entitle the respondent to ask for dismissal on that ground. The situation at (2) is less extreme : here there is no such proof on record at the close of the petitioner’s case, but if objection is then taken on that ground, the petitioner can then adduce the proof.

I respectfully adopt and confirm the conclusion of law which is manifest from Swan J.’s order ; namely that a petitioner need not adduce proof of status unless and until such proof is demanded by the respondent, and that such proof may be adduced even after the close of the petitioner’s case if the demand is only made at that stage. This conclusion, reached in Ceylon 14 years ago, indicates that the election law attaches no great importance to the matter of proof of status ; the status is assumed if no objection to lack of proof is taken at the close of the petitioner’s case, even though there is no proof on record. If the need for proof of a matter can be waived by mere silence on the part of the respondent, how can it be said that the proof when demanded must be proof of the standard required in criminal cases. There can be no waiver in criminal cases, by Counsel’s word or silence, of the prosecution’s burden to prove every ingredient of a charge beyond reasonable doubt ; juries are daily directed in our Courts that an accused and his Counsel may sit tight-lipped throughout a trial, but that nevertheless the accused must be acquitted unless the prosecution proves by evidence, and beyond a reasonable doubt, every fact necessary to establish the commission of the offence. But in relation to the matter of proof of the status of the petitioner in an election petition, it would be absurd for an election Judge

to direct himself in the same manner ; for the election law is that the status is regarded as proved if both sides maintain silence with regard to the matter.

I therefore reach the conclusion that, when it is necessary to adduce proof of the status of a petitioner in an election petition, the standard of proof is the same as that required under our law in Civil actions.

This discussion of the objection as to proof of status has enabled me to understand its true nature. The objection constitutes a formal submission to the Court that there has not been evidence to prove the petitioner's qualification as such, plus a motion that the petition be dismissed if such proof is not adduced. An "objection", as thus understood, could not be taken in the instant case ; for here there was evidence on record, which if believed, was ample proof of the petitioner's qualification. The first passage which I have cited from Swan J.'s order applies in such circumstances, and declares that the burden would shift to the respondent if he challenges the.....evidence of status. Swan J. refers in that passage to evidence of status *given by the petitioner himself*, but only as an "instance". He did not think, nor did the learned Judge who tried the present case think, that the status cannot be proved by other evidence.

The learned trial Judge did not in his judgment direct himself on the question of the standard of proof required to establish the status of the petitioner. But it is significant that he made the following observations :—

"An analogy may appropriately be drawn regarding this matter from a trial in a criminal or civil case. In a criminal trial a *prima facie* case which the defence has to meet can be said to be established only if the prosecution has succeeded in proving to the satisfaction of the Court by reliable evidence, despite attacks made upon it, that the accused committed the offence complained of. If the evidence for the prosecution, though literally available, is such that there is reasonable doubt as to its truthfulness at the end of the case for the prosecution, there is no *prima facie* case which the defence has to meet and the court will not in that state of the evidence call upon the defence. In a civil trial too, where the standard of proof required is lower, if a court does not consider the evidence of the plaintiff and his witnesses, after they have been cross-examined, to be worthy of credit the Court will not proceed to hear the evidence of the defendant, as it has already made up its mind that the plaintiff's case cannot be maintained."

In so far as the Judge thus invoked the principles of the criminal law as to proof of guilt, which are reinforced by provisions such as Sections 162, 191 and 254 (1) of the Criminal Procedure Code, he misdirected himself in law, for those principles do not apply in regard to the proof of the status of a petitioner in an election petition.

Counsel for the appellant before us confidently submitted that never in his experience had evidence adduced for the plaintiff in a civil action been rejected as untrue by a trial Judge without calling for a defence. The

long experience of my two brothers, the one as practitioner and the other as Judge in the original Courts, has been the same. Even Counsel appearing for the respondent conceded that such a rejection is "not normal", and he was not able to cite any instances of such rejection of uncontradicted evidence. Section 163 of the Civil Procedure Code certainly appears to controvert the opinion expressed by the election Judge in the instant case, for it provides that after the party beginning has adduced his evidence, then "the opposing party..... shall..... adduce his evidence". Moreover, there is no provision in that Code in any way resembling ss. 162, 191 and 234 (1) of the Criminal Procedure Code. Section 163 of course does not have the effect that the opposing party must actually lead evidence, and that judgment against him will follow if he does not. For instance, his Counsel can in appropriate circumstances be content to submit that the facts proved by the plaintiff do not establish the pleaded cause of action or do not entitle the plaintiff to the remedy he seeks, or that the plaintiff must fail on some ground of law.

But where the plaintiff has in a civil case led evidence sufficient in law to prove a *factum probandum*, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted.

When respondent's Counsel in the instant case called upon the Election Judge to decide the matter of the petitioner's status upon a consideration of the evidence on record at the close of the case for the petitioner, he did so without himself calling any evidence in disproof of the status. In other words, the evidence on record remained uncontradicted. But nowhere in the judgment did the learned Election Judge refer to this circumstance as "a matter before the Court", and it is evident that he took no account of this circumstance in reaching his conclusion. The failure to take account of this circumstance was a non-direction amounting to a misdirection in law which vitiates the conclusion of fact which the Judge ultimately reached. That is a sufficient ground on which to set aside the order dismissing the petition.

I must disgress here to point out that our procedure and practice in civil actions does not permit a party to harass the Court or his opponent by requiring the same question to be determined more than once on different material. Section 147 of the Civil Procedure Code permits an issue of law to be disposed of as a preliminary issue, but it does not permit the same issue to be decided more than once. Hence, even if it was permissible for respondent's Counsel in this case to request a determination on the matter of status at the stage when he made it, that request disentitles him from leading any further evidence to disprove the status.

The petition in this case names in its caption as the petitioner “Luwisdura Edrick de Silva of No. 11, Subadraramaya Road, Balapitiya”. The petition purports to be signed by the petitioner, and it was common ground at the trial that the signature is written as “L. Adrich de Silva”. I will now refer to some of the evidence upon which the petitioner relied as proof of the fact that the person whose signature appears in the petition is the person named in the caption, and that that person is “Luwisdura Edrick de Silva” who is registered in the Electoral List P54A as a voter of this electorate. For convenience I shall in so doing refer to the pages in the brief typed for the Court of Appeal. The evidence will be better understood if I state at once that, according to the judgment of the learned trial Judge, during many of the days of trial a particular person was seen to be seated just behind the Counsel and Proctor appearing for the petitioner.

(1) During *the cross-examination* of one Mr. Loos who had been the Counting Officer at this particular election, the respondent's Counsel put to the witness the following question :—

Q. You know this gentleman who is seated here in Court now (shows), he is the petitioner in this case—can you remember whether he was a counting agent of some other candidate ?

A. I cannot recollect. (page 989).

(2) During *the cross-examination* of A. M. Amerasekera (p. 1316) the witness stated that he met the petitioner about one or two weeks after the General Election and on that occasion told the petitioner that some persons had at an election meeting spoken in derogatory terms about one of the candidates who contested the present respondent, and the petitioner then inquired from the witness whether he could give evidence. He said “there was a village talk that Edrick de Silva was submitting an Election Petition. Hence, My Lord, I informed Edrick de Silva such a thing took place at Walagedara”. Thereafter the witness stated in answer to a leading question by respondent's Counsel that he later received a letter from the Proctor for the petitioner, and further stated that he made a statement to that Proctor.

When this witness was re-examined (p. 1346) he stated that the name of the petitioner is “Lewis Dure Edrick de Silva”, that he lived along Subaddrama Road, that he was the Chairman of the Town Council, and that he was still a member of the Council, and had worked for Mr. Lakshman de Silva, an unsuccessful candidate at this election.

(3) The next witness was one Ariyadasa. During his cross-examination (p. 1383) the witness said that after a particular election meeting he had met “the Chairman Mr. L. A. de Silva” and

then gave him some information about speeches made at the meeting. He too received a letter from the petitioner's Proctor. (p. 1388).

In re-examination the witness said that the person whom he had met was the petitioner, that his name was Luwisdura Edrick de Silva who had worked for Mr. Lakshman de Silva and had been Chairman immediately prior to the 1965 Elections.

(4) The Grama Sevaka gave the following evidence-in-chief :—(p. 1799)

“Q. Subadhraramaya Road comes within your jurisdiction ?

A. Yes.

Q. You know the Petitioner in this case ?

A. Yes.

Q. He is Luwisdura Edrick de Silva ?

A. Yes.

Q. He lives at No. 11, Subadhraramaya Road, Balapitiya ?

A. Yes.

Q. He is a registered voter No. 689 in the Voters Register for the Balapitiya Electoral District ?

A. Yes.”

In cross-examination the Grama Sevaka stated that he was aware that about August or September 1965 the petitioner had left his former address and taken up residence in another house. His recollection was assisted by the fact that he himself had at one time thought of taking on the petitioner's former residence ; a while later (p. 1801) the witness explained that after the Chairman left the house a Surveyor went into occupation. I now reproduce some further evidence of the Grama Sevaka :—(pp.1801-1802).

Cross-examined :

“Q. The person whom you referred to as Luwisdura Edrick de Silva resided at 11, Subadhraramaya Road. Is he present in Court here today ?

A. Yes.

Court : Q. Where is he living now ?

A. Luwisdura Edrick de Silva is now residing in a house adjoining the house of the late Robert de Soysa which is in my division.

Re-examined :

Q. You know the petitioner personally ?

Mr. Shinya : It would be 'Do you know the person who is seated in Court'.

Court : Is there any dispute ?

Mr. Shinya : I am challenging him to prove that he has any status.

Re-examination continued :

Q. Do you know the person who is seated in this court ?

A. Yes, I know him well.

Q. You know he is Luwis Edrick de Silva ?

A. Yes.

Q. You know that he lived at the time of the Elections at No. 11, Subadhraramaya Road ?

A. Yes.

Q. You were the Grama Sevaka in May, 1963 ?

A. Yes.

Q. You know the Register on which the General Elections of 1965 were fought ?

A. Yes.

A. Yes, in fact it was I who prepared the Voters list in respect of the Ward No. 5 of the Balapitiya Town Council.

Q. (Shown Electoral Register).

Mr. Shinya : I object, then he is reading the Electoral Register.

Court : Q. Can you give any voters number ?

A. The Chairman's family were living at 11, Subadhraramaya Road which is at the commencement of the road".

At the end of the petitioner's examination the following is the record of the end of the Grama Sevaka's examination : (p. 1804)

"Q. Does the petitioner live within your division ?

Mr. Shinya : Not petitioner, My Lord, he may be referred to as Luwisdura Edrick de Silva.

To Court : Q. Does this man who is seated behind Counsel live in your area ?

A. Yes, he is within my division and in fact he has been successively elected Member for Ward No. 5 of the Balapitiya Town Council."

Let me now attempt to sum up the effect of this evidence. The Grama Sevaka professed to know Lewis Edrick de Silva well and knew his former place of residence. In answer to a question phrased according to the wishes of Counsel for the respondent, the witness stated that "he knew well the person who is seated in Court" (who obviously was pointed to in Court), and he then identified him as Lewisdura Edrick de Silva living at No. 11, Subadhraramaya Road, the registered voter named in P54A. That entry reads as follows:—

"SUBHADRARAMAYA ROAD

<i>H. L. No.</i>	<i>Name</i>	<i>Sex</i>	<i>Serial No.</i>
11	Lewisdura Edrick de Silva	M	689 "

It will be seen that the petitioner's Counsel desired then to show the Electoral Register to the Grama Sevaka, but this was objected to. That objection I now find was due to ignorance of the law. Section 7 of the Local Authorities Elections Ordinance, Cap. 262, provides that the basic qualification for a local authority election is that a person's name is entered in the current parliamentary register. A person who has his name on that register is by s. 7 entitled to have his name entered in the Electoral List of the Ward of the Local Authority in which he resides. It is thus clear (see also s. 15 of Cap. 262) that the current Parliamentary Register is utilised for the purpose of preparing electoral lists under the Ordinance. There was a high probability therefore of the truth of the Grama Sevaka's evidence that he knew the register on which the Parliamentary Elections of 1965 was held, and these circumstances strongly supported the correctness of his personal identification of the person seated in Court as the registered voter "Lewisdura Edrick de Silva".

Although during the examination of the Grama Sevaka, respondent's Counsel resiled from his former concession (p. 989) that the person seated in Court was the petitioner, there was already the evidence of Amerasekera and Ariyadasa identifying the petitioner as Lewisdura Edrick de Silva living at the address shown in P54A, and identifying the same person as the Chairman or the ex-Chairman. There was from both these witnesses convincing circumstantial evidence that this person was the petitioner: he told the witnesses that he was the petitioner, and he acted as a petitioner would because he put the witnesses into contact with the Proctor on record. Moreover, Lewisdura Edrick de Silva, the ex-Chairman, was shown beyond any doubt to have been seated in Court just behind the petitioner's lawyers, and he acquiesced when on several occasions he was pointed out in Court to various witnesses as the petitioner. None of the witnesses to whom I have so far referred was cross-examined to suggest in any way that the person seated in Court was not the ex-Chairman or not the petitioner.

Respondent's Counsel's mere statement during the Grama Sevaka's evidence "I am challenging him to prove that he has any status" can in no way detract from the evidence adduced in proof of that status. Respondent's Counsel in appeal did not even attempt to point to any question in cross-examination designed to cast doubt on the truth of the Grama Sevaka's evidence that Luwisdura Edrick de Silva, the person seated in Court, was indeed a registered voter.

This although the Grama Sevaka was called solely for the purpose of proving the status of the petitioner. The learned trial Judge does not examine this evidence in the judgment. He refers to it only to remark that, because he rejects the evidence of another witness, Lakshman de Silva, on the matter of status, he cannot act on other evidence on the same matter. Now one factor taken into account against Lakshman de Silva was that (being an unsuccessful candidate) he was an interested witness; thus the assumption on which the Judge acted was that when the evidence of an interested witness fails the test of credibility the Court may exclude from consideration the evidence of a disinterested witness (in this case the Grama Sevaka). This assumption is unlawful, because it led to the exclusion of relevant evidence, a matter which, in the judgment of Gadjendragadkar J. (1959 A. I. R., S. C. 362) which has often been applied in our Courts, is a ground of law upon which a conclusion of fact may be impugned. The fact that the evidence thus excluded was uncontradicted, and uncontested in cross-examination save by an armchair challenge, enhances the gravity of the ground of law. The assumption is also illogical; it pre-supposes that the safe course for a plaintiff or prosecutor is to call only one witness to prove any particular fact; to call more than one witness is to run the risk that the witness on whom he relies most heavily will be disbelieved arbitrarily on the ground that his least reliable witness might fail the test of credibility.

I hold that the learned trial Judge had a duty to consider the evidence of the Grama Sevaka and the other evidence which I have summarized. I hold also that because that evidence was uncontradicted, and because the truth of the evidence was not contested or doubted in the course of cross-examination, the petitioner succeeded in proving:—

- (a) on the evidence referred to at (1), (2) and (3) above, that the petitioner named in the caption of the petition is Luwisdura Edrick de Silva, who had been Chairman of Town Council and who in 1965 was a member of the Council;
- (b) on the evidence of the Grama Sevaka, that the person pointed out in Court is the same Luwisdura Edrick de Silva, and was a voter registered in P54.

Respondent's Counsel had at no stage during the hearing informed the Court that he would be disputing the signature on the proxy and the

election petition as being that of the petitioner named therein. Nevertheless the learned Election Judge considered this submission which was made after the close of the petitioner's case. As stated earlier in this judgment the signature reads as "L. Adrich de Silva".

Had the learned Judge reached the conclusion, which I have already held he should have reached, that the person named in the petition was proved to be a registered voter, and thus qualified to file a petition in terms of s. 79, he would have realized that the only remaining matter in dispute was whether the named petitioner actually signed the election petition. I much doubt whether the Judge did realize that he was dealing with a submission unique in my experience and his own—a submission that a known identified individual named as plaintiff in a plaint had not signed the proxy filed with the plaint. In the present context of an election petition filed with a deposit of Rs. 5,000, where any one of the 16,519 registered voters who voted in favour of the unsuccessful candidate Lakshman de Silva was competent to file the petition, where was the need or temptation to "borrow" the ex-Chairman's name and pretend that he was the petitioner, and further to have some unknown person forge a signature on the petition? Why run *in limine* the risk that the forgery might be noticed and the petition dismissed on that score? If indeed the respondent's Counsel had instructions that the signature on the proxy was not that of Luwisdura Edrick de Silva, the ex Chairman, why did he not take the simple course of marking even one Town Council document bearing the genuine signature of the ex-Chairman? If Counsel had any faith in his own challenge, why did he run the risk of calling for a decision of fact upon uncontradicted evidence adduced by the opposing party? Why should the ex-Chairman sit in Court in a place naturally occupied by a person who had filed a petition, and why should he acquiesce when the signature on the proxy was identified as his signature in his very presence (p. 2028)? In these circumstances, Counsel's "challenge" was in my opinion unworthy of consideration by a Court.

Nevertheless, because the learned Election Judge did consider Counsel's submission, and because we have held in our order of 25th August 1967 that the status of the petitioner was proved, it is desirable that I do discuss the evidence and the Judge's reasons for rejecting it.

The learned Judge rightly states that the only witness who identified the signature on the proxy as being that of L. Edrick de Silva, the former Chairman, was Lakshman de Silva one of the unsuccessful candidates at this election. This witness had been a Member of Parliament from 1960 till 1965. The learned Judge has disbelieved his evidence, particularly his identification of the signature "L. Adrich de Silva" as being that of the former Chairman, and I will presently discuss the principal reasons for that rejection. In examination-in-chief he, like the other witnesses, said that the petitioner had put him into contact with the Proctor on record, that he had often travelled with the petitioner to Colombo to see the Proctor, that the petitioner had been present in

Court, that the petitioner had been Chairman of the Council, and afterwards a member. He stated that he had known the petitioner for 25 years and was familiar with the petitioner's signature and he identified the signature on the proxy as being that of the petitioner. His capacity to identify the signature is rendered highly probable by the fact that he was the Member of Parliament for Balapitiya during the petitioner's tenure of office as Chairman of the Town Council.

In cross-examination Lakshman de Silva readily agreed that he was related to the ex-Chairman in a manner outlined by respondent's Counsel and he said that he called the ex-Chairman "L. A. Uncle".

It is relevant now to reproduce the following Questions and Answers in the cross-examination of Lakshman de Silva :—

"Q. When you say that you have seen his signature, what you mean is that you have seen the ex-Chairman signing ?
 A. I have seen him signing.
 Q. What you say is the signature appearing on this document is the same as that of that ex-Chairman ?
 A. Yes.
 X Q. Is it not the fact that the ex-Chairman is L. A. de Silva and not L. E. de Silva ?
 A. He is referred to as Edrick as well as Adrick.
 Q. When I asked you as I started my cross-examination to tell His Lordship clearly what is the name of the person whom you call as the petitioner, you said it was Luwisdura Edrick de Silva ?
 A. Yes."

Here is the comment made in the judgment on this evidence :—

"Confronted with the question whether the ex-Chairman was not in fact L. A. de Silva, *a brother of the person in Court*, whose name was later admitted by this witness to be L. Aris de Silva his reply was that the ex-Chairman was called both Edrick and Adrick and did not answer to Counsel's questions directly. Counsel thereupon produced certain Gazette notifications....." (The italics above are mine).

The reference in this comment to the reply of the witness, to his not answering the question directly, and to Counsel thereafter producing Gazette notifications, makes it evident that the trial Judge made the comment with reference to the third question which I have sidelined X in the above extract from the evidence. This question appears at p. 2070 of the brief. There is nothing in that question suggesting that the ex-Chairman was a brother of the person in Court. Indeed, up to that stage, not one word had been mentioned in Court about a brother of

Edrick de Silva named L. A. de Silva. It was most unfortunate for the witness Lakshman de Silva, that the Judge when he came to write his judgment decided that the witness had 'dodged' a suggestion in the question now under reference, that the ex-Chairman had been a person named 'L. Aris de Silva'.

The name 'Aris de Silva' transpired only in subsequent evidence (p. 2072), in an unimportant answer to Court. The Gazette of 24th December 1964 contains a notice published by the Commissioner of Elections (Local Bodies) under the Local Authorities Elections Ordinance of which this Court can take judicial notice. It is a list of the names of the members elected to the Balapitiya Town Council, showing the member for Ward No. 5 as 'Luwisdura Edric de Silva'. No other person in that list bears the name Luwisdura, nor is there any "Aris" in the list. The respondent's Counsel could not conceivably have been instructed to suggest, nor did he in fact suggest, that anyone other than Edric de Silva had been the Chairman or a Member of the Council. I must say therefore with the greatest respect that the comment of the learned Judge with regard to the evidence now under reference was based on a complete misconception both of the evidence and of Counsel's suggestion. The Judge's subsequent statement in his judgment that "the ex-Chairman of the Town Council may well have been the brother L. Aris de Silva" shows how much he was influenced by this misconception.

Another reason for the Judge's rejection of the identification of the ex-Chairman's signature arises from certain Gazette notifications which purport to reproduce in print the signature of the Chairman, Town Council, Balapitiya. In these notifications the signature is printed in English as 'L. A. de Silva' (and in Sinhalese as එල්. අ. ඩීල්ඩා). The assumption on which the Judge relied in this connection was that if, as Lakshman de Silva said, the Chairman signed as "L. Adrich de Silva", that signature would have been reproduced *in full* in the Gazette notices, whereas in fact the English notices have the printed signature 'L. A. de Silva'. With respect, in the absence of the originals of these notices or of any evidence from the Government Printer's Office, this assumption was purely conjectural. The Appeal file of this case convincingly demonstrates the fallibility of such conjecture. For although the petitions of appeal, filed in triplicate, bear the signatures "L. Adrich de Silva", the typed copies of the petition in our briefs have the signature "L. E. de Silva".

The trial Judge was also probably influenced by the fact that in the Gazette notices of the Town Council published in Sinhala the Chairman's name is printed as එල්. අ. ඩීල්ඩා. This circumstance is apparently inconsistent with the evidence of Lakshman de Silva that (so far as he knows) the ex-Chairman only signed in English. But I have in this connection pointed out in Court that, although I myself sign Orders under the Courts Ordinance only in English, my signature is printed in Sinhala in Gazette notifications of my orders.

At another stage of the judgment, there occurs a criticism that the witness would not have called the Chairman "L. A. Uncle" if as the witness had himself said the Chairman's name was Edrick. Here again there is a simple explanation to be found in the Gazette notice. If the Chairman insisted on signing himself 'L. A.' although his name is sometimes spelt with an "E", there is nothing suspicious in the evidence of the witness that he called the Chairman "L. A. Uncle".

The learned Judge unfortunately failed to realise that these very Gazette notifications of the Town Council corroborate Lakshman de Silva's evidence that the Chairman had used an alias; although his name Edrick is spelt with an "E", he signs (according to the witness) as 'Adrich'. The Gazette notices which have the printed signatures 'L. A. de Silva' show that the Chairman did use an 'A' and not an 'E' in signing his name.

The last of the substantial matters referred to in the judgment which relates directly to the credibility of Lakshman de Silva is contained in this passage from the judgment :— (p. 443).

"Thus, during an ostensibly gentle but devastatingly effective piece of skilful cross-examination by Mr. Shinya, this witness was compelled to admit that he was not personally aware whether the person who was seated in Court and referred to as the petitioner was in fact the petitioner."

The only evidence to which this passage is referable is evidence at page 2068, and Counsel for the respondent in appeal has not suggested that it refers to anything else. The following is the relevant evidence :—

"Q. How long after that did you go and have discussions or consultations regarding this petition with the ex-Chairman ?

A. I believe about 1 week or 10 days of the petition being filed the petitioner and I came to Colombo to discuss matters with the petitioner's Proctor.

Q. The reason for you to say that gentleman—the ex-Chairman—is the petitioner is because he told you so. As a result of what he told you ?

A. Yes."

It is quite correct that in these answers the witness did say that he knew that the ex-Chairman is the petitioner because the ex-Chairman had told him so. But I can see here no admission under compulsion, but merely a truthful answer to a leading question. Indeed I quite fail to understand what respondent's Counsel thought he could gain from this question. The witness had never claimed in his earlier evidence that his information as to the identity of the petitioner was based otherwise than

on the ex-Chairman's own statement and conduct ; so that there was nothing in this particular answer which contradicted or modified any previous evidence, and nothing to justify the Judge's impression that the witness contradicted himself or admitted anything under compulsion.

The witness had earlier stated that he was not interested in filing an election petition because he was not in a happy mood after his defeat. Then he came to know that the ex-Chairman was interested in filing a petition. He was told by the ex-Chairman that he had filed one, and he then associated himself by going with the petitioner to see the Proctor. The questions which were put related to a period shortly after the election and the answer truly states how first the witness became aware as to who had filed the petition. In fact I cannot see how else the witness could have become aware of the matter. At that stage the most reliable source from which to obtain information about the filing of the petition was from the petitioner himself. It is quite unreasonable to expect that Lakshman de Silva should have tried to verify the truth of what the ex-Chairman told him by going to Colombo and inspecting (if the Registrar would permit him) the original petition of appeal in the Supreme Court. Plaintiffs in civil actions are identified numerous times every day by witnesses who have not watched them signing proxies.

Examination of the evidence of Lakshman de Silva, and of the treatment of that evidence in the judgment, shows that on all or nearly all of the matters which influenced his rejection of the evidence, the Judge either misconceived the effect of the evidence and of suggestions in cross-examination, or acted upon inferences which were not rationally possible. On this ground, and on the grounds of misdirection stated earlier in this judgment, we allowed this appeal and directed that the hearing of the petition must continue before the Election Judge.

I do not propose to examine much of the remaining part of the judgment, in which the learned Election Judge refers to matters unconnected with the evidence given by Lakshman de Silva. But one of the matters discussed in the judgment, namely, the absence of the petitioner from Court on the last day of hearing, arose from a misconception of what had taken place in Court. According to the record (p. 2083 of the brief) Mr. M. L. de Silva, Junior Counsel for the petitioner, is recorded as having made the following statement before the Court adjourned on 17th September 1966 :—

“ I am sorry, My Lord, that the petitioner is not here. He is very seriously ill and is in the hospital. I close the case for the petitioner.”

On the next day of hearing (19th September 1966), *Counsel for the respondent*, in asking for corrections moved for the following correction :—

“ Finally on the last page Mr. Mahinda de Silva said : ‘ I am sorry, My Lord, that the petitioner is not here. His son is seriously ill and is in the hospital ’.”

Despite this correction which was made by Counsel for the respondent, the learned Election Judge in his judgment states in caustic terms that the petitioner "happened to fall seriously ill and was said to be in hospital....." "The alleged serious illness of the person seated behind Counsel..... is open to the gravest suspicion."..... "Did this illness result from being an eye witness on the previous day to the inextricable position in which Lakshman de Silva found himself....." "Did he suddenly take ill in the thought that, if he came to Court that day, the Judge might of his own motion call him into the witness box...."

These comments were made adversely to the petitioner, and it is most unfortunate that they were based upon a complete misconception as to the stated reason for the absence of the petitioner from court. That absence was a factor which influenced the decision of the learned Judge, because it is referred to among the reasons for the decision.

I have shown that the learned Judge wrongly disbelieved certain witnesses, particularly Lakshman de Silva. But I have no doubt that such former disbelief will not influence the mind of the learned Judge in his consideration of the further matters which will now arise for decision.

TAMBIAH, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

1965

Present : Sansoni, C.J., and Sirimane, J.

B. SEDIRIS SINGHO, Appellant, and D. J. WIJESINGHE, Respondent

S. C. 417/63—D. C. Avissawella, 10116/M.

Rent Restriction Act—Inapplicability to lease of a business carried on at any premises.

Plaintiff leased to the defendant for a period of 3 years the business of a hotel carried on at certain premises, together with goodwill, shop fittings, furniture, utensils and implements of trade. At the expiry of the period of 3 years the defendant was to yield up peaceful possession of the business and premises to the plaintiff.

The defendant claimed that what was leased to him was a furnished apartment and that it was governed by the Rent Restriction Act.

Held, that the transaction between the parties was not a lease of a building but of a business. The defendant's position while he was in occupation of the premises was no more than that of a licensee. The Rent Restriction Act, therefore, had no application to the case.

APPEAL from a judgment of the District Court, Avissawella.

H. V. Perera, Q.C., with *Ralph de Silva*, for the Defendant-Appellant.

H. W. Jayewardene, Q.C., with *G. T. Samerawickrame, Q.C.*, and *I. S. de Silva*, for the Plaintiff-Respondent.

Cur. adv. vult.

December 14, 1965. SANSONI, C.J.—

The parties to this action entered into an indenture on 19th August 1958 whereby the plaintiff leased to the defendant the business called Wijeyasiri Hotel at No. 23, Ratnapura Road, Avissawella, together with goodwill, shop fittings, furniture, utensils and implements of trade, all of which were set out in detail in an annexed list. The lease was for a period of 3 years commencing from 10th January, 1958, at a rental of Rs. 250 a month. The defendant agreed to pay a further sum of Rs. 500 by way of deposit, and also Rs. 750 being arrears of rent; he also agreed to take care that the reputation of the business was not impaired in any way. The plaintiff was to be entitled to visit and inspect the business at any time he pleased. At the expiry of the period of 3 years the defendant was to yield up peaceful possession of the business and premises to the plaintiff. The schedule to the agreement reads "All that business called and known as Wijeyasiri Hotel carried on at premises No. 23" (the boundaries of which premises are there set out).

A contemporaneous writing was signed by the defendant, whereby he undertook to pay the sum of Rs. 1,976/63 in monthly instalments within six months to the plaintiff as the price of certain articles forming the stock in trade there lying in the hotel.

The plaintiff has asked that he be restored to possession of the said business and given delivery of the articles mentioned in the list annexed to the indenture, and that the defendant be ejected from the hotel premises, as the lease has expired. The plaintiff has also claimed damages at the rate of Rs. 1,000 a month until he is restored possession.

The defendant pleaded that what was leased to him was a furnished apartment which is governed by the Rent Restriction Act; and that he is a statutory tenant of the premises leased to him.

The only questions that arise on this appeal are whether the District Judge was right in holding that the transaction between the parties was not a lease of a building but of a business ; and if so, whether the damages he awarded at the rate of Rs. 400 a month from 10th January 1961 are excessive.

I have no doubt, on a consideration of the indenture and the contemporaneous writing, that the transaction was merely one of placing the lessee in charge of the hotel business for a definite period with a view to his carrying it on for three years : the lessee was also, in order to fulfil this agreement, put in possession of the premises in which that business was being run. There was no agreement here to rent the premises, nor was the rent agreed on between the parties payable in respect of the premises. The defendant's position while he is in occupation of those premises is no more than that of a licensee. Consequently the Rent Restriction Act has no application to this case.

I am in entire agreement with the judgment of Nagalingam, S.P.J. in *Charles Appuhamy v. Abeysekera*¹, where the learned Judge had to construe an indenture very similar in terms to the one before us. The case of *Nicholas Hamy v. James Appuhamy*² dealt with a document which was worded very differently, and which made it clear that a certain building was the subject of lease in that case, and not the business that was being carried on at that building.

With regard to the question of damages, the learned Judge has awarded Rs. 400 a month, apparently because the plaintiff had entered into a subsequent agreement with a third party whereby this business was leased at the rate of Rs. 400 a month. No evidence in proof of damages was led by the plaintiff, and I think the sum of Rs. 250 a month is a reasonable amount.

The decree appealed against is affirmed save that damages will be at Rs. 250 instead of Rs. 400 per mensem from the 10th January, 1961. Subject to this variation the appeal is dismissed with costs in both Courts.

SIRIMANE, J.—I agree.

Appeal dismissed.

1967

Present : H. N. G. Fernando, C.J.

A. W. P. SELLAYAH, Petitioner, and
E. E. J. SABAPATHY (Labour Officer), Respondent

S. C. 40/67—Application for Revision in M. C. Colombo, 32692/A

Employees' Provident Fund Act, No. 15 of 1958, ss. 34, 37, 46 (1) (k), 46 (1) (o)—
Employees' Provident Fund Regulations, 1958—Validity of Regulation 65—
Money overpaid to an employee—Failure to refund it after notice—Such failure is not punishable as an offence.

¹ (1954) 56 N. L. R. 243.

² (1950) 52 N. L. R. 137.

An employee to whom the Employees' Provident Fund Regulations of 1958 is applicable is not liable to be prosecuted and punished if he fails, after due notice, to refund any sum overpaid to him by the Commissioner as money lying to his credit in the Provident Fund. Paragraph 2 of regulation 65 of the Employees' Fund Regulations, in so far as it purports to make him so liable, is *ultra vires* of the powers conferred on the Minister to make regulations.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

G. E. Chitty, Q.C., with *A. M. Coomaraswamy*, for the Accused-Petitioner.

S. W. B. Wadugodapitiya, Crown Counsel, for the Complainant-Respondent.

Cur. adv. vult.

May 18, 1967. H. N. G. FERNANDO, C.J.—

Section 34 of The Employees' Provident Fund Act, No. 15 of 1958, provides that any person who contravenes any regulation made under the Act is guilty of an offence under the Act. Section 37 provides that a person who is guilty of an offence under the Act is liable on conviction to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment.

The accused pleaded guilty to the charge framed against him of failing to comply with the requirements of a notice served on him under regulation 65 of The Employees' Provident Fund Regulations, 1958, published in a Supplement to the *Gazette* of October 31, 1958.

In this application in revision Counsel has taken the point of law that regulation 65 in so far as it has the effect of rendering a person liable to prosecution and punishment for an offence, is *ultra vires* of the powers conferred on the Minister to make Regulations. Regulation 65 reads as follows :—

“(1) Where any sum is paid to any person under a determination made under the Act or by virtue of any provision of any regulation made thereunder and it is subsequently decided that such sum was not payable to such person, or where any payment has been made under the Act or under any regulations made thereunder to any person in error, then, the Commissioner may by written notice served on such person require such person to refund such sum within such time as may be specified in the notice.

(2) No person on whom a notice under paragraph (1) of this regulation has been served shall fail to comply with the requirements of such notice."

This particular Regulation was made under the power conferred by paragraph (o) of s. 46 (1) of the Act to make regulations :—

" for treating any sum paid to any person under a determination made under this Act or by virtue of any provision of any regulation, which it is subsequently decided was not payable, as properly paid, *or for the repayment by him and for the recovery from him of that sum;*"

In this particular case (according to uncontradicted statements in the affidavit of the accused) the accused had in November 1963 been paid a sum of Rs. 1,176.89, which sum had then been determined by the Commissioner to be the amount lying to the credit of the accused in the Provident Fund. However, in December, 1965, a notice was served on the accused calling upon him to refund a sum of Rs. 664.81 on the ground that there had been earlier an over-payment of this latter amount. Having regard to the fact that what is paid out to an employee is a sum determined by the Administrators of the Fund themselves to be due to the employee and that the payment is made on cessation of employment, it is alarming to find that an employee can be called upon after the lapse of two years (or indeed after the lapse of even a much longer period) to repay to the Fund moneys which he had been led to believe were his own and expendable at his pleasure. It is surprising to find that the regulation ignores the ordinary law of limitation, and that it fails to take account of an employee's capacity to meet a quite unexpected liability. Fortunately the conclusion of law which I reach is that a failure to make repayment will not in addition render a person liable to a fine and imprisonment.

It is quite usual to find in our Statutes and in subsidiary legislation provisions which enable a Public Authority to recover in a summary manner debts due from private citizens to the Government, but it is most unusual that the failure to pay such a debt can give rise to a prosecution in a criminal Court.

The power given by s. 46 (1) (o) of the Act is to make regulations for the repayment by a person, *and* for the recovery from him, of a sum not properly paid. I have italicized the word 'and' because it seems to me that in conferring this power the Legislature did have in contemplation the usual provision which is made in a case where a sum is due to a Public Authority, viz., provision that the sum must be paid *and that if it is not paid it will be recovered in a specified manner.* The usual manner of recovery is by the production of a Certificate to Court stating the amount due, whereupon the Court will enforce payment either in the same manner as a sum due under a decree or in the same manner as a fine imposed by Court.

Had the regulation which was made in this case included, as the Legislature contemplated, not only provision for repayment but also provision for the mode of recovery in case of default, the provision for recovery would by implication have excluded the possibility of a prosecution in case of default. The argument, based upon paragraph (2) of the Regulation, that there was a breach punishable by prosecution would have been negatived if the Minister had in fact prescribed a mode of recovery. I cannot agree that by omitting to provide a mode of recovery it was open to the Minister to secure that default in repayment would be punishable as an offence.

I would refer in this context to paragraph (k) of s. 46 (1) of the same Act, under which Regulations may be made :—

“ in respect of the circumstances in which costs may be awarded by such Tribunal against any party to an appeal made to the Tribunal and the manner of recovery of such costs ; ”

I would hold in regard to paragraph (k) that the intention of the Legislature is that if Regulations do authorise the award of costs *they must also provide* a mode of recovery of the costs. The Minister cannot by omitting to provide a mode of recovery render a failure to pay costs a matter for a criminal prosecution. Similarly in a regulation made under paragraph (o) it is obligatory on the Minister to prescribe a mode of recovery in the event of non-payment. Paragraph 2 of regulation 65 is *ultra vires* in so far as it purports to render a failure to make the payment a contravention of a regulation made under the Act and therefore an offence.

For these reasons I would set aside the conviction and sentence.

Conviction and sentence set aside.

1965 Present : H. N. G. Fernando, S.P.J., and G. P. A. Silva, J.

A. ABDUL CADER, Petitioner, and
P. WEERAMAN (District Registrar) and 3 others, Respondents

S. C. 280/65—Application for Writ of Mandamus and/or
Certiorari on the District Registrar, Kurunegala, and 3 others.

Muslim Marriage and Divorce Act (Cap. 115)—Sections 16, 17, 21, 29—Validity of divorce despite non-registration—Second or subsequent marriage—Duty of registrar to register it.

If a Muslim divorces his wife, section 16 of the Muslim Marriage and Divorce Act makes the divorce valid even if it is not registered. He is, therefore, entitled to contract a second marriage on the basis that he does not have a wife of another marriage. The registrar has no power then to refuse to register the second marriage on the ground that the notices required by section 24 of the Act have not been given.

APPLICATION for Writ of *mandamus* and/or *certiorari* on the District Registrar, Kurunegala.

M. T. M. Sivardeen, for the petitioner.

S. Sivarasa, Crown Counsel, for the 1st to 4th respondents.

September 22, 1965. H. N. G. FERNANDO, S.P.J.—

This is an application for a mandamus requiring a District Registrar, the third respondent, to register the petitioner's marriage under section 17 of Chapter 115.

It would appear that the petitioner had been previously married and that upon application duly made to a Quazi, the wife of that marriage was divorced in accordance with the procedure set out in the second schedule to the Act. Thereafter, under section 29, it was the duty of the Quazi to register the divorce. But I understand that the registration was not effected for the reason that Quazis had received certain instructions from the Registrar-General in consequence of a decision of this Court regarding their jurisdiction. It is not necessary to decide in this case whether the Quazi lacked the power to register the divorce under section 29.

Although the divorce was not registered, section 16 of the Act preserves the validity of a divorce under the Muslim Law notwithstanding that the divorce is not registered. In refusing to register the marriage of the petitioner, the third respondent relied upon the provisions of section 24 which prevents the registration of a marriage, in the case of a male Muslim already having a wife, unless certain notices are issued to and exhibited by the Quazi of the area. The third respondent took the view that since the divorce of the petitioner had not been registered, it was not a valid divorce and the former marriage was still subsisting. On this view, the present marriage could not be registered because the notices required by section 24 had not been given.

But I have pointed out above that the petitioner's divorce was by virtue of section 16 valid, notwithstanding non-registration. Therefore, for the purpose of section 24, he does not have a wife of another marriage.

The third respondent is directed to register the marriage on the application already made to him by the petitioner.

G. P. A. SILVA, J.—I agree.

Application allowed.

[COURT OF CRIMINAL APPEAL]

1966 Present : Sansoni, C.J. (President), H. N. G. Fernando, S.P.J., and Abeyesundere, J.

THE QUEEN *v.* D. D. GINIGANDARA and another

APPEALS Nos. 102 AND 103 OF 1966, WITH APPLICATIONS 58 AND 59

S. C. 291/65—*M. C. Kalutara, 20085*

Charge of abetment of attempted murder—Conviction for using criminal force—Validity.

An accused person cannot be convicted of using criminal force when the only charge framed against him is that of aiding and abetting another in the offence of attempted murder.

APPEALS against two convictions at a trial before the Supreme Court.

G. E. Chitty, Q.C., with Elmo Vannitamby, Mangala Munasinghe and N. Balakrishnan (assigned), for both Accused-Appellants.

T. A. de S. Wijesundere, Senior Crown Counsel, for the Crown.

September 15, 1966. SANSONI, C.J.—

We see no reason to interfere with the conviction and sentence in the case of the second accused-appellant.

In the case of the first accused-appellant, however, we set aside his conviction and acquit him. The point argued by Mr. Chitty was that the first accused-appellant could not be convicted of using criminal force when the only charge framed against him was that of aiding and abetting the second accused-appellant in the offence of attempted murder. There is a decision of this Court which we think is in point—the case of *Queen v. D. K. Dhanapala*¹, where it was held that on a charge of abetment of attempted murder, a person cannot be convicted of voluntarily causing simple hurt. We would follow that decision.

Appeal of 1st accused allowed.

Appeal of 2nd accused dismissed.

1967

Present : T. S. Fernando, A.C.J. Sirimane, J., and Siva Supramaniam, J.

W. K. D. PREMASIRI, Appellant, and THE ATTORNEY-GENERAL, Respondent

S. C. 401 of 1967—Application under Section 31 of the Courts Ordinance for bail in M. C. Colombo, 37693/C

Courts Ordinance (Cap. 6)—Section 31—Admission to bail thereunder—Service of indictment on prisoner not a condition precedent—“ Might properly be tried ”.

The relevant part of section 31 of the Courts Ordinance is as follows :—

“ If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner. ”

Held, that it is not essential that the prisoner should be served with a copy of the indictment before he can become entitled to be admitted to bail by virtue of the provisions of the Section.

Mendis v. The Queen (66 N. L. R. 502) overruled.

APPPLICATION for bail under section 31 of the Courts Ordinance. This application was referred to a Bench of three Judges in terms of section 48 of the Courts Ordinance.

Nihal Jayawickrama, for the applicant.

V. S. A. Pullenayegum, Crown Counsel, with *Ranjit Abeysuriya*, Crown Counsel, for the respondent.

Cur. adv. vult.

December 5, 1967. T. S. FERNANDO, A.C.J.—

This matter comes before us as a result of a question of law being reserved in terms of section 48 of the Courts Ordinance for the decision of more than one judge of this Court. Alles J., before whom the matter was first taken up, reserved the question of law in view of two recent conflicting decisions both of which will be noticed later.

LXX—9

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Proceedings were instituted in the Magistrate's Court, Colombo, against the applicant and three others on a complaint by the Police that alleged that on or about October 8, 1966, they committed the offence of murder by causing the death of one Chandrapala, an offence punishable under section 296 read with section 32 of the Penal Code.

After a non-summary inquiry held by the Magistrate, the applicant was on February 18, 1967, committed to the Supreme Court for trial. The three other persons accused were discharged by the Magistrate.

After the date on which the applicant was so committed for trial, there was held for the Western Circuit two criminal sessions, one commencing on March 20, 1967, and the other on July 10, 1967. Yet another session (the current session) for this circuit commenced on October 12, 1967, and the applicant fears he may not be brought to trial even at this session for the reason that, although over nine months have elapsed since his commitment, he has hitherto not even had a copy of the indictment served on him. He was first remanded in custody in October 1966 and remains in custody to this day. He has thus been in custody already for over 13 months. He claims that he has a right under section 31 of the Courts Ordinance to be released on bail pending his trial.

The relevant part of the aforesaid section 31 is reproduced below :—

“ If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any Judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner ”.

Neither counsel who appeared before us has been able to find any reported case where before the year 1940 this section has been the subject of judicial interpretation, a feature strongly indicative, in my opinion, of the absence of any serious delay up to that time in the disposal of criminal cases after date of commitment of prisoners for trial by the Supreme Court. The first reported case is one of the year 1940, two years after the introduction of the amendment of the Criminal Procedure Code by Ordinance No. 13 of 1938 whereby the system of direct committal for trial by inquiring Magistrates was substituted for the earlier system of committal on the instructions of the Attorney-General. In that case, *De Mel v. The Attorney-General*¹, Nihill J., dealing with an argument of Crown Counsel that the effect of the 1938 amendments would be to widen considerably the effect of section 31 of the Courts Ordinance unless the words “ at which such prisoner might properly be tried ” are taken to mean that time does not begin to run in a prisoner's favour until he has been served

¹ (1940) 47 N. L. R. 137.

with a copy of the indictment and two weeks (required by section 165F (3) of the Criminal Procedure Code) shall have elapsed thereafter, felt he did not consider himself justified in accepting it as valid. The learned judge there went on to observe that section 31 contains an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable despatch. He added that "it may be that the section is now more favourable to a prisoner in its application than formerly, but if that was not the intention of the Legislature the section could have been amended. Neither do I consider that the section in its application to the new procedure can be said to place a serious impediment in the path of the Crown. A period of three weeks is provided between the date of commitment and the first day of the Sessions. True if further evidence is required this may be too short a period in which to get it and to prepare and serve the indictment, but cases can be and are added to the calendar after a Sessions has begun".

The liberty of the subject is an important personal right enjoyed in democratic communities observing the Rule of Law, and custody pending trial being an infringement of that liberty, the courts must be vigilant in ensuring that the infringement is restricted to the limits spelled out by the Legislature. The observations of Nihill J. reproduced above were quoted with approval by Gunasekara J. in a hitherto unreported decision of 8th March 1955¹ where the learned judge dealt with the case of several prisoners whose trials could not be disposed of before the end of a particular criminal sessions of the Southern Circuit. Sansoni J. (as he then was) himself relied in the case of *Leon Singho v. Attorney-General*² on that part of the observations of Nihill J. which related to section 31 as embodying an important principle safeguarding the liberty of the subject. Gunasekara J. reverted to the subject in the case of *The Queen v. Mudiyanse*³ when he observed that the mischief that is aimed at by the enactment (section 31) is the imprisonment for unduly long periods of accused persons awaiting trial.

Sansoni J. did not, however, in the case mentioned in the above paragraph refer to the other part of the observations of Nihill J. that rejected the argument that time does not begin to run in a prisoner's favour until he has been served with a copy of the indictment, but it is to be noted that he was dealing with a case where indictment had already been served. Another case, also decided by Sansoni J. some four years earlier, *The Queen v. Sunderam*⁴, was relied on by the Crown in its argument before us, inasmuch as the learned judge has there observed that "once the indictment had been served on all the prisoners and fourteen days had elapsed, there was no further legal impediment in the way of the Crown in bringing this case to trial". The argument before us was that the absence of an indictment was one of the legal impediments in the way of the Crown before the case can properly be tried within the meaning of section 31, but we must be careful not to read too much into the

¹ *S. C. Minutes of 8. 3. 1955.*

³ (1961) 63 N. L. R. at 302.

² (1959) 62 N. L. R. at 223.

⁴ (1955) 60 N. L. R. 281.

language employed by the learned judge there as that too was a case where indictment had been served long before the point that was decided there had arisen.

The earliest case which favours the view contended for by the Crown is that of *The King v. Girigoris Appuhamy*¹ in which Nagalingam A.J. (as he then was) held that in view of the amendment introduced to the Criminal Procedure Code in 1938 a prisoner could not have been properly tried at any sessions unless and until a fortnight had elapsed after the service of the indictment on him. That too was a case where at the time the question of bail was decided copy of indictment had long been served. A different view was taken in the later case of *The Queen v. Jinadasa*² where Gunasekara J. granting an application for bail in the case of two prisoners committed on 17th June 1957 for trial in the Southern Circuit held that the first session at which they could properly have been tried was the session that commenced for that Circuit on 16th September 1957, notwithstanding the fact that indictment was served on them only on 2nd April 1958.

I could now turn to the two recent cases which apparently necessitated the reference of the question to this Divisional Bench. In *Mendis v. The Queen*³, Manicavasagar J., dealing expressly with a case where indictment had not been served up to the date of his decision, considered the filing of an indictment and the service of a copy thereof on the prisoner as essential and necessary requirements before the prisoner "might properly be tried". Three years later, and barely five months ago, Samerawickrane J., in *Perera v. Attorney-General*⁴, expressly disagreed with this interpretation placed upon section 31 by Manicavasagar J., and favoured a view which he thought was consonant with the views taken earlier by Nihill J. in *De Mel v. The Attorney-General (supra)* and by Gunasekara J. in *The Queen v. Jinadasa (supra)*. In the last mentioned case Gunasekara J. had taken the view that prisoners could "properly be tried" at a criminal session held for the proper circuit, subject, I would add, to a modification necessitated by a lawful transfer of the trial from one circuit to another.

Samerawickrane J. stated (at page 524) that in deciding whether a prisoner should be admitted to bail under section 31, "a court must consider two questions : (1) has the prisoner not been brought to trial at a sessions held after he was committed by the Magistrate, (2) was that sessions one at which he could properly have been tried. In deciding the second question it seems to me that one must consider whether he could properly have been tried had he been brought to trial at it. It is therefore, in my view, not permissible to give as a ground for holding

¹ (1946) 47 N. L. R. 499.

³ (1964) 66 N. L. R. 502.

² (1958) 60 N. L. R. 125. Digitized by Noolaham Foundation

⁴ (1967) 69 N. L. R. 522.

that a prisoner could not properly have been tried at a sessions the omission to take a step involved in bringing the prisoner to trial, viz., the preparation and service of the indictment".

We have had the advantage of a full argument by learned counsel appearing for the applicant and for the Crown and, after giving due weight to their arguments, I would respectfully agree with the opinions expressed by Samerawickrame J. that (1) the preparation and service of copy of the indictment on the prisoner is but a step involved in bringing the prisoner to trial, and (2) that a sessions at which a prisoner could have been tried, had he been brought to trial is a sessions at which he could properly have been tried. By way of an illustration, if I were to assume that a prisoner had been committed to trial on 1st February 1967, and indictment had been served on him on 25th February 1967, and the first sessions after committal commenced on 20th March 1967, that prisoner could have been brought to trial at the said sessions. If that was then the sessions contemplated in section 31, the omission to serve indictment does not render that sessions not the sessions at which the prisoner could have been properly tried.

This view first found favour with Gunasekara J. whose familiarity with the administration of the criminal law and procedure of this Country is well known and whose contribution to the development of that law and procedure is amply borne out in our law reports. Its confirmation by Samerawickrame J. in the recent judgment above noticed is further strengthened by a reference to an old Ordinance No. 15 of 1843, to which our attention was invited by learned counsel for the applicant. It is an Ordinance described as one providing in certain respects for the more efficient Administration of Justice in Criminal Cases and, as far as we can make out, section 37 thereof is the first legislative provision relating to the proper sessions at which a prisoner might be tried. That section is reproduced below in its entirety:—(The italicizing is mine)

“37. And it is further enacted, that if any prisoner committed for trial before the Supreme Court shall not be brought to trial at the first Criminal Sessions after the date of his commitment, *holden for the Circuit proper for the trial of such prisoner*, provided Twenty-one days have elapsed between the date of the commitment and the first day of such Criminal Sessions, he shall be admitted to bail, unless good cause be shown to the contrary. And if such prisoner is not brought to trial at the second Criminal Sessions of the Supreme Court holden for the said Circuit, after the date of his commitment, unless, by reason of the insanity or sickness of such prisoner, the Judge of the Supreme Court presiding at such last-mentioned Sessions, shall issue his order to the Fiscal for the discharge of such prisoner from his imprisonment for that offence for which he has been committed for trial.”

Ordinance No. 15 of 1843 came into force on the 8th November of that year, and six days earlier, viz., on 2nd November 1843, by section 1 of Ordinance No. 9 of 1843 provision was made for the division of the Island of Ceylon into three or more Circuits in place of the provision introduced by the Charter of 1833 dividing the Island into the District of Colombo and the Three Circuits therein named. The terms of section 37 above reproduced indicate clearly enough that the first sessions and the second sessions specified therein refer to sessions having territorial jurisdiction over the trial of the offence. A close comparison of it with section 31 of the Courts Ordinance in its present form will show that it has not been subjected to any material amendment in spite of the passage of nearly 125 years.

Learned counsel for the Crown submitted, quite correctly, if I may say so, that no person can be tried at any sessions unless an indictment has in fact been presented. He referred us to the language employed in section 281 of the Criminal Procedure Code of 1883 (Ordinance No. 3 of 1883), viz., that the "indictment shall be the foundation of the trial in the Supreme Court", and contended that one cannot contemplate a session existing at which a prisoner might properly be tried until such time as the foundation can be laid for the trial. I think this was but another way of formulating the very argument which was rejected in 1940 by Nihill J., a rejection which was endorsed in 1955 by Gunasekara J., and in 1967 by Samerawickramne J. Crown Counsel invited us also to consider two consequences that may arise by acceding to the argument on behalf of the applicant. He first referred us to the powers reserved to the Attorney-General by section 389 of the Criminal Procedure Code to order a supplemental inquiry at which further evidence might be recorded. Apart from observing that this point too was in the mind of Nihill J. when he decided the case above referred to, I do not consider that any order of the Attorney-General under the said section can affect the plain interpretation of the expression "the date of his commitment" contained in section 31 of the Courts Ordinance. Samerawickramne J. in *Perera v. Attorney-General (supra)* thought that a case where the Attorney-General has exercised his powers under section 389 after commitment would be one in which the Crown could resist an application for bail in terms of section 31 of the Courts Ordinance as there would then be good cause to the contrary. I would myself endorse this observation subject to the qualification that such a situation may, but not necessarily would, constitute good cause against the granting of bail. Crown Counsel next invited us to consider what would happen where the Attorney-General, as he lawfully might do, sends an indictment to the District Court instead of to the Supreme Court to which the accused has been committed by the Magistrate. It was a little difficult to appreciate what force this second argument of Crown Counsel could carry because, apart from the fact that most offences triable by a District Court are bailable offences, section 31

can have no operation except in respect of cases of prisoners awaiting trial by the Supreme Court. Therefore, where an accused person who had been committed by a Magistrate for trial by the Supreme Court has, by the act of the Attorney-General, been called upon to face his trial in the District Court, he has ceased to be a person awaiting trial in the Supreme Court. The consequences contemplated by Crown Counsel do not, in my opinion, militate against the granting of the application for bail made in the instant case.

The applicant has, in my opinion, established that he is entitled to the right conferred on him by section 31 of the Courts Ordinance. No affidavit has been filed on behalf of the prosecution nor has any attempt been made to show other good cause. We have therefore made order that the Magistrate do admit the applicant to bail in such sum as may be fixed by the Magistrate and subject to such conditions as it may seem fit to him to impose.

I might add that we were informed by counsel that the Attorney-General is seeking in some other proceeding the intervention of this Court in an attempt to reverse the order made by the Magistrate discharging the other accused in this case. We cannot say how long the proceedings so set in motion by the Attorney-General may take before they are terminated. They cannot, however, affect the right of the applicant before us. After the date of his commitment two sessions of the Western Circuit have been commenced and terminated. He has now been in custody remanded pending trial for well over a year. Nothing catastrophic can ensue from his release on bail. A Court has undoubted right to cancel bail where it is shown that the right to release on bail has been or is being abused. We venture to think that the granting of this application may in some measure induce a speedier disposal of the criminal proceedings against the applicant and the other accused and, indeed, act as a spur to all concerned in the disposal of cases of remand prisoners filling our gaols in our common duty of eradicating the lethargy that is currently afflicting us. The liberty of the subject is not a slogan as was suggested, cynically so it appeared to us, during the argument, but is a valuable right of a citizen, and the courts must be vigilant in ensuring that it is not unprofitably thwarted.

SIRIMANE, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

Application allowed.

1967 Present : T. S. Fernando, A.C.J., and Siva Supramaniam, J.

M. HANIFFA and others, Appellants, and K. SELLAMUTHU and others, Respondents

S. C. 387 of 1966—D. C. Kandy, 7742/L

Landlord and tenant—Monthly tenancy—Notice to quit—Computation of time.

Where, in a monthly tenancy of premises commencing on the first day and ending on the last day of a calendar month, the landlord gave the tenant a notice before the end of August 1964 requiring him to quit the premises on or before 1st December 1964—

Held, that the notice given by the landlord was a valid notice to quit at the end of November 1964, i.e. at midnight on 30th November/1st December—with an offer by the landlord to the tenant to accept a termination of the tenancy at the latter's option at any time before the end of November.

Ismail v. Sheriff (68 N. L. R. 19) and *Robert v. Fernando* (69 N. L. R. 572) not followed.

APPEAL from a judgment of the District Court, Kandy.

S. Sharvananda, for the plaintiffs-appellants.

W. D. Gunasekera, for the defendants-respondents.

Cur. adv. vult.

November 27, 1967. T. S. FERNANDO, A.C.J.—

Many legal problems have mushroomed in the wake of the shortage of housing, not the least vexed of which is the question of the validity of the notice to quit which a landlord is required to give his tenant preparatory to the institution of a suit for ejectment. That question, like a bad coin, has the disconcerting habit of cropping up with unwelcome regularity in our courts. Court decisions, unfortunately, have not been uniform in their effect and have left landlords in no little uncertainty as to the terms in which a valid notice to quit to be served on their tenants should be framed. The appeal now before us seeks to question the correctness of a recent decision of this Court in the case of *Ismail v. Sheriff*¹.

In the case upon which the appeal has arisen, the landlord of a tenant occupying premises on a month to month tenancy commencing on the first day and ending on the last day of a month, gave to the tenant a notice dated August 27, 1964 requiring him to quit the premises on or before the first day of December 1964. There is no dispute that this notice was received either on the date specified in the notice itself or, in any event, before the end of August 1964. The tenant, however, disputed the validity of the notice; and the issue as to its validity was by agreement of the parties tried as a preliminary issue and decided by the

¹ (1965) 68 N. L. R. 19.

learned trial judge against the landlord. In so deciding, the trial judge correctly felt obliged to follow the decision of this Court in *Ismail v. Sheriff (supra)*. That case dealt with a monthly tenancy commencing on the first day of a month, where the notice to quit had been given on May 11, 1963 requiring the tenant to quit the premises on July 1, 1963. The Court there held that the notice to quit was not valid because the requisite month's notice did not terminate at the end of a current month of the tenancy. As Alles J. who sat alone there put it, "the notice had been given before the due date from which it operates, and the notice would run from 1.6.63 until midnight of 30.6.63." He went on, however, to add that "at midnight a new tenancy on the same terms and conditions would have commenced which would expire at midnight on 31.7.63. According to the notice in the present case, a new tenancy was created from midnight on 30.6.63 to midnight on 1.7.63 (a broken period), a tenancy which is not recognised by the Roman-Dutch Law."

A monthly tenancy is a periodic tenancy ; it is a tenancy which by agreement between the contracting parties runs from month to month, and is terminated by a month's notice. The question in *Ismail v. Sheriff (supra)* depended on a correct interpretation of so much of the expression in the notice as required the tenant to quit on *July 1, 1963*. With respect, I find myself unable to agree with the view taken by the learned judge who decided that case when he held that "a new tenancy was created from midnight on 30.6.63 to midnight on 1.7.63—a broken period." The substantial question in all cases of this kind is the intention of the person giving the notice as expressed therein. It appears to me, again with all respect, to have been quite unreal to have attributed to the person giving the notice an intention to create a tenancy for that broken period ; nor could it fairly be said that the receiver of the notice could reasonably have so understood it.

Much assistance on the interpretation of this expression, and indeed expressions of a like nature, is to be gained by a reference to certain authorities to which my brother drew my attention during the argument. While it is essential to the validity of a notice to quit that it should be certain, and that there should be plain unambiguous words claiming to determine the tenancy at a certain time, the Court of Appeal in *Dagger v. Shepherd*¹ held that the insertion of the words "on or before" a specified date in a notice to quit was, on a proper construction, an offer to the tenant to accept from him a determination of the tenancy on any earlier date than that named on which he would give up possession of the premises. In a later case, *Crate v. Miller*², the same Court quoted with approval a dictum of Lindley L. J. in *Sidebotham v. Holland* (1895) 1 Q.B.D. 378 that—

"The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just

¹ (1946) 1 A. E. R. 132. ² (1947) 2 A. E. R. 45.
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as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

As Somervell L.J. put it (see p. 46), "in other words, a notice to quit on either day could be construed as a notice to quit when the current period in question ended. As a matter of language, a notice 'terminating a tenancy' on the last day of a current period (which was the form used in the present case) may, apart from *Sidebotham v. Holland*, fairly be said to mean the same thing as a notice to quit and deliver up possession on the following day, for in both cases the landlord is intimating that the last day of the current period is to be the last day of the tenancy."

I would apply the interpretation adopted in the English cases referred to above, and hold that the notice given by the landlord-appellant on the present appeal was a valid notice to quit at the end of November, 1964, i.e. at midnight on 30th November/1st December — with an offer by the landlord to the tenant to accept a termination of the tenancy at the latter's option at any time before the end of November. To place any other interpretation would be to defeat the clear expressed intention of the landlord.

Our attention was drawn to another and a more recent decision of this Court in *Robert v. Fernando*¹, also of a judge sitting alone, which is to the same effect as that in *Ismail v. Sheriff (supra)*. It was there held that, where a monthly tenancy commenced on the first day of January 1963, and the notice given dated 22nd February 1966 required the tenant to vacate the premises on or before 1st April 1966, the notice was invalid. The Court interpreted the notice as one in which the time of termination was in the alternative, either on 1st April 1966, or before that date. Having so interpreted the notice, the Court went on to hold that as the notice required vacation of the premises before 1st April 1966, the time of termination of the tenancy was uncertain and that the notice was therefore bad. Alternatively, it held that if the notice terminated the tenancy on 1st April 1966, the notice was bad as the termination of tenancy is not at the end of a month. The reasoning contained in the English cases I have quoted above, which I have already said I would apply, renders it necessary that I should now decline, with respect, to follow the ruling in *Robert v. Fernando (supra)* as well.

The appeal is allowed, the judgment of 22.7.66 dismissing the plaintiff's action is set aside, and the case is remitted to the District Court for trial to be held on any remaining issues. The plaintiff is entitled to the costs of this appeal and to the costs of the trial date (22.7.66) in the District Court.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

1967

Present : Tambiah, J., and Sirimane, J.

W. R. W. M. TIKIRI BANDARA and another, Appellants,
and P. GUNAWARDENA, Respondent

S. C. 602/65— D. C. Ratnapura, 5264/L

Kandyan law—Deed of gift executed prior to 1939—Clause stating that it shall not be revoked—No other conditions imposed—Irrevocability of such deed.

If a Kandyan deed of gift is not governed by the provisions of the Kandyan Law Declaration and Amendment Act and it states expressly that it is irrevocable, and the clause relating to irrevocability is not dependent on any other condition, then such a deed cannot be revoked.

APPEAL from a judgment of the District Court, Ratnapura.

W. D. Gunasekera, with W. S. Weerasooria, for the defendants-appellants.

R. L. N. de Zoysa, for the plaintiff-respondent.

Cur. adv. vult.

June 9, 1967. TAMBIAH, J.—

The plaintiff-respondent brought this action against the two defendants-appellants for a declaration of title to one-third share of the land called Medakumbara described in the schedule to his plaint.

It is common ground that the original owner of this land was one Dinorishamy, who by deed of gift No. 6606 of 3.2.1915, marked P1, gifted 1/3rd share of this land to his niece, one Yasohamy. Yasohamy by deed No. 13743 of 1955, marked P2, transferred her interest to her husband, the plaintiff.

The defendant's case is that Dinorishamy, the original owner, by deed No. 540 of 15.3.57, marked 1D2, cancelled and revoked the Deed of gift, P1, and by deed No. 541 of 15.3.57, marked 1D3, transferred his 1/3rd share to the two defendants.

The question for decision is whether deed P1 which is governed by Kandyan law could be revoked. This deed is not governed by the provisions of the Kandyan Law Declaration and Amendment Act (Cap. 59), which sets out the categories of deeds which are irrevocable. This Act only applies to deeds executed after 1939. Counsel for the appellant contended that the deed P1 could be revoked but the respondent's Counsel urged that in view of the express undertaking in the deed of

gift P1 by the donor that he will not at any time or for any reason revoke the deed, it could not be revoked. The relevant terms of the deed of gift P1 are as follows :

“That as I the said Dinorishamy for and in consideration of the natural love and affection I have and had towards Ratupunchi Waduge Yasohamy of said Rilhena, a daughter of my brother, and in consideration of the help and assistance tendered to me by her, and with the expectation of obtaining similar help and assistance from her in the future, too, and for her future welfare, am desirous of granting and conveying unto the aforesaid Yasohamy as a Gift or Donation absolute and irrevocable, which shall not be revoked at any time in any manner whatsoever the premises held and possessed by me in manner hereunto mentioned and to hold and possess or do whatever please with the same subject only to my life interest.”

Dinorishamy died in 1958. The defendants made a feeble attempt to show that, far from rendering any help or assistance to the donor, Yasohamy, who lived far away, did not even attend his funeral. The learned District Judge has however not believed the defendants' evidence on this point and has held that the effect of the words “which cannot be revoked for any reason or in any manner whatsoever”, is even stronger than the relevant words in the deed of gift which was construed in *Kumarasamy v. Banda* ¹. For these reasons the learned District Judge held that the deed was irrevocable and therefore the defendants had no title.

The revocability of a deed of gift governed by the Kandyan law has a long and checkered career. Kandyan deeds of gift are usually in favour of relatives and are in general revocable. As Hayley remarks, “Sinhalese conveyance of land has the curious characteristic of revocability.” (Vide Sinhalese Laws and Customs by F. A. Hayley, p. 300.) The general characteristic of revocability is however subject to important exceptions. Armour lists the following grants as not being revocable :—

- “(a) Dedications to priests and temples, or for any religious purpose.
- “(b) Grants made in consideration of payment of debts and future assistance and support, and containing a clause renouncing the right to revoke.
- “(c) Grants in consideration of past assistance, with a renouncing clause.
- “(d) Grants to a public official in lieu of a fee, with a renouncing clause.
- “(e) Settlements on the first wife and children before contracting a second marriage.

(vide Perera's Armour, p. 95)

Despite this clear statement by an institutional writer, the revocability of gifts made in consideration of payment of debts or future assistance and support had been the subject matter of many conflicting judgments. This conflict arose as a result of the views of other institutional writers who have not supported Armour on this matter.

In this context D'Oyly states as follows :—

“ Transfers, donations and bequest of land are revocable at pleasure during the life of the proprietor who alienates it. It is held that any landed proprietor who has definitely sold his land may resume it at any time during his life, paying the amount which he received and the value of any improvement, but his heir is excluded from this liberty.”

(vide D'Oyly, p. 151)

Sawers says :—

“ The assessors unanimously deny that a definite sale of land was revocable in the lifetime of the seller, at his pleasure. The chiefs say it was not without precedent for bargains of this kind to be broken and annulled, even years after the land had been sold, but it was not as a matter of course nor justified by law or custom.”

(Sawers, p. 20)

These statements which were applicable to alienations and sales were equally applicable to donations. The resulting position was a spate of decisions of a conflicting nature.

The early customary law of the Kandyans, unaffected by European ideas or judicial decisions, knew of no contract renouncing the right of revocations. The Kandyan customary law is found in the decisions of the Judicial Commissioners, the Agents and the Board of Commissioners. These decisions are found in several volumes containing the decisions of the Board of Commissioners, preserved in the Ceylon Government Archives. The customary Kandyan law permitted revocation in every case with the exception perhaps of dedication to religious establishments (vide also *Salpalhamy v. Kirri Ettena* (1844) Morg. Digest 373 ; Hayley p. 305).

In order to ensure the validity of titles based on deeds of sale by Kandyans, Proclamation of 14th July 1821 declared that “ all sales of land should be final and conclusive, and neither the seller nor his heir should have any right to re-purchase, unless an express stipulation to that effect was contained in the deed.” In such a case the right must be exercised within three years of the date of the deed by the grantor, and the purchase money should be repaid together with compensation for improvements. Transfers other than sales were not affected by this Proclamation.

The earlier decisions of our courts on Kandyan deeds of gifts reflect the view that a duly executed deed of gift vests title immediatley on the donee (vide *Mudelitamby v. Aratchie* (1849) Morg. Digest 441, Hayley p. 306). In D.C. Kandy 9862 (1838) Aust. 43, a distinction was drawn between a gift of the whole of the donor's property and one part. It was held that the transfer of a part of it was not revocable, although no authority was cited for this conclusion.

In *Salpalhamy v. Kirri Ettena* (1844) Morg. Dig. 373 it was stated as a general proposition that all deeds of gift except grants to priests are revocable. A similar rule, however, with the recognition of exceptions set out by Armour, was laid down in *Molligoda v. Kepitipola* (1838) Aust. 214.

In *Bologna v. Punchi Mahatmeya*¹ the earlier cases were reviewed and a Full Bench held that it was impossible to reconcile all the decisions as to revocability or non-revocability of Kandyan deeds, but expressed the view that as a general rule such deeds are revocable, and before a particular deed is held to be an exception to this rule, it should be shown that the circumstances which constitute non-revocability appear clearly on the face of the deed itself. The general view that courts took at this time was that all simple deeds of gift were revocable, despite a clause purporting to renounce the right to revoke (vide Hayley p. 307 and the cases cited in the footnotes u and v).

Thereafter the courts began to apply the English doctrine of consideration to deeds of gift by way of marriage settlement. A settlement on the son of a first marriage was held to be irrevocable on the ground that there was consideration and such a gift came within the exceptions stated by Armour (vide *Dingiria Dureya v. Saleloo* B. & S. 114). In *Ukku v. Dintuwa*² the courts even went to the extent of holding that a gift to a daughter-in-law, executed after marriage and ostensibly out of free will and affection was irrevocable, because it was made in pursuance of a previous promise to the donee that the grantor would give the property to her if she married the donor's son. No authorities were cited in support of this proposition but the judgment appears to proceed on principles of equity. However, in *Dingiri Menika v. Dingiri Menika*³ Lascelles A.C.J. and Middleton J., declined to apply the rule that English principles of equity could be resorted to in order to give equitable relief in construing Kandyan deeds of donation and held that a donation made by a person in favour of his daughter-in-law in contemplation of marriage with the donor's son is revocable under the Kandyan law. In *Doretugawe v. Ukka Banda*⁴, it was held that a gift to the donor's daughter made three days before marriage as dowry was not revocable.

¹ (1866) *Ram.* (1863-68) p. 195.

³ (1906) 9 *N. L. R.* 131.

² (1878) 1 *S. C. C.* 89. ⁴ (1909) 1 *Cur. L. R.* 259.
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The revocability of deeds granted for assistance and support also had been the subject matter of conflicting decisions. It was very common among the Kandyans who were labouring under the burden of performing rajakariya services to their feudal lords, to transfer their lands to the nearest relatives in return for assistance and support when they become feeble and infirm. The grantee in such cases obtained possession either immediately or after the death of the grantor, provided he honoured the undertaking by feeding and clothing the donor and gave him a funeral worthy of his rank. A majority of such gifts were usually executed before death, in consideration of services already rendered and also in respect of future services to be rendered.

It has been held in a number of cases and ultimately by a collective court in Case No. 28626 (1857) Aust. 207, that deeds of gift, for services previously rendered as well as services to be rendered in future, were revocable.

Despite this authoritative decision the English doctrine of consideration was again resorted to in order to interfere with the plain rule of revocability. In *Heneya v. Rana*¹ Phear C.J. and Dias J. held that a grant in consideration of past services could not be revoked. No authorities were however cited in support of this view. But even according to English principles of consideration, a deed for past consideration was regarded a voluntary conveyance. However, in *Ram Menika v. Banda Lekam*² Pereira J. followed the earlier rule in *Bologna v. Punchi Mahatmeya* (supra) and held that any free gift was revocable but stated in an *obiter dictum* that a gift in return for future assistance or other future consideration was really analogous to a sale, and not a free gift and therefore was not revocable, because it would be inequitable to revoke it if services were rendered in return for the gift.

In *Mudiyanse v. Banda*,³ the narrow limits within which a deed of gift could be revoked are set out. In that case a deed of gift given in consideration of future assistance and a previous payment of a sum equivalent to about 1/10th of the value of property but containing no clause renouncing the right of revocation was held to be revocable. Pereira J. modified his earlier dicta in *Ram Menika v. Banda Lekam* (supra) and held that in his opinion, only where a deed of gift is executed in consideration of something which was to be done in future by a donee and that thing is actually done by him, having been induced to do so by the execution of the deed, the deed should be, on grounds of equity, deemed to be irrevocable (vide *Mudiyanse v. Banda*).⁴

It is unnecessary to decide this case on the footing that as it has not been shown that services have not been rendered by Yasohamy as found by the learned District Judge the deed becomes irrevocable since the judgment could be supported on another ground. There has been considerable difference of opinion as to whether a deed becomes irrevocable

¹ (1878) 1 S. C. C. 47.

³ (1912) 16 N. L. R. 53.

² (1912) 15 N. L. R. 407.

⁴ (1912) 16 N. L. R. 53 at 55.

by the donor renouncing his right to revoke. Hayley is of the view that the effect of a clause renouncing the right to revoke a simple deed of gift is of no avail in law (vide Hayley p. 311). In expressing his view Hayley was influenced by the Kandyan customary law. But it has been held that a clause renouncing the right to revoke, coupled with the payment of debts, past services rendered and services to be rendered in the future, is irrevocable (vide *Kiri Menicka v. Caurala*¹). This case was followed by a Divisional Bench in *Tikiri Kumarihamy v. De Silva*². But in *Banda v. Hetuhamy*³ it was held that a deed of gift containing a clause renouncing the right of revocation is revocable under the Kandyan law, if the donee failed to perform his obligations.

In *Kirihenaya v. Jotiya*⁴ it was held that a Kandyan deed of gift, which expressly renounces the right of revocation and which is not dependent on any contingency is irrevocable, since a deed of gift is a contract and there is no rule of law which makes it illegal for one of the parties to a contract to expressly renounce a right which the law would otherwise give. On the same principle in *Ukku Banda v. Paulis Singho*⁵ a deed of gift, which was given in consideration of love and affection as a gift absolute and irrevocable, was held to be irrevocable. In *Kumara-samy v. Banda*⁶ the recital in the deed was as follows :—

“ I have hereby given and grant by way of gift which cannot be revoked for any reason or in any manner whatsoever unto my granddaughter Gallange Appullangedera Horatalie residing at Yatawara aforesaid in consideration of the love and affection I have towards her and with the object of obtaining succour and assistance from her during the lifetime of me the said Kiri Muttuwa Veda.”

This case followed the decision by the Full Bench in *Bologna v. Punchi Mahatmeya* (supra). The view taken in this case was that the donor having declared that the deed is irrevocable in most clear language, was not entitled to go back on it (vide dictum of Basnayake C. J. at page 70).

The customary laws of the Kandyans, on which Hayley was relying, have been developed and modified by case law which adapted the archaic system to suit modern conditions. They are of little significance on this point although on obscure points on which case law could throw little light, they could become an important source of Kandyan law.

As stated earlier, the case law on this matter is of a conflicting nature, but from the medley of conflicting decisions a clear principle has emerged which has been enunciated by the Full Bench of this Court. This principle may be formulated as follows : If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing

¹ (1858) 3 *Lor.* 76.

⁴ (1922) 24 *N. L. R.* 149.

² (1909) 12 *N. L. R.* 74.

⁵ (1926) 27 *N. L. R.* 449.

³ (1911) 15 *N. L. R.* 193.

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⁶ (1959) 62 *N. L. R.* 68.

irrevocability is not dependent on any condition, then such a deed cannot be revoked. This salutary principle, which has been laid down by the Full Bench, had been followed in a long line of decisions and should not be departed from in the interests of ensuring the validity of title based on Kandyan deeds of gift. It is settled principle that a long established rule affecting title to property should not be interfered with by this court. In the instant case the deed of donation comes within this rule. The deed clearly states that it will not be revoked at any time and for any reason. For these reasons the judgment of the learned District Judge is affirmed and the appeal is dismissed with costs.

SIRIMANE, J.—I agree.

Appeal dismissed.

1967 *Present : Abeyesundere, J., and Samerawickrame, J.*

IN RE K. I. SAMSUDEEN

S. C. 208/67—Application for conferment of Sole Testamentary Jurisdiction on the District Court of Colombo in respect of the Estate of Katchi Ibrahim Samsudeen, deceased

Stamp duty—Death of a person outside Ceylon leaving property within Ceylon—Application to Supreme Court to appoint court to exercise sole testamentary jurisdiction—Mode of computing stamp duty leviable on the documents filed by the applicant in the Supreme Court—Relevancy of gross value, and not the nett value, of the deceased's estate—Stamp Ordinance, Schedule A, Part III, paragraph 5—Estate Duty Ordinance, s. 21.

In an application to the Supreme Court for the conferment of sole testamentary jurisdiction on a District Court in respect of the estate of a deceased person, the stamp duty leviable on the documents filed by the applicant must be determined by reference to the probable market value, at the time of the death of the deceased, of all the property of the estate of the deceased. In determining that value no deduction shall be made in respect of any liabilities of the estate.

ORDERS of Court concerning the stamp duty leviable on the documents filed by the applicant in an application for the conferment of sole testamentary jurisdiction on the District Court of Colombo in respect of the estate of a deceased person.

S. Sharvananda, with M. T. M. Sivardeen, for the Petitioner.

M. Kanagasunderam, Crown Counsel, as Amicus Curiae.

September 28, 1967. ABEYESUNDERE, J.—

The question that arises for consideration in this case is the mode of computing the stamp duty leviable on the documents filed by the applicant in the Supreme Court in connection with application No. 208/67. That application is for the conferment of sole testamentary jurisdiction on the District Court of Colombo in respect of the estate specified in the applicant's petition. The Registrar of this Court has required the applicant to stamp the documents on the basis that the stamp duty is computed by reference to the gross value of all the property of the estate of the deceased. The applicant's contention is that the stamp duty should be computed by reference to the net value of the deceased's estate.

It is settled law now that Part III of Schedule A of the Stamp Ordinance containing the duties in testamentary proceedings applies to District Courts only. The Part of the Stamp Ordinance that applies to duties in legal proceedings in the Supreme Court is Part II of Schedule A of that Ordinance. In the said Part II the stamp duties are determined by reference to the value of the legal proceedings in the Supreme Court but there is no provision in that Part or in any other provision of the Ordinance specifying the mode of computing the value of any legal proceedings in the Supreme Court for the purpose of stamp duty. Under the said Part III the value of testamentary proceedings in a District Court for the purpose of stamp duty is now determined in the manner set out in paragraph 5 of that Part. According to paragraph 5, the value of testamentary proceedings in a District Court is determined by reference to the value of the estate and it is provided in that paragraph that the value of the estate shall be taken to be the value as determined for the purpose of estate duty of all property for the administration of which a grant of probate or letters of administration is required. The mode of determining the value of property for the purpose of estate duty is specified in Section 21 of the Estate Duty Ordinance. Sub-section (i) of that Section provides that the value of any property shall be estimated to be the price which, in the opinion of an Assessor, such property would fetch if sold in the open market at the time of the death of the deceased. Therefore in the case of testamentary proceedings in a District Court the value of the estate for the purpose of paragraph 5 of Part III of Schedule A of the Stamp Ordinance is the value which, in the opinion of an Assessor, would be the market value of all property of the estate of the deceased at the time of the death of the deceased.

We are of the view that the principle of determining the value of an estate in testamentary proceedings in a District Court may well be applied to the determination of the value of an estate for the purpose of legal proceedings in the Supreme Court relating to the conferment of sole testamentary jurisdiction on a District Court. In the case before us therefore the stamp duty leviable on the documents filed by the applicant

must be determined by reference to the probable market value at the time of the death of the deceased of all the property of the estate of the deceased. In determining that value no deduction shall be made in respect of any liabilities of the estate. We hold that the Registrar of this Court has taken the correct view, namely that the documents filed by the applicant are liable to stamp duty computed by reference to the gross value of all the property of the estate of the deceased.

SAMERAWICKRAME, J.—I agree.

Assessment of stamp duty upheld.

1967

Present : Alles, J.

THE CEYLON WORKERS' CONGRESS, Appellant, and
THE SUPERINTENDENT OF ROEBERRY ESTATE, Respondent

S. C. 37/1964—Labour Tribunal Case No. 6/3796

Estate labourer—Termination of his services for misconduct—Termination of his wife's contract of service also—Belated joint statement by husband and wife—Remedy of the wife—Estate Labour (Indian) Ordinance, ss. 2, 4, 5, 23 (1)—Industrial Disputes Act, ss. 31 B (1) (b), 31 B (4), 31 C (1), 33 (1).

An estate labourer was summarily dismissed for misconduct on 16th September 1960. On the same day the services of the wife (the appellant) were also terminated under section 23 (1) of the Estate Labour (Indian) Ordinance and she was given one month's wages in lieu of notice. No joint statement was filed by the husband and wife in terms of the proviso to section 23 (1) until three years later. Nor was the question raised at the hearing before the Labour Tribunal whether compensation should be given to the appellant for her past services.

Held, (i) that no effect should be given to the belated joint statement.

(ii) that, in view of the limited powers of the Supreme Court to deal only with questions of law, the case should not be remitted again to the Labour Tribunal to decide whether any relief in the nature of compensation should be granted to the appellant.

APPEAL from an order of a Labour Tribunal.

N. Satyendra, for the applicant-appellant.

Lakshman Kadirgamar, for the employer-respondent.

Cur. adv. vult.

October 9, 1967. ALLES, J.—

The appellant in this case is the wife of one Kitnan who was summarily dismissed for misconduct on 16.9.60 by the Superintendent of the Estate. On the same day, the appellant's services were also terminated under section 23 (1) of the Estate Labour (Indian) Ordinance and she was given one month's wages in lieu of notice. Counsel for the appellant has argued two questions of law before me. Firstly, it was submitted by him that by terminating the appellant's services on the same day that her husband's services were terminated the appellant was deprived of an opportunity of filing a joint statement under the proviso to section 23 (1). Secondly, it was urged that the President had erred in law when he confirmed the order of dismissal with only a month's wages in lieu of notice and without ordering any compensation for her past services. This latter ground was not one that was raised at the hearing before the Tribunal.

It was alleged that Kitnan had abused the Superintendent near the factory on 26.8.60. An inquiry was held into this allegation and on 16.9.60, Kitnan was found guilty and his services and the services of the appellant terminated on the same day. Kitnan was asked to call at the office after seven days for the discharge certificates and requested to leave the estate. He refused to comply with these directions, made representations to the Labour Union, who wrote to the Superintendent on 18.9.60 and continued to remain on the estate for a considerable period thereafter. It was only on 24.6.63, nearly three years later, after he was convicted in the Magistrate's Court of insult and his appeal to the Supreme Court dismissed, that the joint statement was filed.

While I agree that the appellant's services were prematurely terminated on 16.9.60 before the time elapsed within which she and her husband were asked to call for the discharge certificates and leave the estate, it seems to me that neither the appellant nor the Union, which watched her interests, considered the filing of the joint statement of any importance. Had they done so, they would not have failed to take the necessary steps earlier for the continuation of the appellant's services. The parties were apparently more interested in disputing the right of the Superintendent to terminate the services of the appellant and her husband and claiming back wages than seeking to claim re-employment for the appellant. The joint statement that has been filed in the instant case can therefore be hardly considered a serious expression of the willingness of the appellant to seek re-employment on the estate and I therefore do not think that any effect should be given to such a belated statement. The question therefore whether an opportunity was afforded to the appellant or not to file a joint statement in this case is only one of academic interest.

The other question that has been argued before me is one that has caused me some anxiety but having regard to the limited powers of this court to deal only with questions of law, I do not propose to accede to

Counsel's submissions and remit the case again to the Tribunal to decide whether any relief in the nature of some compensation should be granted to the appellant. In doing so I am not unaware of the fact that the appellant's parents have been themselves labourers on this estate, that the appellant was born on the estate, that the appellant herself has worked on the estate for a considerable period and that the termination of her services was due to no lapse on her part. In the circumstances, it might appear, to say the least, an unfair labour practice to terminate her services with only a month's wages in lieu of notice. Counsel for the respondent however submitted that in doing so the employer has done no more than what was required under the provisions of the law. Contracts of service under the Estate Labour (Indian) Ordinance are governed by section 5 and are terminable with one month's notice. The Ordinance has to be read in conjunction with the Service Contracts Ordinance (*vide* sections 2 and 4 of the Estate Labour (Indian) Ordinance) and under the terms of service governed by the latter Ordinance it was open to the employer to terminate the services of any labourer on payment of a month's wages in lieu of notice. But considerable progress in labour relations has taken place since the passing of the Service Contracts Ordinance in 1866 and the Estate Labour (Indian) Ordinance in 1889 and today with the development of modern concepts of social justice and the development of industrial law it is open to a labourer to seek redress for any kind of unfair labour practice. In *Highland Tea Co. of Ceylon Ltd. v. The National Union of Workers*¹ I have not interfered with the order of the President who granted to the innocent spouse one month's wages for every year of service as compensation. In that case I was of the view that the innocent spouse could not claim to be re-instated as a matter of right on the filing of the joint statement but that when the President made an order directing that compensation should be made to the innocent spouse it was an order that was just and equitable. This "compensation" must not be considered as a recompense for the lawful termination of the services of the innocent spouse under the contract for to so hold would in the words of T. S. Fernando, J. in the *High Forest* case² amount to "lawfully making an order the effect of which is to sanction the breach of a law of this land". This payment is more in the nature of some kind of compensation for past services in keeping with the spirit of labour practice prevailing today. I do not think that Fernando, J. when he made the observations in the *High Forest* case ever intended to close the door to Labour Tribunals granting any such relief. It seems to me that the learned Judge was directing his mind to the important question that a Labour Tribunal should not, under the guise of making just and equitable orders, either directly or indirectly sanction a breach of the law. The Privy Council in *United Engineering Workers Union v. Devanayagam*³ accepted the view taken by Abeyesundere, J. in *Shell Co. of Ceylon Ltd. v. Pathirana*⁴ that a Labour Tribunal has jurisdiction under section 31 B (4) read with section 31 C (1) of the Industrial Disputes

¹ (1967) 70 N. L. R. 161.

³ (1967) 69 N. L. R. 289.

² (1963) 66 N. L. R. 14.

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⁴ (1962) 64 N. L. R. 71.

Act to grant relief to a workman in spite of the fact that his services have been lawfully and justifiably terminated by his employer. For the same reason it would be open to a Labour Tribunal to give relief in an appropriate case to an innocent spouse whose services have been lawfully terminated under section 23 (1) of the Estate Labour (Indian) Ordinance whether a joint statement is filed or not. I agree with Counsel for the respondent that such orders must not indirectly flout the provisions of the law and for that reason I am unable to agree with Mr. Satyendra's contention that since the appellant has expressed her willingness to be re-employed on the estate an order directing re-employment in any form would be a just and equitable order. Counsel for the respondent submitted that it was open to the appellant to claim any benefits under section 31 B (1) (b) of the Industrial Disputes Act but that the appellant chose only to claim re-instatement with back wages. The President too under the wide powers given to him under section 33 (1) of the Act could have granted relief to the appellant. No case has therefore been made out for a remission of the case to the President for any relief.

I dismiss the appeal.

Appeal dismissed.

1967

Present : Tennekoon, J.

A. SOMALINGAM, Appellant, and K. A. JAYAWARDENE
(Food and Price Control Inspector), Respondent

S. C. 682/67—M. C. Badulla (helden at Bandarawela), 46873

Control of Prices Act—Charge of selling imported foodstuffs in excess of maximum controlled price—Inspector of Foodstuffs—Competency to give evidence as an expert.

In a prosecution for selling Masoor Dhal Imported Split (Grade I) in excess of the maximum controlled retail price, an Inspector of Foodstuffs who has sufficient experience and practical knowledge in the examination of imported foodstuffs is competent to give evidence as an expert in order to establish that the subject of the sale was Masoor Dhal Imported Split (Grade I).

APPEAL from a judgment of the Magistrate's Court, Badulla.

Colvin R. de Silva, with Nimal Senanayake and Bala Nadarajah, for the Accused-Appellant.

Faisz Mustapha, Crown Counsel, for the Attorney-General.

November 6, 1967. TENNEKOON, J.—

The accused-appellant was convicted of the offence of selling a pound of Masoor Dhal imported split (Grade I) at a price in excess of the maximum controlled retail price and sentenced to one month's rigorous imprisonment and also to a fine of Rs. 1,000.

The main submission in appeal was that the learned Magistrate had misdirected himself in holding on the evidence that the article sold was Masoor Dhal imported split (Grade I). The Price Order in question referred to two varieties of Masoor Dhal—

1. Masoor Dhal—Imported Split (Grade I)
2. Masoor Dhal—Locally Milled (Grade II)

In order to establish that the subject of the sale was Masoor Dhal Imported Split (Grade I) the prosecution called one Gooneratne. He testified to the effect that P1 the subject of the sale was submitted to him for an opinion and that he identified it as Masoor Dhal imported split Grade I. Gooneratne testified that he was an Inspector of Food-stuffs attached to the wharf for the last 24 years. He had joined the Food Department in 1945 ; in 1965 he was sent to India to follow a course of training in the physical analysis of foods. His ordinary duties were the examination of foodstuffs imported into the Island by the Government or the C. W. E. for quality, condition and variety ; he issues reports in respect of all foodstuffs taken over or imported for purposes of payment ; he stated that the Government has been the sole importer of Masoor Dhal for the last 12 years, and that he had given expert evidence on foodstuffs in a number of cases in courts. He also stated the points of distinction between Masoor Dhal imported split (Grade I) and Masoor Dhal locally milled (Grade II). Gooneratne also stated that while it may be possible to produce Grade I quality Masoor Dhal from the unmilled Masoor Dhal that is imported and distributed to millers, he himself was unaware of Grade I Masoor Dhal being produced by millers in Ceylon.

On the question of whether Gooneratne was rightly treated as a person "specially skilled" on the science of identifying foodstuffs and in particular different varieties of Masoor Dhal, I need only refer to the judgment of my brother T. S. Fernando, J. in the case of the *Solicitor-General v. Fernando*¹. It was held in that case that in a prosecution for unlawful possession of an excisable article, viz., fermented toddy, an excise inspector who has sufficient experience, and practical knowledge in the detection of excise offences relating to fermented toddy may be qualified to give evidence as an expert on the question whether the liquid claimed to have been found in the possession of the accused was fermented toddy. I think that on this principle Gooneratne's opinion that the subject of the sale in this case was Masoor Dhal Imported Split (Grade I) was properly treated by the Magistrate as relevant evidence.

¹(1965) 67 N. L. R. 159.

In the course of cross-examination, Gooneratne was asked whether he was aware that any local miller could produce Grade I Masoor Dhal from unsplit Masoor Dhal that is imported and distributed by the Government to millers. Gooneratne's answer was that millers to whom imported unsplit Masoor Dhal is given by the Government are only authorised to mill the dhal up to Grade II quality, and that he himself was unaware of millers, contrary to instructions, producing Grade I Masoor Dhal. He was also asked whether it is not possible for millers to utilise the percentage that is allowed to them for processing and wastage by the Government for conversion into Grade I Masoor Dhal. His answer was that he was unaware of any such practice. This suggestion having been denied by the expert, the learned Magistrate said : " Even if that be so it was for the accused who has preferred to sell such a variety in open market in spite of the Price Order in P4 to satisfy court that this dhal was locally milled (Grade I). " It was submitted by Counsel for the appellant that here the Magistrate was ignoring the principle that in a criminal prosecution the burden was on the prosecution to establish its case, and that there was no burden on the accused. I do not think that the Magistrate had misdirected himself at all. There was sufficient *prima facie* evidence on which the Magistrate was entitled to, and indeed did, call upon the accused for his defence. If the case of the accused was that what he sold was Grade I dhal produced in some unusual fashion by millers from imported unsplit dhal, a practice of which the expert himself was unaware, he should have placed evidence of that fact before court.

In the absence of such evidence I do not think the Magistrate has misdirected himself in holding on the evidence of the expert and the failure of the accused to produce any evidence on that point, that the prosecution has proved beyond reasonable doubt that the dhal that was sold in this case was Masoor Dhal Imported Split (Grade I).

The appeal is dismissed. The conviction and sentence are affirmed.

Appeal dismissed.

1967

Present : H. N. G. Fernando, C.J., Tambiah, J.,
 Abeyesundere, J., Silva, J., and Samerawickrame, J.

D. H. MOOSAJEE, Appellant, and Y. CAROLIS SILVA, Respondent

S. C. 381/63—D. C. Colombo, 9457/L

Servitude of light and air—Window light—Negative servitude—Bare enjoyment cannot create prescriptive title—Prescription Ordinance (Cap. 68). s. 3.

Judical precedent—Principal of stare dicisis—Qualifications as to the binding nature of previous decisions—Meaning of terms “Collective Court”, “Full Court”, “Full Bench”—Extent of the binding force of a decision of a Collective Court—Courts Ordinance, ss. 7, 38, 51.

Under the law of Ceylon mere long enjoyment, for ten years, of the free access of light and air through a window of a building does not entitle the owner of the window to the servitude *ne luminibus officiatur*, i.e., the right to prohibit a neighbour from obstructing the window light by erecting a higher building on his adjoining land. This servitude cannot be acquired by the mere fact that the neighbour has not built on his land for a long period so as to cause such obstruction of light and air.

Neate v. de Abrew (1883) 5 S. C. C. 126, *Goonawardana v. Mohideen Koya & Co.* (1910) 13 N. L. R. 264, and *Pillai v. Fernando* (1905) 14 N. L. R. 138, overruled.

A Court of five Judges constituted in terms of section 51 of the Courts Ordinance is not bound to follow a previous decision of a Collective Court upon a question of law if that decision did not duly consider the relevant law and was founded on a manifest mistake or oversight. Accordingly, the case of *Neate v. de Abrew* (supra), even assuming that the Court which heard it was a properly constituted Collective Court, has no binding force for the reason that the Court did not duly consider the law relating to acquisition by prescription of the servitude *ne luminibus officiatur* and the *ratio decidendi* of the decision is obscure.

In regard to the terms “Full Court”, “Full Bench” or “Collective Court”, each term conveys the same meaning. The only proper and meaningful term is “Collective Court”, that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of section 7 of the Courts Ordinance or the corresponding sections in earlier enactments. A Collective Court is not bound except by a judgment of a previous Collective Court. A decision of any Bench of three Judges in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

Prior to 1901, three Judges did not constitute a Collective Court unless it was assembled to hear an appeal which had been especially reserved for the consideration of the Collective Court, either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights. Hence a Bench of two Judges sitting at the present time is not strictly bound to follow a decision rendered by a Court of all three Judges prior to 1901 if the latter Court was not especially assembled to sit as Collective Court. If therefore the correctness of such a decision is seriously doubted by a Bench of two Judges, the appropriate course is that a numerically superior Bench, i.e., of five or more Judges, should be constituted under section 51 of the Courts Ordinance, with power either to approve or overrule the doubtful decision. It is not clear whether *Neate v. de Abrew* (supra) was decided by a Collective Court properly so called.

LXX—10

1*—H 11339—2,130 (2/68)

APPEAL from a judgment of the District Court, Colombo. This appeal was referred to a Bench of five Judges in terms of section 51 of the Courts Ordinance.

H. W. Jayewardene, Q.C., with *S. W. Walpita, B. J. Fernando, S. S. Basnayake, B. Eliyatamby* and *T. L. D. Fernando*, for the Defendant-Appellant.

C. Ranganathan, Q.C., with *A. P. Ranatunga, E. B. Vannitamby* and *K. Thevarajah*, for the Plaintiff-Respondent.

Cur. adv. vult.

November 14, 1967. H. N. G. FERNANDO, C.J.—

The plaintiff in this action is the owner of premises No. 71 Old Moor Street, Colombo, and the defendant is the owner of premises No. 69 which adjoins the plaintiff's premises on the western side. The building on No. 71 is a very old one and the wall on its western side had for a long period contained a small window, and the access of light and air through this was not obstructed by the old building which formerly stood on No. 69. Some time prior to the institution of this action, the defendant demolished the building which previously stood on No. 69 and commenced to construct a new building of two floors. The plaintiff thereupon sued for an order on the defendant to remove certain encroachments alleged to have been made on the plaintiff's property, and to restrain the defendant from building any structure which might interfere with the light and air entering through the window on the western side of the plaintiff's building. The learned District Judge has entered decree ordering the removal of certain encroachments, and also ordering the removal or alteration of the eastern boundary wall of the defendant's building in such a manner as to remove the obstruction to the free passage of light and air through the window on the western wall of the plaintiff's building. In this appeal the defendant does not contest that part of the decree which orders the removal of certain encroachments. The appeal is only pressed against the order for the removal of the obstruction to the free passage of light and air.

Although the District Judge does not refer in his judgment to any case law governing the claim for a free passage of light and air, the decision of the learned Judge is fully in accord with the decision of this Court in the case of *Neate v. de Abrew*¹ in which it was held that where a plaintiff had for ten years enjoyed an unobstructed flow of light and air through a window, he acquires a servitude *ne luminibus officiatur*. This judgment was followed in the cases of *Goonawardana v. Mohideen Koya & Co.*² and *Pillai v. Fernando*³. Nevertheless in the case of *Perera v. Ranatunge*⁴, a Bench of two Judges of this Court decided that the servitude cannot be acquired by mere enjoyment, i.e., by the mere fact

¹ (1883) 5 S.C.C. 126.

³ (1900) 14 N.L.R. 138.

² (1910) 13 N.L.R. 264.

⁴ (1964) 66 N.L.R. 337.

that the neighbour has not built on his land for any length of time. The present appeal was referred by my predecessor for consideration by a Bench of five Judges in view of the conflict of previous decisions and of an argument that the decision in *Neate v. de Abrew*, even if incorrect, is binding on this Court and must be followed.

The case of *Neate v. de Abrew* is reported both in the Fifth Volume of the S. C. Circular and in Wendt's Reports as having been decided by a Bench of three Judges, de Wet A.C.J., Clarence and Dias, JJ. ; but there is a divergence in the two Reports as to the circumstances in which the appeal came to be decided by three Judges. Both reports state that the appeal was argued on the 26th September, 1882 before Clarence and Dias, JJ. Thereafter according to one report (5 S. C. C. 127) :—

“ The appeal was argued on the 26th September, 1882, before Clarence and Dias, JJ. It was afterwards arranged, with the consent of Counsel on both sides, that De Wet, A.C.J., should be furnished with a note of the authorities cited, and should take part in the decision of the appeal. ”

but according to the report in Wendt's, p. 196 :—

“ The case was subsequently (on 29th November) put on for reargument before the full Court (De Wet, A.C.J., Clarence and Dias, JJ.) when Counsel agreed to leave the case without further argument, furnishing their Lordships with copies of the above report of the argument.”

The original minutes of the Supreme Court contain a purported order that the appeal be listed before the Full Court. This order creates some doubt as to the correctness of the opinion expressed by Basnayake, C.J. in *Perera v. Ranatunge* that “ the decision cannot be regarded as a decision of the then Full Bench of three Judges . . . ”. Subject therefore to certain observations which we will reserve for the latter part of this judgment, we propose first to regard the decision in *Neate v. de Abrew* as having been *prima facie* one of a Full Court. Under the law then prevailing (1882) the Supreme Court consisted only of three Judges.

Upon the passing of Ordinance No. 24 of 1901 the Supreme Court came to consist of 4 Judges, and while that was the number of Judges the question of the binding effect of a judgment of three Judges was considered in *Rabot v. de Silva*¹. That case was heard in review by a Bench of three Judges pending an appeal to the Privy Council and it was contended for the defendant that the Court was bound by two earlier rulings, each of a Bench of three Judges (in 1903 and 1904), when the number of the Judges of the Court was four. In considering the position of a Bench thus sitting in review, Hutchinson, C.J. made the following pronouncement :—

“ There is no law prescribing whether the Court so constituted is to follow the ruling of a similar Court given in review. But I think it is right that, whether it agrees with the ruling or not, it should follow

it, unless perhaps it was founded on a manifest mistake or oversight or was inconsistent with some previous decision of a similar Court which appears to be of equal or greater authority. Such a ruling ought to be regarded as the law until it is reversed by His Majesty in Council."

In the same case Wendt, J. referred at some length to the binding nature of various decisions of the Court, and after considering a number of earlier cases expressed himself as follows:—

"Having given the matter my most careful consideration, I suggest that this Court, whether hearing an original appeal or sitting in review, should consider itself bound by a decision upon a question of law of a three Judge Bench, whether pronounced before or after the Ordinance of 1901 became operative, and whether upon an original appeal or in review, provided it appears that the law and the existing decisions of the Court have been duly considered before the three Judges arrived at such decision. If, however, it were made clear that the decision in question was founded on manifest mistake or oversight I should recognize that as an exception to the rule."

It will be seen that both Hutchinson, C.J., and Wendt, J., were of opinion that even after the Supreme Court came to consist of four Judges, the Court was yet bound by previous decisions of a bench of three Judges, whether the decision had been given before or after 1901. Middleton, J. however, agreed with Wendt, J., only to the extent that a Court of *three Judges* would thus be bound:—

"Whether a Court of four Judges should be deemed to have power to over-ride the decision of three is a matter that I would leave to be decided by that Court if necessary when it is first called into operation."

The occasion thus contemplated by Middleton, J. apparently never arose; we have not been referred to any case decided by the full complement of four Judges in the period between 1901 and 1921, in which latter year the number of Judges was increased to five. In the first case decided by the full complement of five Judges, Bertram C. J. observed that although the former s. 54A of the Courts Ordinance empowered the Chief Justice to reserve any case for the consideration of all four Judges, there was a series of cases reserved, not for four Judges, but for only three Judges out of the four, and that the decisions in those cases have been consistently referred to in the law reports as decisions of a Full Bench. In this first decision of a Bench of five Judges (*Jane Nona v. Leo*¹) the question which precisely arose was whether after 1921 a Bench of five Judges was bound by a judgment of a Court of three Judges. The majority of the Court held that they were not so bound, but only on the ground that a decision given by three Judges at a time when the Bench consisted of four Judges, must not be regarded as a judgment of a Collective Court and is therefore not binding on a Collective Court of five Judges. Accordingly, the judgment in *Jane Nona v. Leo* has no direct bearing on

that part of Wendt J.'s proposition in which he referred to the binding nature of a decision given by three Judges at a time when the Court consisted of only three Judges. For the purposes of the point under discussion in the present appeal, it suffices to state that the Court in *Jane Nona v. Leo* did not disagree in any way with the qualifications stated by Hutchinson, C.J. and Wendt J., as to the binding nature of previous decisions. It is interesting that the House of Lords in 1962 (*Scruttons Ltd. v. Midland Silicones, Ltd.*¹) referred to similar qualifications :—

“I would certainly not lightly disregard or depart from any *ratio decidendi* of this House. But there are at least three classes of cases where I think we are entitled to question or limit it : first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision. The first two of these grounds appear to me to apply to the present case.”

There must of course have been numerous occasions during the past 60 years when Judges of this Court have stated themselves to be bound by decisions of three Judges of the Court whether sitting as the proper “Full Bench” before 1901, or as the mis-named Full Bench after 1901, but such statements cannot be fairly understood to have constituted an abandonment of the qualifications as to the binding effect which were expressed in *Rabot v. de Silva*.

Let me now consider the arguments for the appellant in the present case in support of his submission that in reaching the decision in *Neate v. de Abrew*, the Court did not duly consider the law relating to acquisition by prescription of the servitude *ne luminibus officiatur*, and that the *ratio decidendi* of the decision is obscure.

De Wet, A.C.J., referred in his judgment to certain general statements of Van Leeuwen as to the character of servitudes. None of these statements contains any reference whatsoever to the mode of acquisition of servitudes ; and the only references in any of the statements to the servitude under consideration in the case are explanations of the nature of the right. Finally the learned Judge cites the following statement from Huber, Book 2, p. 294 (5 S. C. C. 129) :—

“The right that my neighbour shall not build so as to obstruct my light I do not lose even though he should not so build for 50 years, but only if he has built and obstructed my light and I have acquiesced in the same for 10 years.”

This last statement, in the opinion of the learned Judge, supported the proposition “that any man is of right entitled to the enjoyment of light and air”. It is clear, however, that the passage from Huber refers, not to the acquisition of the servitude, but to the loss of the right of

¹ (1962) 1 A. E. R. 12.

servitude by the sufferance of an obstruction for the period of prescription. Although therefore the learned Judge thought that he was applying the Roman Dutch Law to the question before him he did not in fact refer to any text applicable to that question. Thus Voet VIII, 4, s. 5 (Gane's Translation, Vol. 2, p. 484) states :—

“ No prescription results from failure to use a right. Meantime it seems that we should by no means omit to notice that prescription of servitude is not brought on by the mere fact that perchance one of the neighbours has not used his right upon his property for a long term, and that the other neighbour has reaped an advantage thereby. What if he has not planted trees on his ground, has not made a pleasure garden or has not built higher on his ground, and it has thus happened that his neighbour's lights have for a very long time remained undarkened and his freer outlook in no way obstructed ? Wrong would it surely be for his neighbour on the strength of that to claim for himself a servitude of not building higher or of not having his outlook or lights blocked. To build up higher on one's own ground and to do things like that are matters of sheer capacity, in respect of which prescription has not been proved, but freedom has all the time been retained. Ulpian therefore lays down that no action lies against one who by building up darkens the house of a neighbour to whom he owes no servitude, nor can any notice in regard to the new work be given.”

Indeed the judgment of Clarence J. in the same case indicates emphatic dissent from the opinion of de Wet, A.C.J.:—

“ There can be no question but that, under the Roman Dutch Law, a negative servitude such as this could not be acquired by prescription in virtue of bare enjoyment such as plaintiff has had in this case.”

“ But in the negative kind, such as window-light, the enjoyment is not attended necessarily by any invasion of the neighbour's dominium. Voet (VIII, 4, 5) is as distinct as possibly can be in laying it down that bare enjoyment will not create the negative servitude by prescription ; and he cites from Neostadt (Decis. No. 98), a decided case which is precisely on all fours with the present, in which the owner of the windows failed to establish his right although until the neighbour began to obstruct them they had remained unobstructed from beyond the memory of man.”

Clarence, J. himself in *Neate v. de Abrew* held that upon a construction of s. 3 of the Prescription Ordinance of 1871 (now Chap. 68), the mere uninterrupted enjoyment for ten years of window lights, deriving light from a neighbour's land, entitles the owner of the windows to have the adjoining landowner restrained from building so as to obscure them. This conclusion was reached by Clarence, J. upon the basis of a decision of this Court in *Ayankar Nager v. Sinatty*¹. But unfortunately Clarence, J. appears to have formed the opinion that the principle of *juris quasi possessio*, which was applied in that case in regard to a right of way,

¹ *Ramanathans' Reports* 1860, 62, p. 75.
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was equally applicable in regard to a negative servitude. This opinion, presumably based upon a passage from Savigny cited in that case, turns out to have been quite erroneous. The passage cited in *Ayankar Nager v. Sinatty* is from page 131 of Perry's Translation of Savigny. But Savigny deals elsewhere with the specific case of the acquisition of negative easements, and the following statements appear in the course of his discussion :—

“If my neighbour has built his house to a certain height only, I enjoy the benefit of it merely casually and as a matter of fact, and I have therefore no possession.” (p. 385)

“It follows from the above that the possession of negative easements may be acquired in two ways—by adverse user, and by legal title ; i.e., 1st, by resistance to the attempt to obstruct the user ; 2nd, by any juridical proceeding . . . ” (p. 386)

Savigny further states that the same principle which applies in regard to the acquisition of a positive servitude must apply also in this case :— “In general the acquisition of this *juris quasi possessio* may be stated thus :—

the act which constitutes the subject of the right must be exercised in fact, and be exercised as of right.”

The note of the argument in *Neate v. de Abrew* (5 S. C. C., p. 128, and Wendt at p. 194) shows that these statements of Savigny were relied on by Counsel appearing for the defendant. The failure of Clarence, J. to refer to these statements in his judgment can only indicate that Clarence, J. failed to consider adequately the law applicable to the question for determination. Indeed he himself expressed in strong terms his own opinion that user of passage is not ordinarily to be regarded as possession, but he felt compelled to disregard his own opinion because he held himself bound by the decision in *Ayankar Nager v. Sinatty*. Yet in considering himself bound by that decision, he fell into the error of regarding the decision as being applicable in the case of a negative servitude.

The third judgment in the case of *Neate v. de Abrew* was that of Dias, J. He too held that the servitude had been acquired under our Statute Law governing prescription. But in this judgment also there is no reference whatsoever to the argument most strongly relied on by Counsel, by reference to Voet and Savigny, that the servitude *ne luminibus officiatur* cannot be acquired by the mere long enjoyment of light and air. The statement in the judgment “admittedly the plaintiff possessed the right which he claimed for more than 10 years” begs the question. For a right can only be possessed after a person acquires the right.

Having examined the three judgments, it is now certain that the opinion of the three Judges was not unanimous. The ground relied on by de Wet, A.C.J., was emphatically rejected by Clarence, J. The

ground relied on by Clarence J. and Dias J. was not accepted by de Wet, A.C.J., and it was a ground which could not have been accepted if the authorities cited to the Court had received examination. De Wet A.C.J. himself made no single reference to the only law which could have applied, viz., the Prescription Ordinance of 1871.

In these circumstances this Court is fully justified in reaching the conclusion that the law was not "duly considered" before the three Judges who decided *Neate v. de Abrew*, and accordingly that the decision is not binding in the sense explained by Wendt, J. in *Rabot v. de Silva*, and that it was founded "on a manifest mistake or oversight" in terms of the dicta of Hutchinson, C.J.

What s. 3 of the Prescription Ordinance (Chap. 68) requires is undisturbed and uninterrupted possession of lands or immovable property for 10 years, and "immovable property" includes a servitude. Once a person has acquired a servitude, i.e., a positive or negative right affecting his neighbour's property (whether by grant, judicial decree or prescription) he may properly be said to possess the right. But until the right has come into existence, there can be no possession of it. The case is different with land, for a person can actually possess a land while he has no right to possess it. That is why the doctrine of *juris quasi possessio* was necessary. If an act in relation to a neighbour's property is exercised by a person, he is said to possess the right of which the act is the subject. In the case of a positive servitude, e.g., a right of way, a person does exercise the subject of the right when he walks over his neighbour's property; and if he does so "undisturbed and uninterrupted" and "adversely" he has the *juris quasi possessio* for the purposes of the law of prescription. But in the case of a negative servitude, the subject of the right is that one's neighbour must desist from doing an act on his own land. Many systems of Law—Roman Law, Roman-Dutch Law, Scots Law, Spanish Law, the Code Napoleon—recognize that subject only to one exception, there can be no exercise of the subject of such a right. (cf. Burge, Colonial and Foreign Laws, Vol. III, pp. 441, 442.) The exception itself is perhaps purely theoretical and cannot actually lead to an acquisition of a servitude by prescription save in extraordinary circumstances. This exception was first stated in the Code of Justinian (lib. 7.33.12), and is recognized in some of the systems of law mentioned above. If my neighbour attempts to obstruct the flow of light and air, and I oppose that attempt, the neighbour's long acquiescence in my opposition, presumably by his desisting from the obstruction, can give me a right to the servitude. But it would appear that the South African Courts do not recognize even this exception (*Ellis v. Laubscher*¹).

Burge (Vol. III, p. 440) states that in English Law a servitude can only be created by deed. But in early English Law, long enjoyment of free access of light and air was held to establish a presumption of a grant of the servitude. (English Law appears to have been exceptional

in favouring claims for “ancient lights”.) Such long enjoyment now, by statute, creates the right that there should be no sensible diminution of the light and air thus enjoyed. But the terms of our Prescription Ordinance do not bring into operation the principle which is expressly stated in the English statute.

The conclusion of Clarence J. in *Neate v. de Abrew*, when considered in the light of all systems of law other than English Law, has the consequence that s. 3 of our Prescription Ordinance is unique in that it permits the acquisition of a negative servitude by prescription, on the ground of the mere long enjoyment of the access of light and air. We have shown already that the assumption of Clarence J. that there can be *possession* of the subject of this servitude conflicts with all earlier opinion, particularly that of Savigny. But a further consideration is that for purposes of prescription, *possession* must be *adverse*. Savigny contrasts casual or accidental or factual enjoyment with enjoyment as of right; where there is enjoyment as of right, the element of adversity can be established. We find assistance in this connection from the principle often recognized in our Courts that a person’s *possession* of property is referable to his lawful title. An owner of land, who erects thereon a building with windows, merely exercises his clear right to do what he pleases on his own land. His act is not referable to any intention to detract from his neighbour’s rights; such an act in no way resembles positive acts such as passage over the neighbour’s land, inserting beams in his wall, or emitting rain or surface water into his premises. The erection of a window being thus referable to the lawful rights of an owner of land, is incapable of becoming subsequently an adverse act, except in the theoretical and unusual case to which reference has already been made.

In construing the meaning of s. 3 of our Prescription Ordinance and the concepts of “possession” and “adversity” our Courts have for long understood those concepts in the same sense as they were fairly recently explained in the American Re-statement of the Law (Property: Servitudes: s. 458, p. 2928):—

“Use must be wrongful or capable of being made wrongful. To be adverse a use must be wrongful as to the owner of the interest affected or must be capable of being made by him wrongful as to him. If a possessor of land builds on his land in such a way that his building receives support from neighbouring land, or receives light coming from neighbouring land, he is using the neighbouring land, but since these uses are not wrongful as to those having interests in such land, nor capable of being made wrongful by them, they are not adverse to them. The use or enjoyment authorized by a negative easement is neither

wrongful as to the owner of the interests affected nor capable of being made by him wrongful as to him. Hence such an easement cannot be created by prescription."

For these reasons, we hold that under the law of Ceylon mere long enjoyment of the access of light and air through a window does not entitle an owner of land to the servitude *ne luminibus officiatur*. We thus over-rule the previous decisions of this Court to the contrary. To do so is of great practical advantage in the public interest. In our congested cities and towns, adequate work and living space has to be provided by the erection of tall modern buildings, which may be in quite close proximity to each other. It is unthinkable that such necessary development of available ground-space should be impeded by the mere fact of the existence on a neighbouring land of a building which has hitherto enjoyed the access of light and air in fact only, and not as of right. The civic authorities have by statute sufficient powers to control development in the interest of public health and on other similar grounds.

We return now to the matter of decisions of a "Full Court", a "Full Bench", or a "Collective Court", as such decisions have been differently termed. The difference in terminology is confusing, particularly if each term was intended to convey the same meaning. It appears from the judgments in *Bandahamy v. Senanayake*¹ that the only proper and meaningful term is "Collective Court", that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of s. 7 of the Courts Ordinance or of the corresponding sections in earlier enactments. We use the term hereafter in the sense just explained. *Jane Nona v. Leo* has already decided that a Collective Court is not bound except by a judgment of a previous "Collective Court". Thus a decision of any Bench of 3 Judges given in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

There remains the question whether every decision of a Bench of 3 Judges prior to 1901 must be regarded as a decision of a Collective Court. Wendt J. himself, while strongly favouring the opinion that decisions of 3 Judges prior to 1901 are binding, mentions the fact that sittings of 3 Judges were sometimes merely casual, and not deliberate (*Rabot v. de Silva*²) :—

"In practice, besides these hearings in review, and besides cases specially reserved, many cases (especially in the earlier years, even up to the seventies, when the number of appeals was small) came before

¹ (1960) 62 N. L. R. 313. ² (1967) 10 N. L. R. at p. 147.
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the Full Bench of three Judges, who, not having other demands upon their time, sat together to hear a mixed list composed of two-Judge cases and one-Judge cases. There were thus decisions of the Full Court which dealt with appeals not involving any “doubt or difficulty”, and which sprang out of a two-Judge Bench reserving for the opinion of the Full Bench cases involving points upon which conflicting decisions existed with the view of obtaining a definitive ruling thereon.”

The last sentence in the passage cited refers, not to instances where 3 Judges sat only casually, but to cases where because a Bench of 2 Judges was unable to agree on the decision of an appeal, the decision of the Court was suspended until 3 Judges were present. A similar suspension is still necessary under s. 38 of the Courts Ordinance in its present form.

There were thus decisions of Benches of 3 Judges rendered before 1901 where the Benches assembled for 3 different reasons:—

- (1) 3 Judges sat purely casually, because there was no other demand on the time of one of them.
- (2) 3 Judges sat in pursuance of statutory provision, but only for the reason that 2 Judges could not previously agree as to the decision of an appeal.
- (3) 3 Judges assembled to hear an appeal which had been specially reserved for the consideration of the Collective Court, either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights.

We are agreed that decisions of 3 Judges rendered before 1901 in the circumstances stated at (1) and (2) above cannot be regarded as binding judgments of a Collective Court and that before 1901, 3 Judges constituted a Collective Court whose decision would be a binding judgment only if their sitting was in the circumstances stated at (3) above. Hence a Bench of 2 Judges sitting at the present time is not strictly bound to follow a decision rendered by 3 Judges not assembled in the circumstances lastly mentioned. If therefore the correctness of such a decision is seriously doubted by a Bench of two Judges, the appropriate course is that a numerically superior Bench, i.e., of 5 or more Judges, should be constituted under s. 51 of the Courts Ordinance, with power either to approve or to over-rule the doubtful decision. Many of the judgments in *Bandahamy v. Senanayke* (62 N. L. R. 313) recognize the principle that the decision of such a Bench will, on the ground of numerical superiority and because of the special reservation under s. 51, be followed by any Bench ordinarily constituted under s. 38 of the Courts Ordinance.

The “facts” mentioned earlier in this judgment as to the hearing and decision of *Neate v. de Abrew* do not clearly establish that the case was decided by the Collective Court properly so called. That is a second reason why the present Bench may properly review and over-rule the decision.

The appeal is allowed, and the decree of the District Court is varied by the deletion therefrom of the order for “the removal or alteration of the eastern boundary wall of the defendant’s premises in such a manner as to remove the obstruction for the free passage of light and air through the window on the western wall of the premises of the plaintiff.”

In the unusual circumstances of this case, we make no order as to the costs of this appeal.

ABEYESUNDERE, J.—I agree.

SILVA, J.—I agree.

SAMERAWICKRAME, J.—I agree.

TAMBIAH, J.—

I agree with the reasons set out by My Lord the Chief Justice for allowing this appeal. In the early reports, particularly the Supreme Court Circulars, there are a number of judgments in which all the three judges who constituted the Supreme Court at that time had taken part. How far these judgments could be considered judgments of a Full Court or Collective Court has been discussed in *Rabot v. de Silva* ¹.

As stated in that case it is only when the Supreme Court assembles under statutory provision to sit as a Collective Court its decisions will have the effect of a Collective Court. Under the statutory provisions which existed when *Neate v. de Abrew* ² was decided a Full Court could only be constituted if a case was referred to it either by a single judge or by the Chief Justice. Applying this test the case of *Neate v. de Abrew* should be regarded as a Full Court decision.

The three judges who decided the case of *Neate v. de Abrew* had given three different reasons. With respect to the learned judges who decided that case, the reasons given by them are demonstrably erroneous. Are the hands of future generations of judges tied and are they to follow this erroneous decision? The answer to this question is found in the dictum of Denning L.J. who said: (vide the dictum of Denning L.J.

¹ (1907) 10 N.L.R. 140.

² (1883) 5 S.C.C. 126.

in *Ostime v. Australian Provident Society*¹). “The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps.”

The English principle of *stare decisis* has been adopted by us. As this dictum of Lord Denning shows, in the United Kingdom a liberal view is now being taken permitting judges to depart from wrong decisions of a binding nature. In the Dominion jurisdiction, even a more liberal view is being now taken. In Ceylon, it would be sufficient to state that we should be content to follow the English principles on this matter which has been succinctly set out by the House of Lords in *Scrutton Ltd. v. Midland Silicones Ltd.*². One of the principles enunciated in this case is that if a *ratio decidendi* of a case is obscure, the decision has no binding effect. The *ratio decidendi* of *Neate v. de Abrew* is obscure and we are not bound to follow it.

In Roman Dutch Law, the better view is that the servitude *ne luminibus officiatur* cannot be acquired by prescription. The Prescription Ordinance (Cap. 68) makes specific provision governing the acquisition of servitudes by prescription. In interpreting the provisions of section 3 of this Ordinance, a real servitude has been equated to immovable property and it could only be acquired by adverse possession for a period of ten years. There must be something in the nature of an invasion of another's right and adverse possession of such a right for the period of ten years, to entitle a person to claim the acquisition of a real servitude by prescription.

In the instant case, the plaintiff has failed to prove any adverse use. A person is entitled to build as high as possible on his land, under the common law, as an incident of his ownership. As stated by the Privy Council in *Corea v. Appuhamy*³, possession could never be adverse if it is referable to a lawful title. If a person builds on his land to whatever height he may desire, he does so as the owner of the land and his right is therefore based on lawful title. In the absence of proof of other facts, he cannot acquire a negative servitude of this nature.

It was urged by Mr. Ranganathan that even if the case of *Neate v. de Abrew* was wrongly decided, it has been regarded as good law for well over eighty years and therefore should not be departed from by this Court. The principle *communis error facit jus* was stated by Lord Buckmaster as follows: “Firstly, the construction of a statute of doubtful meaning once laid down and accepted for a long period of time ought not to be altered unless your Lordships could say positively that it was

¹ (1959) 2 A. E. R. 245 at 256.

² (1962) 1 A. E. R. p. 12.

³ (1911) 15 N. L. R. 65.

wrong and productive of inconvenience. Secondly, that the decisions upon which title to property depends or which by establishing principles of construction otherwise form the basis of contracts ought to receive the same protection. Thirdly, decisions affecting the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made or the position of the public materially affected, ought in the same way to continue.” vide *Bourne v. Keane*¹. Lord Evershed M. R. said: “There is well established authority for the view that a decision of long standing, on the basis of which many persons will in the course of time have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision.” vide *Brownsea Haven Properties v. Poole Corp*n². The decision in *Neate v. de Abrew* however does not affect title and does not come within the principles set out in perpetuating inveterate error. In *Pate v. Pate*³ Lord Sumner in declining to follow earlier cases on the construction of section 18 of the Prevention of Frauds Ordinance (Cap. 70) which had stood for forty-four years said: “This is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which would be unjust to disturb nor is it in any case sound to misconstrue a statute for fear that in particular instances hardship may result. That is a matter for the legislature, not for the Courts.” Mr. Ranganathan was only able to cite a few cases (vide *Goonawardana v. Mohideen Koya & Co.*⁴ and *Pillai v. Fernando*⁵ where *Neate v. de Abrew* was followed; on the other hand, recently it has not been followed. vide *Perera v. Ranatunge*⁶).

If negative servitude could be acquired by prescription by the mere act of building in one’s own land, it would follow as a logical consequence that the right of servitude for prospects could also be acquired in this way. Such a result would be unthinkable in modern society. The recognition of this principle would act as a clog on building activity, prevent town expansion and act as a deterrent to town expansion, since a person who had put up a building ten years earlier could always say that he enjoyed the right of prospect to view either the sea or the range of undulating hills, and bring an action asking for an injunction preventing persons from building.

For these reasons I agree with the order proposed to be made by My Lord the Chief Justice.

Appeal allowed.

¹ (1919) A.C. 815 at 874; 18 N.L.R. at 293.

⁴ (1901) 13 N.L.R. 264.

² (1958) Ch. 574 C.A.

⁵ (1905) 14 N.L.R. 138.

³ (1915) A.C. 1100, 1108.

⁶ (1964) 66 N.L.R. 337.

1966 *Present : Sri Skanda Rajah, J., and Manicavasagar, J.*

W. A. RATWATTE, Appellant, and A. BANDARA
and another, Respondents

S. C. 202/61—D. C. Badulla, 13686/M

Buddhist ecclesiastical law—Ruhunu Kataragama Maha Devale—Claim by a person to be hereditary Maha Kapurala thereof—Burden of proof.

Appeal—Fresh evidence—Circumstances when reception of fresh evidence may be justified.

(i) Plaintiff sued the Basnayake Nilame of the Ruhunu Kataragama Maha Devale for a declaration that he was a duly appointed Kapurala of the Devale on the footing that his father (added defendant) was the hereditary Maha Kapurala who, according to custom, had the right to appoint subordinate Kapuralas and in the exercise of that right appointed the plaintiff as Kapurala on May 1, 1955. He alleged that the defendant refused to recognize his appointment and prevented him from functioning as a Kapurala.

Held, that the burden of establishing that the added defendant had the right to appoint the plaintiff a Kapurala was on the plaintiff.

(ii) Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

APPEAL from a judgment of the District Court, Badulla.

H. V. Perera, Q.C., with H. W. Jayewardene, Q.C., C. R. Gunaratne, A. H. E. Molamure and L. C. Seneviratne, for 1st Defendant-Appellant.

C. D. S. Siriwardene, with B. Bodinagoda and Miss A. P. Abeyratne, for Plaintiff-Respondent.

W. D. Gunasekera, with W. S. Weerasooria, for 2nd Defendant-Respondent.

Cur. adv. vult.

October 8, 1966. SRI SKANDA RAJAH, J.—

At the outset I would express my regret for the delay in setting down the reasons for the decision. It was mainly due to my having had to deal with three very long trials of election petitions and to my participating in some rather long Divisional Bench Appeals.

The plaintiff-respondent Adikaram Bandara filed this action against W. A. Ratwatte, the then Basnayake Nilame of the Ruhunu Kataragama Maha Devale, for a declaration that he was a duly appointed Kapurala of the Dewale on the footing that his father Manis Appu, who was later added as defendant, was the hereditary Chief Kapurala, and who, according to custom, had the right to appoint subordinate Kapuralas and in the exercise of that right appointed the plaintiff as Kapurala on 1.5.1955. He further alleged that the defendant refused to recognize the said appointment and prevented the plaintiff from functioning as a Kapurala and claimed damages.

The defendant contested this claim and the right or power of Manis Appu to make such appointments.

After a very lengthy trial the learned District Judge entered judgment for the plaintiff declaring that—

- (a) there is an office of Maha Kapurala ;
- (b) the office of Maha Kapurala devolved by hereditary succession ;
- (c) the added-defendant Manis Appu is the holder of the office of Maha Kapurala ;
- (d) the added-defendant, by virtue of the office, is entitled to appoint and dismiss subordinate Kapuralas ; and
- (e) the plaintiff is a duly appointed Kapurala.

The defendant appealed. He died pending appeal and S. L. Ratwatte, the defendant's successor in office as Basnayake Nilame, was substituted.

The real issue in this case is whether Manis Appu had the right to appoint the plaintiff a Kapurala. The burden of establishing was clearly on the plaintiff. That appears to have been lost sight of by the learned District Judge ; for, he said, “ The first defendant has failed to prove by any convincing evidence of any instance where the Basnayake Nilame had appointed a Kapurala to this Dewale ”. In expressing himself thus he was misplacing the burden on the first defendant. Had he not approached the evidence in this case in this way he would have come to a different conclusion.

Chief Justice Howard's remarks in *The King v. Wegodapola*¹ made in respect of an inordinately lengthened trial would apply with equal force to this trial in which the real issue was clouded by its inordinate length.

The document 1D17 of 6.7.1951, to which the plaintiff was an attesting witness, would go to show that Basnayake Nilame Rambukpotta suspended Kapurala Solomon Appuhamy on a complaint by the Maha Kapurala (i.e., Manis Appu) on 13.4.1951 and reinstated him on 6.7.1951.

If Manis Appu had the right that is claimed in this case it is inconceivable that he would have complained in writing to the Basnayake Nilame against Solomon Appu instead of dealing with the latter himself.

The evidence of M. F. A. Fernando, Head Clerk, Buddhist Temporalities, Public Trustee's Office, is that after Rambukpotta, Basnayake Nilame, died an election was held and W. A. Ratwatte (the original defendant) was elected. One of the contestants at that election was the plaintiff. Thereafter, the plaintiff, his father Manis Appu and Mr. Advocate Suntheralingam interviewed the Deputy Public Trustee. Fernando himself was present at that interview. Their complaint was that the first defendant (W. A. Ratwatte, Basnayake Nilame) had refused to appoint Bandara (the plaintiff) as Kapurala. (This interview was on 19.5.1955 after W. A. Ratwatte's election as Basnayake Nilame.)

Manis Appu, in his evidence, admitted that he did not tell Mr. Suntheralingam that he had the right to appoint Kapurala. Also he said, "This is the first time I have made an appointment of a Kapurala in writing. That is by letter P4. I gave the writing to be in evidence of the appointment in view of the dispute that has arisen with the Basnayake Nilame". He further said, "I went to the first defendant's Walawu and asked him to give me the place of Maha Kapuralaship . . . On several occasions I went to him".

If Manis Appu was Maha Kapurala by hereditary right and custom what was the need for him to ask the Basnayake Nilame (the first defendant) for that post?

If the learned Judge had not misplaced the burden on the first defendant but had given due weight to the pieces of evidence I have just referred to he would have dismissed the plaintiff's action with costs.

The question of the admission of fresh evidence at the hearing of this appeal may now be referred to, though the above reasons are sufficient to support the decision we reached, viz., that the appeal should be allowed with costs and plaintiff's action dismissed with costs.

After appeal was filed in this case—but before the original defendant, W. A. Ratwatte, died—the added-defendant Manis Appu, presumably encouraged by the success in this case, filed Case No. 2163 D. C. Badulla against one T. R. Charlis Appu and W. A. Ratwatte, Basnayake Nilame, claiming that he, Manis Appu, was the holder of the office of Maha Kapurala of the Ruhunu Kataragama Maha Dewale, that he had in that capacity appointed Charlis Appu as a subordinate Kapurala and the appointment was terminable at his will and further claiming that he, Manis Appu, had the right to officiate as Kapurala during the Esala season.

The two defendants filed answer denying the existence of a hereditary office of Maha Kapurala and that the Basnayake Nilame had appointed Charlis Appu as Kapurala of the Dewale as he was lawfully entitled to.

At the trial the following issues were, *inter alia*, raised :—

28. Is the right to appoint Kapuralas a right belonging to plaintiff as Maha Kapurala ?

29. If so, was the appointment of first defendant (Charlis Appu) contrary to custom and irregular ?

During the course of the trial W. A. Ratwatte died and S. L. Ratwatte, his successor in office as Basnayake Nilame, was substituted.

While the trial was proceeding certain documents were discovered in the possession of one M. N. Rambukpotta, the son of a former Basnayake Nilame. One of them was a letter written by Manis Appu on 16.11.1938 to the then Basnayake Nilame G. B. Katugaha (marked D155 in D. C. 2163) and another (D156) notes of inquiry held by the Public Trustee in 1945 at which Manis Appu stated that Basnayake Nilame Katugaha dismissed certain Kapuralas and appointed others as Kapuralas and a third was letter (D195) by which the Basnayake Nilame appointed one Munasinghe to function as Kapurala for the month of Nawan (February-March) in 1946.

That action was dismissed and Manis Appu has appealed.

We decided to receive same in evidence for the reasons set out below.

In *Ramasamy v. Fonseka*¹ Weerasooriya, J., following the decision reported at page 74 in *Balasingham's Notes of Cases*, held that fresh evidence would not be permitted to be adduced in appeal unless it is of a decisive nature ; it must be such that, on a new trial being ordered, it would almost prove that an erroneous decision had been given. It may be observed that the admission of these documents in D. C. 2163 proved to be decisive against Manis Appu, who claimed the very same right in that case, and through whom this plaintiff claimed to have derived the office of Kapurala.

In *Ladd v. Marshall*² Denning, L.J., said, "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled : first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial : second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive : third, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible".

Basnayake Nilames are elected. Therefore, they may not be aware of the existence of relevant documents in the possession of their predecessors or elsewhere. D155 was with the son of the former Basnayake Nilame.

The three conditions enumerated by Denning, L.J., are fulfilled.

Manis Appu was questioned (in D. C. 2163) as to whether he wrote the letter (D155) to the then Basnayake Nilame Rambukpotta. He attempted to disown it, but, ultimately admitted, "This is like my

¹ (1958) 62 N. L. R. 90. ² (1954) 3 A. E. R. 745 at 748. Digitized by Noolaham Foundation
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signature". His subsequent evidence regarding one of the Kapuralas, viz., Theris, suffering from parangi, to which disease D155 makes reference, makes it highly probable that he wrote this letter (D155). If he had the right and power in accordance with custom, as alleged both in this case and in D. C. 2163, to appoint and dismiss Kapuralas at his will and pleasure he would not have written D155 to the Basnayake Nilame.

In D156 (in 1945) Manis Appu admitted to the Public Trustee in the presence of the First Accountant, Public Trustee's Office, that the Basnayake Nilame Katugaha dismissed some of the Kapuralas and appointed five other Kapuralas, with whom he was prepared to co-operate.

These three documents go to fortify the decision reached independently of them.

MANICAVASAGAR, J.—

The issue which has to be determined in this action relates to the claim of the plaintiff that he is the duly appointed Kapurala to the Kataragama Devale: his appointment is derived from his father, the added defendant, who he says holds the office of Maha Kapurala to the Devale, and according to the custom, coming down from time immemorial, he alone has the right to appoint Kapuralas to the temple.

An essential characteristic to a claim such as this is the enjoyment, as of right, *nec vi nec clam nec precario*, without interruption, of the alleged custom, and without acknowledgment or acquiescence of that right in another, for such a length of time, sufficient in the opinion of the Court to infer as a fact that the custom has existed for a substantial period.

The onus of establishing this is on the plaintiff who relies on its existence. Even assuming that the added defendant holds an office bearing the designation, Maha Kapurala to the Devale, by *right of hereditary succession*—I consider the quality of the evidence relating to this falls quite short of the standard of proof that a Court requires—the plaintiff's action must fail; he has not discharged the burden of proving the existence of the custom he claims: not only is the oral evidence, which consists in the main of the evidence of the added-defendant, who is keenly interested in the success of this suit, not weighty enough to rely upon, but the documentary evidence produced at the hearing in the original Court, and in appeal establishes that the Basnayake Nilame has in the past exercised the right to appoint, and to take disciplinary action against Kapuralas, and the added-defendant has himself acquiesced, without demur, in the act of the Basnayake Nilame, until the present dispute arose.

I agree with the reasons stated by my brother for the order we made at the conclusion of the argument, allowing the appeal, and dismissing the plaintiff's action, and the cross-appeals with costs.

Appeal allowed.

1967

Present : Sirimane, J.

S. A. JAMALDEEN, Appellant, and A. MANAFF, Respondent

S. C. 77/67—C. R. Kandy, 19033

Rent Restriction (Amendment) Act, No. 12 of 1966—Sections 2 and 4—Scope of retrospective effect of section 4 (1)—Sub-letting—Rent Restriction Act, s. 12A (1) (b).

The retrospective operation of the provisions of section 4 (1) of the Rent Restriction (Amendment) Act, No. 12 of 1966, is not applicable to a pending action in which a landlord claims the right to eject his tenant on the ground of sub-letting.

APPEAL from a judgment of the Court of Requests, Kandy.

P. Somatillekam, with P. Edusuriya, for the Plaintiff-Appellant.

B. J. Fernando, for the Defendant-Respondent.

October 28, 1967. SIRIMANE, J.—

This was an action for ejectment filed by the plaintiff on 27.7.65 on the grounds :—

- (a) That the premises were reasonably required by him for his occupation, and
- (b) That the defendant had sub-let these premises.

It was admitted that the Rent Restriction Act applied to these premises and that the rental value of the premises was under Rs. 100/- per month. Answer was filed by the defendant on 3.9.66. Between these dates (i. e., on 10.5.66) the Amending Act 12 of 1966 was passed. The effect of that Act is, to further restrict a landlord's right to file an action for ejectment, where the rental value of the premises is under Rs. 100/- per month. But Section 12A (1) (introduced by Section 2 of the Amending Act) sets out those instances in which the landlord may still file an action for ejectment even where the rental value is under Rs. 100/- per month. Section 12A (1) (b) empowers the landlord to sue for ejectment when the premises have been sub-let by the tenant.

By Section 4 the provisions of this Act were made retrospective as from 20th July, 1962.

On the date that the Amending Act was passed, there would have been many actions pending in the Courts filed after 20.7.62 for ejectment on grounds not permitted under Section 12A (1) so that, in order to give effect to its retrospective operation, it was necessary that such pending actions should be declared null and void : Section 4 (1) provides that accordingly an action instituted on or after 20.7.62 and pending at the time the Amending Act came into force should be deemed to have been null and void.

In my opinion the provisions of this Section are applicable to pending actions for ejectment (where the rental value of the premises is under Rs. 100/- per month) on grounds other than those set out in Section 12A (1).

The learned Commissioner has dismissed the plaintiff's action, and merely stated that he holds that the action pending before him is null and void by virtue of the Amending Act without specifying any reason why he had reached that conclusion. I am of the view that this was an action which the plaintiff, the landlord, could have filed even after the Amending Act came into operation retrospectively, as he claimed the right to eject the defendant on the ground of sub-letting as well. Section 4 (1)A therefore does not render this action null and void.

I set aside the decree dismissing the plaintiff's action and send the case back for trial by the learned Commissioner.

It was submitted by counsel for the defendant that the pleadings are not clear as it has been stated in the plaint that notice to quit was given to the defendant *for the reason* that the premises were reasonably required by the plaintiff and that he had sub-let the premises. The plaintiff should be given an opportunity of amending the plaint if he so desires. He is entitled to the costs of this appeal.

Decree set aside.

1967

Present : Samerawickrane, J.

M. SEYED MOHAMED, Appellant, and M. H. M. MEERA PILLAI,
Respondent

S. C. 19/66—C. R. Colombo, 87093/R.E.

Rent Restriction Act—Section 9—Sub-letting—Quantum of evidence.

The question was whether the defendant had, in contravention of section 9 of the Rent Restriction Act, sub-let a part of the premises rented to him by the plaintiff. The evidence disclosed that one A. C. was in sole and exclusive occupation of a room of the premises and that he carried on business in that room. The defendant took up the position that no rent was paid to him by A. C. and that the latter had been let into occupation of the room before the defendant became the tenant of the premises.

Held, that, in the absence of acceptable evidence to explain A. C.'s occupation, the only inference was that A. C. was in occupation as a sub-tenant paying rent to the defendant.

Held further, that, where sub-letting is continued, there is a continued breach by the tenant of the statutory provision against sub-letting.

APPEAL from a judgment of the Court of Requests, Colombo.

C. Ranganathan, Q.C., with *K. N. Choksy* and *L. A. T. Williams*, for defendant-appellant.

H. V. Perera, Q.C., with *M. S. M. Nazeem*, for plaintiff-respondent.

Cur. adv. vult.

March 15, 1967. SAMERAWICKRAME, J.—

The learned Commissioner of Requests has entered decree for ejectment of the defendant-appellant on the ground that he has sub-let a part of the premises in suit, No. 82, Messenger Street, Colombo, to one Abdul Cader.

The greater part of his judgment deals with the question whether the premises were reasonably required by the plaintiff-respondent. On that point, he held against the plaintiff-respondent. There is no careful examination and analysis of the evidence touching the question of sub-letting. It is necessary, therefore, to examine that evidence.

The plaintiff-respondent produced documents P2 to P5 which are the certificates of registration of a business called the Happy Flower Brassiere Co. They indicate that Abdul Cader was carrying on the business of a manufacturer of brassieres and garments in the premises in suit for some period by himself, and during other periods in partnership with another. These documents also show that the usual residence of Abdul Cader was not in these premises but in 81, Messenger Street. The Surveyor who was called by the plaintiff-respondent has spoken to the fact that the business of Happy Flower Brassiere Co., was carried on in a room marked lot 7 in his plan and that in that room there were three sewing machines and three girls working. Abdul Cader has given evidence for the defendant and from his evidence it appears that he commenced business in partnership with one Sumanawathie at Welikada and as his business improved, he decided to move closer to Pettah. He obtained the room at No. 82, Messenger Street, from one Hamid who was a relation of his and he had in that room three sewing machines, three employees working there, a writing table and a chair. He stated that the profits from his business is about Rs. 2,500 an year and that was net profit. He said that he got orders from Pettah, Maradana, Borella, Fort and sometimes from the Wellawatte and Dehiwela areas and that he went in search of orders during the daytime as well as in the night. He admitted that it was essential for his business to go out during the daytime in search of orders and that he did go to the Pettah bazaar two days in the week. He denied, however, that he paid any rent and stated that he was allowed to occupy a room and carry on business there rent free because he was looking after the goods of the defendant that were stored in the premises.

The defendant too took up the position that no rent was paid by Abdul Cader but that he was permitted to occupy the room that has been depicted as lot 7 in the plan in the premises in consideration of his looking after his goods that were stored in premises No. 82, Messenger Street. At a certain point of his cross-examination, the defendant denied that Abdul Cader was a watcher and in answer to a question whether the room was given to Abdul Cader to safeguard the goods that the defendant was storing in the premises replied, "he was doing his own business in that room". It appears to me that the position taken up by the defendant is not in accordance with fact and has been put forward merely to meet the case for the plaintiff. The evidence discloses that Abdul Cader was in sole and exclusive occupation of a room at No. 82, Messenger Street, and that he carried on business in that room. In the absence of acceptable evidence to explain his occupation, the only inference is that he is in occupation as a sub-tenant of the defendant and on payment of rent to him.

Mr. Ranganathan for the defendant-appellant further submitted that in any event the evidence showed that Abdul Cader had been let into occupation of the room before the defendant became the tenant of the premises. He relied on a dictum of Manicavasagar J. in the case of *Fernando v. de Silva*¹ to the effect that in the case of a monthly tenancy, once a tenant is let into occupation, the tenancy runs from month to month until it is terminated by a month's notice. He accordingly submitted that there has been no sub-letting by the defendant and that no right to ejectment in terms of Section 9 of the Rent Restriction Act had accrued to the plaintiff. Sansoni J. has, however, in the case of *Kalandankutty v. Wanasinghe*² held that where the sub-letting is continued, there is a continued breach by the tenant of the statutory provision against sub-letting.

I am, therefore, of the view that the order of the learned Commissioner decreeing ejectment of the defendant on the ground that he has sub-let part of the premises to Abdul Cader is justified. The appeal is dismissed with costs.

Appeal dismissed.

1967

Present : Tennekoon, J.

WATARAKA MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD.,
Appellant, and W. WICKREMACHANDRA, Respondent

S. C. 48/67—Labour Tribunal Case LT/G/2569

Industrial Disputes Act—Section 33 (1) (d)—Dismissal of workman on ground of inefficiency—Proof, by employer, of absence of malice not necessary—Compensation to dismissed workman—Circumstances when award would be an error of law.

When a workman's services are terminated by the employer on the ground of inefficiency, there is no burden on the employer to prove that he acted without malice in dismissing the workman. In such a case, if there was neither illegality nor any finding that the dismissal for inefficiency was an unfair labour practice it is an error of law to award any compensation to the workman under section 33 (1) (d) of the Industrial Disputes Act.

APPEAL from an order of a Labour Tribunal.

L. W. Athulathmudali, for the Appellant.

No appearance for the Respondent.

¹ (1966) 69 N. L. R. 164.

² (1958) 60 N. L. R. 307.

November 4, 1967. TENNEKOON, J.—

In this case the respondent made an application to the Labour Tribunal in respect of the termination of his services with the appellant society. He was employed on the 12th November, 1965 on a temporary or probationary basis and his services were terminated with effect from 30th March, 1966. The applicant stated at the hearing before the Labour Tribunal that he was unjustifiably dismissed from service and that he seeks re-instatement and back pay for the period that he was not employed, and any further relief that may be obtainable.

There is no doubt that the respondent was either on probation or was a temporary employee. The society served a charge sheet on him on 13th March, 1966 alleging inefficiency to which the applicant made answer on the 19th of March, 1966. The committee of the appellant society on the 20th of March, 1966 decided to terminate the services of the respondent with effect from 30th March, 1966. The correctness of the appellant society's findings that the applicant was inefficient finds corroboration in a report of the Area Co-operative Inspector who having investigated the functioning of the society at or about the time of the dismissal of the applicant came to the conclusion that the applicant was inefficient and ought to be dismissed. The Labour Tribunal accepts as correct this view of the respondent's efficiency when it says: "It is especially because the applicant was not conversant with and accustomed to writing out of the books that the Area Co-operative Inspector recommended for the approval of the A. C. C. D. the dismissal of this applicant". These being the facts, the Tribunal went on further to say "It was their duty to have clearly proved to me that the dismissal was made after due consideration and that it was made entirely free from malice". There was no allegation of malice or any suggestion that the dismissal was made for personal reasons influencing one or more members of the society or its Committee of Management.

I think the Tribunal has erred in law in placing such a burden on the employer. It is on this approach only that the Tribunal came to the conclusion that the dismissal of the applicant had not been 'honestly' made. The conclusion cannot be allowed to stand in view of the error in law earlier referred to. Further the Tribunal has awarded compensation under paragraph (d) of section 33 (1) of the Industrial Disputes Act without any finding that the termination of the respondent's services was either unlawful or contrary to accepted standards of fair labour practices. If the respondent was in fact inefficient and there was neither illegality nor any finding that termination of services for inefficiency was an unfair labour practice it is an error of law to award any compensation under Section 33 (1) (d) of the Act.

The order of the Labour Tribunal is set aside. The applicant-respondent's application made to the Labour Tribunal is dismissed. No costs.

1967 Present : H. N. G. Fernando, C.J., T. S. Fernando, J.,
G. P. A. Silva, J., Siva Supramaniam, J., and Tennekoon, J.

THE ATTORNEY-GENERAL, Appellant, and K. B. MUNASINGHE and 3 others, Respondents

S. C. 39/67—D. C. (Criminal) Kalutara, 6625/18313

Indictment—More than one accused—Circumstances in which they can be said to have jointly committed one and the same offence—Extent of the liability of each accused—Offence committed with common intention—No requirement that section 32 of Penal Code should be specified in the indictment—Position where one accused alone is charged when he acted jointly with others—Penal Code, ss. 8, 32, 33, 35, 293—Criminal Procedure Code, ss. 167, 168, 169, 171 to 174, 178, 184.

When two or more persons who acted with common intention are charged together with committing the same offence, a failure to refer to section 32 of the Penal Code in the charge is not a bar to the accused being convicted on the basis of individual liability for a joint offence. In such a case even the word "jointly" need not be used in the charge, and each accused is responsible for any criminal act done by any of the other accused in furtherance of the common intention. If, at the conclusion of the trial, the court finds that the offence was in fact committed by some only of the accused and that the other accused were not participants, the court would still be free by reason of the provisions of section 171 of the Criminal Procedure Code to convict the former, unless the error in stating (or implying) in the charge that they committed the offence jointly with others misled them in their defence.

Four persons were tried before a District Court on an indictment. Count 1 of the indictment alleged that all of them committed the offence of causing grievous hurt with a sword to one Alwis. The 4th accused was acquitted on the ground that he took no part in the incident. The 1st accused was convicted. The evidence throughout was that only the 1st accused used a sword. In regard to the 2nd and 3rd accused, the trial Judge found that each of them struck Alwis with a club and that they and the 1st accused acted with the common intention of causing grievous hurt to Alwis. Nevertheless he acquitted the 2nd and 3rd accused stating, as reason, that the indictment had failed to say that "the accused had acted with a common intention under section 32."

Held, that the fact that no reference was made in the indictment to the common intention set out in section 32 of the Penal Code was not an error or omission which could prevent the court from convicting the 2nd and 3rd accused on count 1 of the indictment, of the offence of causing grievous hurt.

Obiter (T. S. FERNANDO, J., dissenting) : Where only one of a group of persons who have jointly committed an offence is charged and tried alone, and it is sought to make him liable for the acts of those who are not being charged at all, the charge should comply with section 169 of the Criminal Procedure Code to the extent of saying that the accused committed the offence with others unknown or named. In such a case, although it may be sometimes impracticable—particularly in cases of circumstantial evidence—to allege joint participation, the failure to do so is curable only on the rather tenuous grounds stated in section 171 of the Criminal Procedure Code.

APPEAL from a judgment of the District Court, Kalutara.

V. S. A. Pullenayegum, Crown Counsel, with *Faisz Mustapha*, Crown Counsel, for Appellant.

Colvin R. de Silva, with *M. L. de Silva* and *Nihal Jayawickrema*, for 2nd and 3rd Accused-Respondents, as *Amicus Curiae*.

Cur. adv. vult.

November 6, 1967. TENNEKOON, J.—

This is a case in which the Attorney-General indicted four persons in the District Court of Kalutara ; count 1 of the indictment reads as follows :—

“ That on or about the 29th day of November, 1964, at Imbula, Pelpola, in the Division of Kalutara within the jurisdiction of this Court, you did voluntarily cause grievous hurt to Loku Liyanage Sumanadasa Alwis with a sharp cutting instrument, to wit, a sword, and that you have thereby committed an offence punishable under section 317 of the Penal Code.”

The 4th accused was acquitted. The learned District Judge convicted the 1st accused on count 1. In regard to the 2nd and 3rd accused he said : “ There is certainly evidence to prove that the 1st, 2nd and 3rd accused acted with the common intention of causing grievous hurt to the brothers Sumanadasa and Richel ”. Nevertheless the learned District Judge went on to say that as the indictment had failed to say that “ the accused had acted with a common intention under section 32 ” he was unable to convict the 2nd and 3rd accused on count 1.

The learned Attorney-General has appealed against the acquittal of the 2nd and 3rd accused on count 1 of the indictment. When this matter came up before my brothers Justice Abeyesundere and Justice Alles, they made order as follows :—

“ In this appeal the Attorney-General appeals from the acquittal of the 2nd and 3rd accused on count (1) of the indictment. The learned District Judge has ordered the acquittal holding that the indictment was bad because section 32 of the Penal Code was not specified. He has held that the evidence disclosed common intention on the part of the 1st, 2nd and 3rd accused.

Mr. Pullenayegum, Crown Counsel, appearing for the Attorney-General, submitted that it was unnecessary to specify section 32 of the Penal Code in the indictment.

There are two conflicting judgments of the Court of Criminal Appeal in regard to the question whether or not section 32 should be specified in the indictment where the prosecution relies on common intention. In the case of *The Queen v. Mudalihamy*¹ the three Judges of the Court of Criminal Appeal who heard that case were unanimously of the view that section 32 should have been specified in the indictment. In the latter case of *G. K. Ariyadasa v. The Queen*² the majority of the three Judges constituting the Court of Criminal Appeal did not follow the decision in *The Queen v. Mudalihamy*.

For the aforesaid reason, we recommend that the Chief Justice exercise his powers under section 51 of the Courts Ordinance and refer this appeal to a Bench of five or more Judges.”

This matter now comes before this Bench of five Judges in pursuance of a reference by My Lord the Chief Justice under section 51 of the Courts Ordinance.

The question then that arises on this reference is whether when two or more persons are charged together with committing the same offence a failure to refer to section 32 of the Penal Code in the charge is a bar to the accused being convicted on the basis of individual liability for a joint offence.

Before proceeding to examine the possible answers to this question, it will be useful, I think, to make a brief reference to the background in which the question must be examined.

The Penal Code is a Code which defines a number of offences ; each of these definitions deals only with the case of a single individual doing or omitting to do a thing and makes such act or omission punishable.

It is, of course, immediately apparent that just as much as an innocent act can be performed by more persons than one, so also, an act which is made punishable by law (and is therefore an offence) can also be done or committed by more persons than one. Thus the definition of any offence in the Penal Code will apply not only to the case of one person doing the act made punishable by law but also to the case of more persons than one jointly doing such an act.

Indeed, section 8 which occurs in the Chapter headed “General Explanations” states “words importing the singular number include the plural number”. Accordingly, when, for instance, section 293 of the Penal Code says in the singular that “Whoever causes death by doing an act with the intention of causing death..... commits the offence of culpable homicide”, we must understand the section as also saying that “Where more persons than one cause death by doing acts with the intention of causing death..... such persons commit the offence of culpable homicide.” Thus we get a plurality of persons capable of

¹ (1957) 59 N. L. R. 299.

² (1965) 68 N. L. R. 66.

committing one and the same offence and questions immediately arise in such cases as to—

- (i) whether each participant is only liable for the offence partially and proportionately or whether each is severally liable for the offence committed by all ;
- (ii) the approach to the question of *mens rea* where *mens rea* is an ingredient of the offence ; the presence of more persons than one necessarily means the presence of more 'minds' than one.

The answer to these problems is to be found among the "General Explanations" to the Code which are contained in Chapter 2 thereof. Sections 32, 33 and 35 occur in this Chapter ; they are three sections dealing with situations in which more persons than one combine to commit, one and the same offence.

It is unnecessary for the purposes of this opinion to examine the exact content and scope of each one of these sections. It would be sufficient to say that they lay down the law (i) as to the circumstances in which more persons than one can be said to have jointly committed one and the same offence, and (ii) as to the extent of the liability of each such person.

The main question that arises on this reference relates to the procedural aspects of charging and trying more persons than one who have committed one and the same offence.

Section 184 of the Criminal Procedure Code deals with certain trial aspects in such a case. This section is one—and the only one—dealing with joinder of accused persons. It deals with many circumstances in which more persons than one can be tried together at one trial. That portion of section 184 relevant to the present discussion reads as follows :—

"Where more persons than one are accused of *jointly committing the same offence*.....they may be charged and tried together or separately as the court thinks fit."

An illustration of more persons than one charged in this way is given in the first illustration under the section :

"A and B are accused of the *same murder*. A and B may be indicted and tried together for *the murder*."

What are the matters that need be stated in a charge when more persons than one are accused of jointly committing the same offence ? Section 169 of the Criminal Procedure Code reads (the italicizing is mine)—

"Where the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter of which he is charged, the charge shall also contain such particulars of the *manner in which the alleged offence was committed* as will be sufficient for that purpose."

To take a case of a charge of joint murder. Murder can be committed in many ways, by bare hands, by blows with a blunt instrument, by hanging, drowning, poison, the gun, or in one of many other innumerable ways. These would be the many 'manners' in which the offence of murder may be committed. It is the same with other offences, though with some the 'manner' can vary with every case, in others there is little or no scope for variations in the manner of committing the offence.

Are there any other matters which can be regarded as part of the 'manner' of committing an offence? Where more persons than one are involved in the commission of one offence there are some cases in which there is what appears to be equal participation: for example X and Y may join in bludgeoning A to death each attacking with a club; in this type of case it is more often than not impossible to prove which of the participants inflicted the fatal injury; details of the participation may be obscure and beyond the reach of any investigator; but before a case of joint commission of the offence is established it would be necessary for the prosecutor to prove that both X and Y attacked, that one or more of the blows (irrespective of who struck) resulted in the death of A and that each X and Y were acting in furtherance of the common intention of both to cause the death of A. There can also be, seemingly unequal participation: X and Y may join in order to achieve their common intention of causing the death of A, X doing the bludgeoning while Y keeps a look-out to prevent their being surprised by an intruder. This is the type of case in which it has been said of persons who play a role similar to Y's, that "he also serves who only stands and waits". Y has not done anything which, in the physiological sense, can be said to have caused the death of A. No medical witness will testify that Y's act of keeping watch caused, or was one of the factors contributing to, the death of A. But it is unnecessary to understand the expression "cause death" in section 293 of the Penal Code in this somewhat limited medico-legal sense. The result achieved by X and Y is the death of A. The acts by which that result was intended to be achieved are the totality of the acts of both persons. Some of the acts would never by themselves achieve the ultimate result intended; they would only be furthering the attainment of that result. Turning for a moment to activities which are not *prima facie* criminal: if two men set out to fell a tree and only one of them lays his axe to the tree trunk while the other's activities are confined to lopping off branches of adjacent trees in order to secure a free fall for the tree to be felled and thereafter to standing on the adjacent public road in order to warn passers-by of the danger of a falling tree, there is no strain either on the use of language, or on truth, to say that they both jointly felled the tree. As was said by Lord Sumner in the case of *Barendra Kumar Ghosh*¹ in dealing with the meaning of section 34 of the Indian Penal Code (which is identical with section 32 of our Code): "'Criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

Whatever, then, may be the nature of the participation of each person in a joint crime, it seems to me that the evidence which tends to establish the nature of the participation of each not only establishes his participation but also establishes the manner in which the criminal act was done, i.e. by several persons acting together.

I am accordingly of opinion that the fact of a person committing an offence not singly by himself, but by participating with others, is a fact relating to the manner of committing the offence. In a case of joint murder, say, by shooting with a gun, the material relating to the manner of committing the offence would include not only the fact of causing the death by shooting with a gun, but also of the fact of each causing the death jointly with others. In a case of joint cheating, "manner" would include both the nature of the deception and the fact of each accused acting jointly with others to achieve the deception. Indeed there does not appear to be much controversy over this aspect of the matter. In *Mudalihamy's* case and in *Ariyadasa's* case (both of which will be referred to in greater detail later on in this judgment) there is a clear, if unexpressed, assumption that the *joint* committing of an offence is a matter relating to the 'manner' of committing such offence.

I am therefore of the opinion that the fact of an offence having been committed jointly with others is something which section 169 requires to be included in the charge where that is the prosecution case and where it is not the intention of the prosecutor to signify to the accused that the prosecution case is that he committed the offence by himself alone.

How is this to be done? Must there be a reference to section 32 in the charge? Indeed the question referred to this court is in this very form. Formulated thus the question must, I think, be answered in the negative. Section 32 does not create an offence; it is only a section laying down a principle of liability. At the same time it must not be forgotten that it lays down a principle of liability *where an accused person commits a crime in a particular way or manner, i.e. by joining with others*; and accordingly the question should perhaps be re-formulated in this way: "In a case where an accused person is sought to be made liable on the basis that he was one of many who jointly committed a single offence, must there be reference in the charge to the fact of the offence having been committed jointly before the prosecution can call in aid the provisions of section 32 to bring home individual liability?"

This question must, I think, be answered differently in relation to two different types of cases that arise in our courts; they are—

- (i) cases in which the participants or some of them are *charged and tried together* for the one offence alleged to have been committed by them; and
- (ii) cases in which one only of the participants to an offence committed jointly with others is *charged and tried alone*.

(i) In the first type of case, viz. where more persons than one are alleged to have committed one and the same offence and are to be tried at one trial, there would ordinarily be one charge ; there is nothing in section 178 of the Criminal Procedure Code which requires a separate charge in respect of each such person. The section reads : " For every distinct offence of which any person is charged there shall be a separate charge." In a case of murder, where A, B and C are alleged to have committed one and the same murder of say X, it would be legitimate to charge A, B and C with having committed the murder of X in one charge, because they are charged of one offence and not of distinct offences. But, necessarily, there is implicit in a charge so drafted three distinct charges —one against A, one against B and one against C. If the case fails against one, it does not mean that the case against the other two fails. A may be acquitted while B and C are convicted. This is possible only because there is impliedly a separate charge against each one of the several persons accused of committing the one offence. It is, I think, fairly clear that if the charge were split up it would result in three charges each reading—

You A, did jointly with B and C commit the murder of X.

You B, did jointly with A and C commit the murder of X.

You C, did jointly with A and B commit the murder of X.

It thus becomes apparent that when the charge is drafted as one, the idea of each having committed the offence jointly with the other two is necessarily implied and it becomes a matter of indifference whether the word "jointly" is used in the charge or not. What is important to note is that each accused is clearly given notice of the fact that the prosecution case against him is that he committed the crime jointly with the others and that the provisions of sections 32, 33 or 35, as the case may be, would be relied on by it to establish his liability to be convicted and punished as though he committed the offence by himself alone. It is perhaps also important to note that if, at the conclusion of the trial, the court finds that the offence charged was in fact committed by one of the accused alone and that the other accused were not participants, the court would still be free by reason of the provisions of section 171 of the Criminal Procedure Code to convict that one accused—unless of course the error in stating (or implying) in the charge that he committed the offence jointly with others misled that accused in his defence.

(ii) In the second type of case, viz. : where only one of a group of persons who have jointly committed an offence is charged and tried alone, the position is such that, in my opinion, a bare compliance with the requirements of section 167 and 168 of the Criminal Procedure Code would be inadequate to give the accused sufficient notice of the matter with which he is charged, for the reason that a charge against one person that he committed an offence would signify to the accused that the prosecution case is that he committed the offence by himself alone. Accordingly in

such a case the charge should comply with section 169 to the extent of saying that the accused committed the offence jointly with others unknown or named. It is hardly necessary to add that any *other* particulars in regard to the manner of committing the offence may also have to be added in seeking to act in full compliance with section 169. An omission in such a case to allege that the accused committed the offence jointly with others may deprive the court of the power to apply the principles of constructive liability contained in section 32 (or sections 33 and 35), if to do so would be prejudicial to the accused. Section 171 of the Criminal Procedure Code would thus come into play in such a situation.

To sum up then, it is my opinion that where any accused person is sought to be made liable on the basis of his being one of many participants in an offence jointly committed by such persons, the charge must make it clear that such participation is being alleged ; this is achieved either—

- (a) by the very fact that several persons are charged together with one offence at one trial, or
- (b) by the use in the charge of such words as “together with X” or “together with others unknown” in a case where all the participants are not actually charged.

It may of course be sometimes impracticable—particularly in cases of circumstantial evidence, of which a vivid example is the case of *Ramlochan v. The Queen* referred to later in this judgment—to allege joint participation. But it is well to note that the failure to do so is curable only on the rather tenuous grounds stated in section 171. However, it seems to me that in those cases where the evidence in the hands of the prosecution indicates the joint commission of the crime it would be unsafe, and even unfair, for the Crown to omit the necessary allegation on the bare faith of section 171.

It is necessary, before concluding, to deal with the two cases which gave rise to this reference, and also to apply these conclusions to the instant case.

The case of *Queen v. Mudalihamy*¹ was one in which one person was charged *simpliciter* with murder and it was sought to make him liable not for an act or acts done by him alone but for acts done by him jointly with others. At page 302 of the judgment the following passage occurs :—

“ . . . although the omission to mention section 32 in the charge in a case where more persons than one are being charged with an offence and it is sought to make them vicariously responsible for a criminal act committed by one of them in furtherance of their common intention, may not be fatal to a conviction, if it is clear to the accused that they are being made vicariously liable for the acts of one of them, we think that it is desirable even in such cases to refer to section 32 or other

appropriate section of that group in the charge and certainly in this case, if it was sought to make the person vicariously responsible for the acts of those who are not being charged at all, it was necessary that the appellant should have been made aware at the outset that it was a charge of vicarious liability that he had to repel. We are of opinion that section 169 of the Criminal Procedure Code requires that it should be done."

For reasons already stated I do not agree that there should be any reference in the charge to section 32, (33 or 35) of the Penal Code in any of the situations contemplated in this passage. These sections deal not with the manner of the commission of an offence but with the consequences ensuing from an offence being committed in a particular manner ; subject to this comment, I am broadly in agreement with the approach made to the problem in *Mudalihamy*.

In the case of *Ariyadasa v. The Queen*¹ it was submitted for the Crown and the argument was adopted by the majority of the court that illustrations (b) and (e) given under section 169 of the Criminal Procedure Code support the view that in a charge of murder where the accused is sought to be made liable under section 32 as participant in a joint murder, there need not be any reference to section 32 or indeed to the fact that he was being sought to be made liable not for his act alone but for the totality of acts of himself *and others*. With respect I do not think such an implication arises from illustrations (b) and (e) which read as follows :—

- “ (b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.
- (e) A is accused of the murder of B at a given time and place’ The charge need not state the manner in which A murdered R. ”

Each of these illustrations deals only with the case of one person being sought to be made liable for his own acts and accordingly the word ‘manner’ in each illustration refers only to that aspect of the manner of committing an offence, which relates to the means employed and not to the commission of the offence by joining others in the commission of it. If illustrations (b) and (e) are to have any influence in the decision of this matter we would end up with the curious result that in a case of joint cheating reference would have to be made to section 32 or at least to the joint commission of the offence, *but not in a case of murder*. With all respect I find it difficult to agree.

In *Ariyadasa's case* reliance was also placed on the West Indian Case of *Ramlochan v. The Queen*.² In that case the accused Ramlochan was charged alone with the murder of his wife. There was apparently nothing in the charge to indicate that the Crown case was that the accused had

¹ (1965) 68 N. L. R. 66.

² (1956) A. C. 475.

committed the offence jointly with another or others ; nor apparently was there in the charge any reference to that provision of the Criminal Law of Trinidad parallel to our section 32. The case was one based on circumstantial evidence ; after the close of the prosecution case the accused Ramlochan was called upon for his defence. He gave evidence on his own behalf. In cross-examination by Counsel for the prosecution it was suggested that the accused had a partner in the committing of the crime and that the fatal blow was struck by his partner and that Ramlochan himself was only present and assisting the other. In dealing with a submission that improper prejudice may have been caused to the appellant by the nature of the cross-examination their Lordships stated : "On the evidence it was open to the jury, in their Lordships' opinion, to take the view that the accused committed this deed alone or that he committed it with the assistance of some other person. The trial judge did not exclude the first alternative, though he may have stressed the view that the evidence might be taken to indicate that the murder was committed by more than one person. But that is not in their Lordships' opinion fatal to a conviction because it was a view open to the jury to take on the evidence."

I take this part of the Privy Council judgment to be authority only for the proposition that the conviction of a person for an offence on the basis that he with others committed the offence is not *necessarily* bad because the charge only indicated that he was being sought to be made liable for a crime committed by himself alone. I think this is the law that is also contained in our own section 171 of the Criminal Procedure Code which reads :

"171. No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission."

In *Ramlochan's case* the Privy Council were, I think, clearly of the view that having regard to the whole of the proceedings at the trial there could have been no prejudice to the accused by the jury being told that they could convict even if they held that the accused had committed the crime jointly with another. The following passage occurs a little ahead of the earlier quoted passage :—

"The Crown was not bound to state its theories in advance. These theories were inferences from evidence which, it may be assumed, Crown Counsel explained to the jury on opening that he was about to lead. Their Lordships are unable to extract from the evidence led for the prosecution that the Crown had tied itself to any view of how the murder was committed. In cross-examination counsel was, however, in their Lordships' view, *bound* to put to the accused any inferences from the evidence which he proposed to put before the jury."

Indeed it seems to me that there is here a clear implication that the matters referred to in this passage were sufficient to establish that the accused had not been prejudiced even if the verdict of the jury was based on a finding that Ramlochan was merely assisting another who in fact struck the fatal blow. The decision of the Privy Council may well have been different if a case of prejudice had been made out. Illustrations (a) and (b) to section 171 bring out this same principle clearly :—

- (a) A is charged under section 237 of the Penal Code with " having been in possession of counterfeit coin having known at the time when he became possessed thereof that such coin was counterfeit ", the word " fraudulently " being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.
- (b) A is charged with cheating B and the manner in which he cheated B is not set out in the charge or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The court may infer from this that the omission to set out the manner of the cheating is not material.

In my view *Ramlochan's case* does not conflict with the view I have taken in this matter.

Ariyadasa's case was similar to the *Ramlochan case* in that there was a simple charge of murder against one accused and the judge directed the jury that they could convict the accused even if, on the evidence, they came to the conclusion that the fatal blow was not struck by the accused but that the deceased had been inveigled to a particular place in pursuance of a common plan between the accused and another and that the other assaulted the deceased in pursuance of that common plan to kill.

In dealing with a submission that the failure to refer to section 32 of the Penal Code in the charge was in the circumstances fatal to the conviction, the majority of the court, after examining the cases of *Mudalihamy* and *Ramlochan*, stated as follows :—

" For reasons which have been outlined above the majority of us were unable to agree with the observations of this Court in *Mudalihamy's case* and uphold the second ground of appeal. In the opinion of the majority of the Court (1) the charge as framed gave the appellant, having regard to the circumstances of this case, such particulars of the charge as he was entitled at law to receive and (2) *there was neither prejudice to him nor misdirection by the trial judge*" (the italicising is mine).

Respectfully, I would disagree with the statement that the charge contained no error or omission ; however the finding that there was no prejudice to the accused brings the case in substance into line with *Mudalihamy* and *Ramlochan* and within the principle contained in section 171 of the Criminal Procedure Code.

Applying the conclusions I have reached and indicated above to the present case : I am of opinion that this being one in which four persons were charged in one charge with the offence of voluntarily causing grievous hurt and tried at one trial, the charge on which they were tried was sufficient to give each of the accused notice of the matter of which he was charged. There should have been no doubt in the mind of each accused that he was in fact facing a charge of having jointly with his co-accused committed the offence. There was no objection taken to the legality of the single charge and the single trial ; that was an objection that would have been available to the accused if they were under the impression that they were being charged with four separate offences of causing hurt to Sumanadasa Alwis. I am perfectly convinced that the defence were aware, despite the absence of words to that effect, that the charge was that the four accused jointly committed the offence and that the relevant provisions of law would necessarily be relied upon by the Crown to bring home individual liability. Accordingly, the learned District Judge having held that the 1st, 2nd and 3rd accused voluntarily caused grievous hurt to Sumanadasa Alwis each acting in furtherance of the common intention of all to cause grievous hurt, (and no argument has been addressed to us that such finding was wrong), the 2nd and 3rd accused each became liable, upon application of the law as contained in section 32 of the Penal Code, to be convicted of the offence of voluntarily causing grievous hurt as though it were committed by himself alone.

I would accordingly hold that the learned District Judge was wrong in holding that there was any error or omission in the charge (count 1) which prevented him from convicting the 2nd and 3rd accused. I would set aside the acquittals of these two accused, convict them each on count 1 and sentence them each to a term of 9 months rigorous imprisonment, which is the term which was imposed by the District Judge on the 1st accused himself.

H. N. G. FERNANDO, C.J.—I agree.

G. P. A. SILVA, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

T. S. FERNANDO, J.—

This is an appeal by the Attorney-General from an acquittal of the 2nd and 3rd accused who (along with two others, the 1st and 4th accused) were tried before the District Court of Kalutara on an indictment containing two charges. The first charge alleged that all four accused committed the offence of voluntarily causing grievous hurt with a sword to one Sumanadasa Alwis, an offence punishable under section 317 of the

Penal Code. The second charge alleged that they committed a similar offence by cutting one Richel Alwis. At the close of the case for the prosecution, the District Judge made order discharging (acquitting ?) the 4th accused. This order was made on the ground that there was no evidence that he took part in the incident which resulted in hurt to the two men above-named. The other three accused were called upon for their defence, and, at the conclusion of the evidence called by them, the trial judge acquitted all three accused on the second charge, viz., that in respect of the grievous injury received by Richel Alwis. In regard to the first charge, the judge held that the 1st accused had cut Sumanadasa Alwis with a sword and found him guilty of the offence charged. There was no evidence that either of the other two accused (the 2nd and 3rd) had caused an injury or injuries with a sword. The trial judge found as a fact that the 2nd accused hit Sumanadasa Alwis on his leg with a club causing a grievous injury, and that the 3rd accused too hit him with a club. While stating in his judgment that the 1st, 2nd and 3rd accused had acted with the common intention of causing grievous hurt to Sumanadasa Alwis, the learned judge, observing that "in the circumstances of a case like this the accused should be (made ?) aware that they are held liable because of the common intention, and for this purpose the indictment should definitely state that the accused acted with a common intention section 32", acquitted the 2nd and 3rd accused on the first charge as well.

The appeal before us is confined to a canvassing of the acquittal on the first charge.

The trial in this case was preceded by a committal after an inquiry in the Magistrate's court, and there was no suggestion of a variation between the evidence for the prosecution in the Magistrate's court and that at the trial. The accused heard the evidence given in the Magistrate's court and had access to the brief containing the record of that evidence. When the first charge alleged that all four accused committed the offence of causing grievous hurt with a sword, and the evidence throughout was that only the 1st accused used a sword, it must have been clear enough to the 2nd and 3rd accused that the charges against them rested on liability set out in section 32 of the Penal Code. The prosecution was therefore not required to specify this last-mentioned section in the charge. When the learned trial judge stated that, although the evidence established that the 1st, 2nd and 3rd accused had acted in furtherance of a common intention, but that he was obliged to acquit the 2nd and 3rd accused as the charge omitted any reference to section 32, with all respect, I think he was in error. His attention had not been drawn to the decision of this Court in *Thambiah v. Tennekoon*¹ which held that when two persons were charged with causing grievous hurt on the basis that they acted in furtherance of an intention shared in common between them it was unnecessary to specify section 32 of the Penal Code in the charge. The prosecution in the case now before us had, in my opinion, complied with the provisions

¹ (1949) 51 N. L. R. 186.

of the Criminal Procedure Code relating to the framing of the charge, and this appeal has to be allowed. I would therefore set aside the acquittal of the 2nd and 3rd accused on the first charge and enter a conviction against them thereon. Each of them will serve in respect of that conviction a term of nine months' rigorous imprisonment.

As no appeal has been preferred in respect of the acquittal of the accused on the second charge, it is sufficient to say here that no opportunity arises to consider the correctness of that acquittal.

I should have been content to say no more on this appeal but for the fact that the two judges of this Court before whom this appeal was first taken up for hearing and who caused it to be referred to this Bench thought that the conflict between the decisions in *The Queen v. Mudalihamy*¹ and *Ariyadasa v. The Queen*² merited consideration by a fuller Bench. The two cases mentioned above do not deal with a situation similar to that which arose upon the trial that preceded the present appeal, and, speaking for myself, I should have preferred a consideration of the conflict on an occasion on which a case of the kind met with in *Mudalihamy* or *Ariyadasa* had again arisen and we had had the benefit of argument on the specific point. Anything this Court can now say in respect of the nature of the charge in such a case must necessarily be *obiter*. Nevertheless, as the conflict between these two decisions has been mentioned in the reference made to this Bench, and as my brother Tennekoon who has been kind enough to send me an advance copy of his own judgment has considered the nature of the conflict, I think I should express very shortly why I am still of the opinion that even in a case where only one or more but not all the persons alleged to have participated in the doing of a criminal act are charged it is not obligatory on the prosecution to specify in the charge either (a) that section 32 is relied on or (b) that the person or persons charged acted jointly with others, known or unknown.

No Court would like to say anything that may tend to discourage utmost candour on the part of the prosecution, and it would be a very desirable thing for the prosecution to set out in the charge the fullest particulars possible of the offence, both in respect of the matter with which the accused is or are charged as well as the manner in which the offence alleged was committed. What is *desirable* to have mentioned in the charge is, however, not the same thing as what is *required* to be mentioned therein. So long as the prosecution has complied with the provisions of the Criminal Procedure Code in respect of the particulars *required* to be stated in the charge, no question of the prosecution invoking the aid of section 171 of that Code can arise, because there would then be neither error nor omission in the charge. The charge is something that has to be framed by the prosecution before the trial commences, and the adequacy of the charge must be judged by the material available to the

¹ (1957) 59 N. L. R. 299.

² (1965) 68 N. L. R. 66.

Crown before the trial commenced. Something may transpire in the course of the evidence, or there may even be a change of front on the part of a prosecution during a trial, and in such situations the trial court has always a discretion to permit an alteration of the charge and sometimes even an adjournment the alteration may necessitate—section 172 to 174 of the Code. Where a charge framed alleges that A, B and C committed an offence, and this is understood as implying that they jointly committed that offence, the fact that during the evidence recorded at the trial it transpires that not only A, B and C, but that D and E, or D or E, also participated in that joint offence, does not, in my opinion, render the charge upon which A, B and C stood their trial defective by reason of error or omission that is contemplated in section 171. It is hardly necessary to add that it is immaterial whether the additional offender or offenders disclosed in the evidence is or are identified or unidentified.

In a case of direct evidence, it would not be unfair to assume, the prosecution would, generally speaking, be aware of the manner in which the offence was committed. The extent of the knowledge on the part of the prosecution of the manner of the commission of the offence would often be different in a case dependent on circumstantial evidence. The particulars *required* to be mentioned in a charge cannot, in my opinion, vary according as the evidence available is direct or circumstantial. The Code contemplates no such distinction and, I think, cannot fairly contemplate such a distinction.

*Ramlochan v. The Queen*¹ serves as a graphic illustration of the kind of situation that can arise in a case of circumstantial evidence. Ramlochan stood two trials, the jury having found itself unable to agree at the first trial. Throughout the entirety of that first trial, the Crown's case was that Ramlochan alone killed the deceased Toy. At the second trial too its case was the same until the cross-examination of the accused began. In the course of that cross-examination, Crown Counsel, for the first time, suggested that the deceased was actually killed by some other man, and that Ramlochan merely assisted that killing by participating therein. Their Lordships of the Privy Council did not consider this suggestion as a change of front on the part of the prosecution. That view of their Lordships was possible because they thought the charge framed was adequate. It is in this context that their Lordships observed that “the Crown was not bound to state its theories in advance”. The Court also stated as follows:—

“The Crown case was that the accused had murdered this girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or no the accused, if he carried out the murder, was assisted by someone else was another unknown feature in the case. Whether the accused himself struck the girl's head or was a party to someone doing so was immaterial. In either case he was guilty of murder.”

It being clear that the Crown theory at the time the trial commenced was that Ramlochan himself killed the deceased, it necessarily follows that the Crown could not have been expected to particularise in the charge that Ramlochan only assisted another in the killing. Even if the law had permitted an amendment of the charge at the later stage, the Crown did not and could not have been expected to give up either theory, both theories being consistent with the evidence relied upon. The decision in that case serves, in my opinion, to illustrate that even when the Crown put forward a different theory no change in the charge became necessary. On either theory the charge was one of murder. There was no change in the matters requiring proof. I do not understand that decision to mean that the charge was erroneous but that the accused was not misled or prejudiced by the error.

Acquittals set aside.

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[COURT OF CRIMINAL APPEAL]

1967 *Present : H. N. G. Fernando, C.J. (President), Tambiah, J., and Abeyesundere, J.*

THE QUEEN *v.* J. L. P. ARNOLIS APPUHAMY

APPEAL No. 76 OF 1967, WITH APPLICATION No. 99

S. C. 135/66—M. C. Anuradhapura, 10423

Trial before Supreme Court—Verdict of Jury—Duty of Judge to accept it—Autrefois convict—Criminal Procedure Code, ss. 230, 248 (2), 251.

Section 230 of the Criminal Procedure Code reads as follows :—

“ The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require.”

Held, that section 230 does not entitle the Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury.

Accordingly, where, after a verdict of guilty is returned by the Jury, the Judge discharges the Jury because he disagrees with that verdict, the accused is entitled to raise, in appeal, the point of *autrefois convict* if he is convicted again at a second trial on the same indictment.

A PPPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *Anil Obeyesekere*, *Nihal Jayawickreme*, *C. Chakradaran*, and *M. Kanakaratnam* (Assigned), for the Accused-Appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

October 19, 1967. H. N. G. FERNANDO, C.J.—

The appellant in this case was indicted on two counts with the murder of one Muthu Banda, and with the attempted murder of one Nanhamy. He was after trial convicted on 2nd July 1967 of culpable homicide not amounting to murder on the first count, and of attempted culpable homicide not amounting to murder on the second count, and sentenced to terms of imprisonment for 10 years and 3 years, to run concurrently. We allowed the appeal and ordered a verdict of acquittal to be entered. We now state our reasons.

The only point argued in appeal was one of *autrefois convict*, based on the following facts. The appellant had been previously tried on the same indictment and it is necessary to re-produce here the proceedings which took place at the end of the earlier trial on 28th May 1967:—

“Jury return at 4.20 p.m.

Clerk of Assize : Mr. Foreman, are you unanimously agreed upon your verdict in respect of charge No. 1 ?

Foreman : Yes.

Clerk of Assize : By your unanimous verdict, do you find the prisoner guilty of the charge laid against him ?

Foreman : No.

Clerk of Assize : Do you find him guilty of any lesser offence ?

Foreman : Yes.

Clerk of Assize : Of what offence ?

Foreman : We find him guilty of culpable homicide not amounting to murder.

Clerk of Assize : By your unanimous verdict, do you find the prisoner guilty of the charge laid against him in charge No. 2 ?

Foreman : Not guilty.

Clerk of Assize : Of any lesser offence ?

Foreman : No.

Clerk of Assize : Gentlemen, your unanimous verdict is that you find the prisoner, Jayasekera Liyana Patabendige Arnolis Appuhamy guilty of culpable homicide not amounting to murder in respect of count No. 1, and not guilty of any offence in respect of Count No. 2 ?

Foreman : Yes.

Court : Mr. Foreman, the position is that you hold that the injuries on Nanhamy were not caused by gunshot injuries. I directed that the verdict you would have to bring in respect to that matter would be either attempted murder, grievous hurt or voluntarily causing simple hurt.

Foreman : My Lord, he exceeded the right of private defence.

Court : Your verdict was arrived at on that footing ?

Mr. Foreman : My Lord, simple hurt may have been caused by a pellet not directed towards Nanhamy.

Court : In other words, you held that that was accidental ?

Mr. Foreman : Yes.

Court : You said that your verdict of culpable homicide not amounting to murder was on the footing that he exceeded the right of private defence ?

Foreman : Yes.

Court : I did not tell you what the law in respect of private defence is. I told you to follow the law as I gave you.

Mr. Foreman : My Lord, what we say is that he used the gun before the other man used the gun.

Court to Crown Counsel : Shall I charge them again ?

Counsel :

Crown Counsel : It appears that the verdict is confused, there appears to be some grave confusion. The question of private defence never arose. If that was the basis on which the verdict was arrived at then there is no doubt that there was grave confusion.

Court : *Mr. Kapukotuwa*, have you anything to say ?

Mr. Kapukotuwa : The position in law is that the Jury are the sole judges on questions of fact. Even if a defence has not been taken, it is open to them to decide on what they can. But, if Your Lordship believes that the Jury has been confused in regard to the law, then it is open to Your Lordship to discharge the Jury and order a re-trial.

Court :

In the circumstances of this particular case, I think that if I were to charge the Jury now, it might be prejudicial to the accused. In those circumstances, since they have come to a conclusion on a matter they were not addressed on and on which there was no evidence led, I think the only fair thing to do is to discharge the Jury and order a re-trial. I accordingly order a re-trial. The accused is to be on remand."

It is perfectly clear that the learned Commissioner disagreed with the unanimous verdict at the earlier trial because in his opinion the evidence did not justify the finding of the Jury that the accused had fired his gun in self-defence—the learned Commissioner had himself not directed the Jury on the matter of self-defence. But with respect, it seems to us that the defence could properly arise. According to the evidence of Nanhamy at the second trial, Muttu Banda and Nanhamy were both Game Watchers at the Wilpattu Sanctuary. The two men were about to retire for the night when they heard a gun shot some distance away, and they proceeded in that direction, Muttu Banda carrying a gun and Nanhamy a torch. They then saw three men and gave chase to those men, whereupon two of the men ran in one direction and the third in another. They chased the third man who was running into the jungle and they stopped after chasing for a few fathoms. The third man himself apparently stopped in the jungle, for Nanhamy then recognized him as the accused. At this stage, the accused fired a gun, killing Muttu Banda and injuring Nanhamy. Although there was no evidence that Muttu Banda had actually aimed his own gun at the accused before the latter fired his shot, the circumstances might well have led the Jury to think that such was probably the case. A man with a gun in hand who runs away when chased by another with a gun, particularly by a game watcher, is *prima facie* trying to make his escape; and if he subsequently fires when "at bay", it is not unlikely that in the words of the Foreman "he used the gun before the other man (Mutlu Banda) used the gun." Had the learned Commissioner appreciated this aspect of the matter and acted according to law, the interests of justice would have been served far better than they are in the ultimate result.

It is most unfortunate that neither the learned Commissioner nor Crown Counsel appear to have been aware of a judgment of this Court which is completely in point. It was held in *The Queen v. Handy*¹ that s. 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury. The relevant provisions of the Code were fully examined in that judgment, and we are in entire agreement with the judgment. We need mention only one additional point, for the sake of completeness. In *Handy's* case, as in the present case, the presiding Judge quite clearly did not approve of the Jury's verdict.

¹ (1959) 61 N. L. R. 265.

If for that reason the Judge was reluctant to accept the verdict, s. 248 (2) entitled him to direct a re-consideration of the verdict, and to charge the Jury afresh for that purpose. But short of having the verdict recorded and thereafter proceeding according to law, s. 248 (2) provided the only permissible alternative. But even then, the Judge would have been bound to accept the verdict given after re-consideration. This provision emphasises the principle that the object of a trial by Jury is to secure a verdict which the Jury holds to be proper, and not a verdict which a Judge will find acceptable.

The only difference between the instant case and that of *Handy* is that in the latter case the rejected verdict was one of acquittal, whereas here the verdict was a conviction of culpable homicide on the first count upon which sentence should have been passed. The accused has been fortunate in escaping punishment, for in view of s. 251 of the Code it is now too late to pass sentence on him. For that, he should be thankful to the presiding Judge and the Crown Counsel who conducted the prosecution at the first trial.

Accused acquitted.

1960 *Present: Sri Skanda Rajah, J., and Alles, J.*

E. M. DAYAWATHIE, Appellant, and W. A. GUNARATNE, Respondent

S. C. 581/1964—D. C. Kurunegala, 1656/D

Marriage of a minor—Registration without father's consent—Subsequent action for declaration that the marriage was invalid—Not maintainable — Marriage Registration Ordinance (Cap. 112), ss. 42, 46.

A wife, who was 18 years old at the time of her marriage, which was registered, sued her husband subsequently praying for a declaration that the marriage was null and void on the ground that her father's consent to the marriage had not been obtained.

Held, that sections 42 and 46 of the Marriage Registration Ordinance (Cap. 112) debarred the marriage from being declared invalid.

APPEAL from a judgment of the District Court, Kurunegala.

W. D. Gunasekera, with W. S. Weerasooria, for Plaintiff-Appellant.

T. B. Dissanayake, for Defendant-Respondent.

February 9, 1966. SRI SKANDA RAJAH, J.—

The marriage between the Plaintiff-Appellant, who was 18 years and 2 months old, and the defendant-respondent was registered on 23.8.1963.

This action was filed praying for a declaration that the marriage was null and void on the ground that it was contracted without the consent of her father, the next-friend.

The relevant provision in the Marriage Registration Ordinance, Cap. 112, is section 42, which enacts :—

“ After any marriage shall have been registered under this Ordinance it shall not be necessary in support of such marriage to give proof..... of the consent to any marriage having been given by any person whose consent thereto was required by any law..... *nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage* ”

The portion italicized above speaks for itself. If evidence regarding want of consent is shut out by Statute, then it necessarily follows that the marriage cannot be declared invalid on that score.

Want of the requisite consent is not one of the circumstances mentioned in section 46 which sets out the circumstances in which a marriage will be null and void.

In *Selvaratnam et al. v. Anandavelu*¹ de Kretser, J. pointed out, “ Where the provisions of the Ordinance have been flagrantly flouted, section 42 (new section 46) declared such marriage null and void. Want of consent was not so drastically treated.” I would respectfully adopt this dictum.

For these reasons, I would dismiss the appeal without costs.

ALLES, J.—I agree.

Appeal dismissed.

1967 Present : Manicavasagar, J., and Samerawickrame, J.

CEYLON INSURANCE CO. LTD., Petitioner, and
R. M. SUDU BANDA, Respondent

S. C. 350/67—*Application in Revision in D. C. Colombo, 66288/M*

Interrogatories—Omission to answer them—Procedure thereafter—Civil Procedure Code, ss. 94, 98, 100, 109.

A party who omits to answer interrogatories served on him is entitled to be heard before the Court makes an order requiring him to answer under section 100 of the Civil Procedure Code. The party sought to be interrogated should therefore have notice of the application under section 100, so that he may show cause, if any, against an adverse order being made against him.

¹ (1941) 42 N. L. R. 487, at 493.
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APPLICATION to revise an order of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *N. R. M. Daluwatte*, for the defendant-petitioner.

Nimal Senanayake, with *Bala Nadarajah*, for the plaintiff-respondent.

Cur. adv. vult.

November 28, 1967. MANICAVASAGAR, J.—

The plaintiff, who is the respondent to this application, obtained leave of the original Court under Section 94 of the Civil Procedure Code to deliver interrogatories for answer by the defendant-petitioner. The latter did not answer, and the plaintiff applied to the Court under Section 100 of the Civil Procedure Code and obtained an ex-parte order requiring him to answer within 4 days. The defendant did not comply with this order, and the Court on the application of the plaintiff under Section 109 struck out the defence.

The question which we have to determine is whether a party, who omits to answer interrogatories served on him, is entitled to be heard before the Court makes an order requiring him to answer under Section 100 of the Code.

The learned Judge answered this question in the negative, and held that no notice of the application under Section 100 was necessary in the case of a party who omits to answer, or refuses to answer giving no reason for his refusal, but such notice is necessary where he answers insufficiently or gives reasons for his refusal.

We are of the view that the learned Judge is wrong, and the distinction drawn by him is not warranted by the terms of Section 100 : on the contrary, the proviso to Section 100 requires the Court to decide, before it orders a party to answer, whether in its opinion the latter need not have answered under Section 98. It is obvious that the opinion of the Court should be after hearing both sides : the party sought to be interrogated should therefore have notice of the application under Section 100 in order to enable him to show cause, if any, against an adverse order being made against him. This is an essential step, and an omission to take this step renders an order made under Section 109 nugatory, for the reason that the Court must see that all steps and orders prior to an order under Section 109 have been regularly and properly made.

The order striking off the defence is set aside, and the case will go back for trial in due course. The Court will take the steps indicated by this order if the plaintiff desires to pursue his application under Section 100. The defendant will have the costs of this appeal, and the costs of the inquiry in the Court below.

SAMERAWICKRAME, J.—I agree.

1967

Present : Samerawickrane, J.

R. SELLIAH, Appellant, and A. I. E. DE KRETSER, Respondent

S. C. 241/67—M. C. Avissawella, 76,168

Criminal trespass—Intention to annoy—Proof—Penal Code, s. 433.

Where an estate labourer, after his services have been terminated, remains on the estate unlawfully, contumaciously and in defiance of the Superintendent, an intention to annoy must be inferred and he is guilty of criminal trespass. The fact that he has made an application to the Labour Tribunal for re-instatement does not justify his remaining on the estate pending the proceedings.

APPEAL from a judgment of the Magistrate's Court, Avissawella.

Bala Nadarajah, for the accused-appellant.

H. V. Perera, Q.C., with *L. Kadirgamar*, for the complainant-respondent.

Cur. adv. vult.

September 4, 1967. SAMERAWICKRAME, J.—

This is an appeal against a conviction in the Magistrate's Court of Avissawella on a charge of criminal trespass punishable under Section 433 of the Penal Code.

The facts on which the charge was based are set out in the evidence of Mr. A. I. E. de Kretser, Superintendent, Kiriporuwa Group, Yatiyantota. The appellant was a labourer on the estate. On or about 18th July, 1963 it was found that he was erecting without permission a cattle shed 20 feet away from the line rooms. The rule designed to safeguard the health of the occupants of the line rooms was that sheds should be at least 75 yards away. The Superintendent went to the spot and found that the appellant was erecting the shed and told him that he was doing something unlawful and directed him to demolish the shed. The appellant refused to do so and said that he would not carry out his orders. The Superintendent suspended the appellant and gave him one month's time to demolish the shed. The appellant failed to demolish the shed and the Superintendent terminated his services and gave him a month's time to leave the estate. The appellant refused to accept the notice which the Superintendent wanted to hand over to him and in an arrogant manner asked him to do what he wanted. A copy of the notice was fixed on the door of the line room and another copy was sent by registered post. The appellant did not leave the line room and this prosecution was therefore made.

The appellant has made an application to the Labour Tribunal and proceedings upon his application are pending. In evidence the appellant admitted that when he was suspended he was told that work would be given to him if he demolished the shed. He also stated that he was willing to leave the estate in the event of his application to the Labour Tribunal being refused ; till the proceedings were over he would stay.

It was suggested in the course of cross-examination of the complainant that the shed had been built as far back as the year 1954. When the appellant gave evidence, however, he said it was put up in 1962.

Upon the facts stated it appears to me that the appellant has remained on the estate unlawfully, contumaciously and in defiance of the complainant and an intention to annoy is to be inferred. In 51 New Law Reports at page 475, the Privy Council said: "The case of *Forbes v. Rengasamy* on which the courts in Ceylon relied is distinguishable because in that case the accused did not give evidence as to his real intention and the court thought that his conduct had been defiant." Where the accused has given evidence and, after an examination of his evidence, the Court finds that his conduct was contumacious and defiant, the result must be the same.

It is true that upon his application to the Labour Tribunal that body has the power to order his reinstatement and in the event of the Tribunal making such an order he may be provided with a line room for his occupation. This fact does not, however, justify his remaining on the estate pending the proceedings. Indeed, the appellant did not say that he believed that he was entitled to remain till the termination of those proceedings. In the light of the facts and circumstances of this case, the statement by the appellant that he was prepared to leave the estate if his application to the Labour Tribunal failed is no more than a specious excuse for his continued defiance of the complainant by a trespass which has already lasted for nearly four years. The finding of the learned Magistrate that the intention on the part of the appellant to annoy the complainant has been established is justified. The conviction of the appellant is correct and I accordingly dismiss the appeal.

Appeal dismissed.

1967 Present : H. N. G. Fernando, C.J., and T. S. Fernando, J.

THE QUEEN v. REV. H. GNANASEEHA THERO and others

S. C. 372/67—Application to summon a Special Jury in M.C. Colombo,
34638/A

Jury—Accused persons' election to be tried by a Sinhala-speaking jury—Attorney-General's application thereafter to summon a special jury—Requirement of cogent grounds—Anachronistic nature of qualifications for special jurors—Criminal Procedure Code, ss. 165B, 222, 224, 257 (1) (b), 267 (1) (d).

Where accused persons elect, under section 165 B of the Criminal Procedure Code, to be tried by a Sinhala-speaking jury from the list of persons referred to in section 257 (1) (b), the Court will not override such election otherwise than on cogent grounds if the Attorney-General makes an application thereafter to the Supreme Court under section 222 for an order requiring a special jury to be summoned to try the case against the accused. The language and income qualifications presently set out in section 257 (1) (d) for the special panel of jurors are anachronic and merit re-consideration by the Legislature.

APPLICATION to summon a Special Jury.

V. S. A. Pullenayegum, Crown Counsel, with Wakeley Paul, Crown Counsel, for Attorney-General, in support.

Colvin R. de Silva, with K. C. de Silva, C. D. S. Siriwardena and H. L. K. Karawita, for 1st Accused.

Colvin R. de Silva, with Malcolm Perera and M. D. S. Boralessa, for 5th Accused.

Colvin R. de Silva, at their request in Court, for 7th, 8th and 9th Accused.

Colvin R. de Silva, with R. Weerakoon, for 11th and 16th Accused.

Neville Samarakoon, with Felix R. Dias Bandaranaike and Nihal Jayawickrema, for 4th Accused.

P. K. Liyanage, with H. M. Jayatissa Herath, for 3rd and 13th Accused.

U. B. Weerasekera, for 18th Accused.

D. W. Abayakoon, with Harischandra Mendis and Vernon Gooneratne, for 14th Accused.

Prins Gunasekera, for 20th Accused.

Mohamed Nassim, for 12th Accused.

Percy Karunaratne, for 15th Accused.

D. T. P. Rajapakse, with M. D. S. Boralessa, for 6th Accused.

Sarath Muttetuwegama, for 17th Accused.

G. D. C. Weerasinghe, with *Harischandra Mendis*, for 2nd Accused.
Harischandra Mendis, for 10th Accused.
Stanley Tillekeratne, with *Harischandra Mendis*, for 19th Accused.
Mangala Moonesinghe, with *G. C. Wanigasekera*, for 22nd Accused.

Cur. adv. vult.

October 19, 1967. H. N. G. FERNANDO, C.J.—

22 accused have been indicted in this case of charges :—

- (i) That between the 1st day of December, 1965, and the 18th day of February, 1966, at Maharagama, Homagama, Nugegoda, Colombo and other places, in the division of Colombo, within the jurisdiction of this Court, you with others did conspire to wage war against the Queen, and that you have thereby committed an offence punishable under Section 115 of the Penal Code ; and
- (ii) that within the period and at the places aforesaid and in the course of the same transaction, you with others did conspire to overawe by means of criminal force or the show of criminal force, the Government of Ceylon, and that you have thereby committed an offence punishable under Section 115 of the Penal Code.

In response to the inquiry made by the committing Magistrate under s. 165B of the Criminal Procedure Code, the accused elected that the Jury shall be taken for the trial from the Sinhala-speaking panel, i.e. from the list referred to in s. 257 of persons who can speak, read and write the Sinhalese language and possessing the requisite qualifications specified in paragraph (b) of sub-section (1) of that section. Thereafter the Attorney-General made an application to the Supreme Court for an order requiring a special jury to be summoned to try the case against the accused. That application was refused after we had heard the arguments of learned Crown Counsel, and we now state our reasons.

It was rightly submitted that the application was one made under s. 222 of the Code ; accordingly the question which arose was whether the Court considers the application for a special jury to be just and reasonable. There were two main grounds urged in support of the argument that the case is one which should be tried by a special jury : *firstly*, that the case is of unusual complexity in that evidence will be led at the trial of several incidents, the connection between some of which will not be easily apparent, and that the prosecution will be relying largely, for proof of the alleged conspiracy, on inferences arising from various incidents and from the conduct of the accused persons ; and *secondly*, that the prosecution will be proving confessions made by some of the accused, the contents of which will not in law be admissible as against others of the accused, and that a special jury will be better able than a Sinhala-speaking jury to observe the principle that a confession by one accused is not evidence against the others.

In considering the question whether a special jury will be better qualified than a Sinhala-speaking jury to cope with these anticipated difficulties, the first point which arises is whether the distinctions made in the law between the special panel and the other panels reasonably ensure that the special panel will consist of more competent persons than those on the ordinary panels. Under s. 257 (1) (d) the special panel consists only of persons who can speak, read and write the English language. In addition, paragraph (d) requires *one* of the following qualifications :—

- (a) the possession of an income of not less than Rs. 3,000 a year ;
- (b) in one's own right or that of one's wife, the possession of movable or immovable property not less than Rs. 20,000 in value ;
- (c) the enjoyment of a monthly salary of not less than Rs. 500.

Paragraph (b) of s. 257 (1) provides for a list of persons who can speak, read and write the Sinhalese language, and requires one of the following additional qualifications :—

- (i) the possession in one's own or in one's wife's right of movable or immovable property, not less than Rs. 1,000 in value ;
- (ii) an income of Rs. 500 a year.

Paragraph (c) provides corresponding requirements in the case of the Tamil-speaking panel.

It will be seen that the distinctions made in s. 257 refer firstly to the matter of the language which a person can speak, read, and write, and secondly, to the income or wealth which a person or his wife may possess. Thus s. 257 does not directly require in either case any minimum educational qualification. Nevertheless Counsel argued that, because the Legislature in paragraph (d) laid down certain qualifications for a *special* jury, it follows that the Legislature's intention and expectation was that persons on the *special* panel will be better educated and more capable of dealing with complexities of facts and the law than persons on the other panels.

I entirely agree that the Legislature which enacted the Criminal Procedure Code in 1898 must have entertained the intention and the expectation just mentioned. But it is necessary to consider, as they appear from the Statute, the matters on which the Legislature relied for the realisation of its intention and expectation. The matter first expressed pertains to language, and it is manifest that the Legislature in 1898 expected that persons having a knowledge of the English Language are likely to be better educated than those having only a knowledge of Sinhala or Tamil. Having regard to the known facts concerning the educational policy of the British Government of Ceylon and to its consequences, that was quite a reasonable expectation ; secondary education, for instance, was in 1898 and until fairly recent times imparted exclusively through the English medium, and the language of the Administration and of Commerce was in all important respects exclusively English. The provision in paragraph (d) of s. 257 requiring for a special

juror the enjoyment of a monthly salary of not less than Rs. 500 did certainly ensure the possession of a reasonably high educational qualification and/or of commercial or administrative experience, and there could have been in 1898 but few persons having a knowledge only of Sinhalese or Tamil language enjoying salaries at that level. In brief therefore s. 257 was based on a perfectly valid assumption that a person on the special panel would in many respects be a more competent juror than persons of the other panels. It follows therefore that for many years after 1898 it would have been just and reasonable in a fit case to direct that it be tried by a special jury.

But I am satisfied that the assumption validly made by the Legislature in 1898 no longer holds good having regard to the radical change of circumstances which has taken place in this country particularly after Independence. It is a matter of common knowledge that the majority of those who now complete secondary education receive their education in the Sinhala medium and not in English. It is also a matter of common knowledge that even the minority which receives secondary education in the English medium no longer possesses a proficiency in the English language in any way comparable to the proficiency attained in that language prior to the 1940s.

The figures of recent University entries establish that the majority of the young people who are now competitively selected for University education have little or no knowledge of the English language, so that there has come a stage when the majority of those possessing superior educational qualifications will not on the ground of language be eligible for the panel of special jurors. Thus the principal ground for the assumption which led the Legislature in 1898 to lay down the language qualifications specified in paragraph (d) of s. 257 is no longer valid.

Passing now to the income qualification, here again it may have been reasonable to suppose at the beginning of this century that the requirement of an annual income of Rs. 3,000 or of the possession of property worth Rs. 20,000 would secure that persons on the special panel would be better educated than others in less affluent circumstances, but having regard to the changes in the real value of money, the limits imposed in paragraph (d) are far too low to justify a similar expectation at the present time.

Counsel attempted to equate what he termed the complexity of the present case to the complexity which might arise in a case in which the evidence relates to involved accounts or matters of business practice. In a case like the present one, the functions of the Jury will not be extraordinary ; their task will be to decide such matters as whether a particular incident did occur, whether a person said or did something on a particular occasion, whether one accused was aware of some purpose which another may have entertained, whether an inference of guilt should be drawn from matters held to have been proved. That in no way resembles the task of the Jury in a case in which the evidence cannot be properly

understood save by persons possessing some knowledge or experience of accounting, commercial or scientific matters. Even if persons having the qualifications set out in paragraph (d) of s. 257 (1) of the Code may be more competent than others to serve as jurors for a case of the latter type, we are not here concerned with such a case.

On the grounds discussed above, it does not appear to me reasonable to deprive the accused in this case of the right they have exercised under s. 165B to be tried by a Sinhala-speaking Jury.

There is the further consideration arising under s. 222 whether or not it is *just* that the case be tried by a special jury, when the accused have exercised their statutory right of election that they be tried by a Sinhalese-speaking jury. The second argument of learned Crown Counsel is relevant to this matter. He suggested that a Sinhalese-speaking jury may be less able than a special jury to keep out of consideration as against some accused confessions alleged to have been made by other accused. In other words, he urged that a special jury was advisable in the interests of the defence. Had the accused made no objection, then perhaps it was incumbent on the Court to consider whether the interests of the defence would be better served by the empanelling of a special jury. But when the accused themselves have elected a Sinhalese-speaking jury, and when they have through their Counsel intimated their objection to a special jury, it would be gratuitous and, as my brother remarked, patronizing, for the Court, in the supposed interests of the accused, to over-ride a choice freely made by the accused and their advisers.

I presume that some of the witnesses at the impending trial will give their evidence in English ; if so, it is not the practice for that evidence to be translated into Sinhalese at a trial before an English-speaking jury. One of the advantages therefore which the accused will enjoy if tried according to their choice, is that they will be able personally to understand all the evidence, and thus to instruct their Counsel more usefully.

I do not propose to discuss the other practical advantages which the Legislature must be presumed to have intended to afford to accused persons by the exercise of their right to choose the particular language speaking panel from which juries should be drawn. But having regard to the clear right of election thus conferred, justice will not appear to be done if this Court were to over-ride such an election otherwise than on cogent grounds. I have tried to show already that no sufficient grounds have been made out in this case.

The rejection by this Court of the accuseds' choice to be tried by a Sinhalese-speaking jury, at a time when Sinhala is generally the language of official business and education and often the language of the Legislature's deliberations, can confuse and perplex the mind of the public and so lead to distrust of our Courts. That is an evil which all those concerned in the administration of justice must be watchful to avert.

Learned Crown Counsel repeatedly stated that in previous cases a special jury has been ordered although the accused's election under s. 165B had been only for an ordinary jury. The instance to which he often referred was the trial concerning the assassination of the late Prime Minister, Mr. Bandaranaike. In that case apparently the accused had elected to be tried by an English-speaking jury, and the Court acceded to an application by the accused themselves for a special jury. In the result the accused were yet tried according to their own choice because a special jury under s. 257 is always English-speaking. No question there arose of the Court over-riding the election made by the accused. For this reason that particular instance is not favourable, but is rather opposed, to the present application.

The case of *The King v. Nadarajah*¹ does not support the Crown in this case. There the prisoners had elected under s. 165B to be tried by an English-speaking jury in a case expected to be heard in the Northern Circuit; the Attorney-General thereafter transferred the case to the Western Circuit at Colombo, and the prisoners then applied to be tried by a Tamil-speaking jury. That application did not fall under s. 222 of the Court, but instead under s. 224. The trial Judge relied upon the provision in s. 165B that an accused is bound by his election under that Section; and in refusing the application for an alteration of the election, the Judge exercised his discretion under s. 224. No question arose in that case, as in this one, of over-riding the election made under s. 165B.

The case of *The King v. Thelenis Appuhamy*² was again one of an application not under s. 222, but under s. 224. That fact suffices to distinguish the case. True it was that the accuseds' election of a Tamil-speaking jury was there over-ridden by an order of Court under s. 224, but it is clear that the trial Judge made his order because of the peculiar circumstance that Sinhalese accused had in that case elected to be tried by a Tamil-speaking jury upon grounds which in the opinion of the trial Judge were quite unreasonable.

The instances to which Counsel referred during his argument afford no grounds for holding that in the present case it would be *just* to order these accused to be tried by a special jury.

One last observation is necessary. I must not be understood to hold the opinion that special panels of jurors are no longer necessary for criminal trials. But I do think that the qualifications presently set out in s. 257 of the Code for the special panel are anachronic and merit reconsideration by the Legislature.

T. S. FERNANDO, J.—I agree.

Application refused.

¹ (1945) 46 N. L. R. 192 ² (1945) 46 N. L. R. 304.
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1967

Present : T. S. Fernando, A.C.J., and Sirimane, J.

A. H. M. RAZEEM, Appellant, and A. M. NAZEER, Respondent

S. C. 18 of 1966—In the matter of an Application for a Mandate in the nature of a Writ of Quo Warranto challenging the right of an elected member of the Colombo Municipal Council to hold office

Quo warranto—Member of Municipal Council—Allegation of disqualification on the ground that he is not a citizen of Ceylon—Burden of proof—Presence of a member's name in register of voters—Effect—Local Authorities Elections Ordinance (Cap. 262), ss. 8, 9 (1), 10, 18—Citizenship Act (Cap. 349), s. 2 (2).

The applicant applied for a writ of *quo warranto* against the respondent on the ground that the latter, who was elected to represent a Ward of the Colombo Municipal Council to sit and vote as a member thereof, was disqualified under section 9 (1) of the Local Authorities Elections Ordinance for membership of the Council in that he was not a citizen of Ceylon.

Held (i) that the onus of satisfying the Court that the respondent was not a citizen of Ceylon was on the applicant.

(ii) that the fact that the respondent's name was on the register of voters was not a bar to the present application. The right to be elected to membership of the Council and the right to sit and vote as a member thereof are not one and the same thing.

APPLICATION for a writ of *quo warranto* challenging the right of an elected member of the Colombo Municipal Council to hold office.

E. R. S. R. Coomaraswamy, with *Rajah Bandaranayake*, *Nihal Jayawickrama* and *S. S. Sahabandu*, for the applicant.

H. W. Jayewardene, Q.C., with *Izadeen Mohamed* and *S. C. Crossette-Thambiah*, for the respondent.

Cur. adv. vult.

November 10, 1967. T. S. FERNANDO, A.C.J.—

This was an application filed questioning the right of the respondent, a person elected to represent Ward No. 16 of the Colombo Municipal Council, to sit and vote as a member thereof. The sole allegation upon which the application was sought to be supported was that the respondent was disqualified for membership of the Council in that he is not a citizen of Ceylon as required by section 9 (1) of the Local Authorities Elections Ordinance (Cap. 262). The onus of satisfying this Court that the respondent is not such a citizen was undoubtedly on the applicant and, at the conclusion of the hearing, we were not satisfied that that onus had been discharged. We therefore dismissed the application with costs.

We wish, however, to refer to a point taken by Mr. Jayewardene by way of a preliminary objection to the maintenance of this application. He pointed to the fact that, at the time of the preparation of the electoral lists, an objection to the inclusion of the respondent's name in the relevant electoral list had been lodged on the ground that he was not a citizen of Ceylon, and had been inquired into and decided in favour of the

respondent. In these circumstances, Mr. Jayewardene claimed that it is now too late for any person to question the respondent's right to sit on the Council after a valid election. He cited in favour of this claim an unreported decision of this Court (S. C. Application No. 94 of 1960—S. C. Minutes of March 7, 1960) made by Sinnetamby J. to the effect that so long as an elected member's name remains on the register of voters an application for a writ of *quo warranto* cannot be entertained. We wish to state, with all respect to that learned judge, that the right to be elected to membership of the Council and the right to sit and vote as a member thereof are not one and the same thing. While a person whose name has been finally entered on the electoral list and who has the residential qualification specified in section 8 of the Local Authorities Elections Ordinance is qualified for election to membership of the Council, section 10 of the same Ordinance disqualifies the member from sitting or voting if he is disqualified by reason of the operation of any of the provisions of section 9. One of such provisions, as already indicated above, requires the member to be a citizen of Ceylon. For this reason we found ourselves disposed not to follow the decision referred to above. We need only add that, if a decision of an elections officer under section 18 of the Local Authorities Elections Ordinance has the far reaching effect implicit in the judgment above referred to, it is capable of leading to a practice of obtaining decisions from an elections officer in favour of intending candidates for membership of a Council by objections lodged in collusion with such candidates, a phenomenon which cannot be brushed aside as unlikely in this Country. Moreover, it can render nugatory the provisions of section 2 (2) of the Citizenship Act (Cap. 349) under which a person becomes entitled to the status of Ceylon citizenship only in the ways specified therein.

SIRIMANE, J.—I agree.

Application dismissed.

1967 Present : Samerawickrame, J., and Tennekoon, J.

H. LYDIYA, Appellant, and I. P. KIRIUKKUWA and five others,
Respondents

S.C. 398/65—D.C. Kegalle, 1906/T

Kandyan law—Illegitimate son—Death intestate and issueless—Devolution of his acquired property—Respective shares of his wife and the legitimate children of his deceased mother—Kandyan Law Declaration and Amendment Ordinance, s. 11.

Under the Kandyan Law, where, after his mother has predeceased him, an illegitimate son dies intestate and issueless, leaving him surviving his wife and no relations other than the legitimate children of his mother, the dominium in respect of his acquired property devolves on his mother's legitimate children, and his wife is entitled only to a life interest in such property.

APEAL from a judgment of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *B. J. Fernando* and *L. C. Seneviratne*, for Appellant.

C. R. Gunaratne, for Respondents.

Cur. adv. vult.

October 1, 1967. TENNEKOON, J.—

The contest in this case is in regard to the acquired property of one Sedara who died in 1955, and whose estate is being administered in D.C. Kegalla Testamentary Case No. 1906/T.

Sedara was the illegitimate son of one Siri born of an association with one Appuwa. After Appuwa's death, Siri was either married to, or was the mistress of, one Dingiriya. The respondents are the children of that union. Siri died in 1942.

Sedara having died issueless his acquired property is now claimed on the one hand by the appellant who is the widow of Sedara, and on the other by the respondents who concede to the appellant only a right to life interest in such property.

The learned District Judge having held, in the first place, that the respondents were the legitimate children of Siri and Dingiriya went on to hold that where an illegitimate person (being a man) dies leaving him surviving a spouse and no relations other than the legitimate children of his mother, the Kandyan Law Declaration and Amendment Ordinance contains no provision for the resolution of the question of devolution of title to his acquired property, and that the question must accordingly be resolved under the general Kandyan Law; applying that law he came to the conclusion that the wife was entitled only to a life interest and that the respondents being, as he held, legitimate children of Siri succeeded to the dominium.

Mr. H. W. Jayewardene, Queen's Counsel appearing for the appellant, while accepting the learned District Judge's opinion that the answer to the question of succession that arose in this case had to be resolved by reference to the general Kandyan Law, submitted that the law on the question is to be found formulated in a decision of this court made in 1904 in the case of *Tittewelle Sangi v. Tittewelle Mohotta*¹ which followed an earlier case of *Punchirale et al. v. Punchi Menika*². These two cases certainly are authority for the proposition that under the general Kandyan Law where a man died leaving him surviving a spouse, she would have an absolute *lathimi* right to the acquired property of her deceased husband to the exclusion of any "relations" more distantly connected to the deceased than parents, full brothers and sisters and their children.

¹ (1903) 6 N. L. R. 201.

² (1879) 2 S. C. O. 44.

Mr. Jayewardene's submission was that the respondents were, whether they were the legitimate or illegitimate children of Siri, excluded by this rule.

Mr. Guneratne for the respondents while submitting that the 6 N. L. R. case was not in accord with the general Kandyan Law—and in this he is supported very strongly by Hayley—Laws and Customs of the Sinhalese (1923) at pages 365–366—contended that the learned District Judge was wrong in holding that the Kandyan Law Declaration and Amendment Ordinance did not apply. He referred us to the provisions of section 11 thereof which, he submitted, dealt fully with the case of a man dying intestate after 1938 leaving a spouse surviving. This section provides (*inter alia*) that the surviving spouse shall be entitled (i.e. absolutely) to the acquired property of the deceased intestate only if the deceased left him surviving *no other heirs*. I agree with Mr. Guneratne's submission that the effect of section 11 is to declare (while amending in certain respects) the law relating to the rights of a widow to the immovable property of her deceased husband; in particular having regard to the wording of section 11 (1) (d)—

“in the event of the deceased leaving him surviving no other heir, the surviving spouse shall succeed to all his property both paraveni and acquired”—

it is now no longer possible to found a right in the widow to full dominium upon the general Kandyan Law which gave her that right not in the somewhat extreme event of there being no other heirs of the deceased but in the more generous circumstance of there being no relations of a given proximity to the deceased. The words “no other heir” must, in the context in which they appear, be taken to signify that the test to be applied is: if the widow is left out of the reckoning, would there be any heir, however remote, to succeed to the property? If there is such an heir the wife would have a life estate only, and she would succeed to the full dominium only in the absence of any such heir.

The question that then remains is: are the respondents heirs of the deceased Sedera? Sedera himself is an illegitimate son of his mother. While it is accepted Kandyan Law that a father cannot succeed to the acquired property of his illegitimate child there is nothing to suggest that a mother cannot succeed to the acquired property of her illegitimate son. The difficulty however is that Siri predeceased Sedera; can any heirship be established between Siri's illegitimate son and Siri's lawful heirs *by representation*?

I am relieved of duty of searching for an answer to this question in the texts of writers on Kandyan Law because this Court has at least in two cases answered this question in the affirmative.

In the case of *Banda v. Banda*¹ the facts were: The defendant transferred certain property to his illegitimate son Kirimudiyanse who

died unmarried and issueless. Kirimudiyanse's mother had predeceased him ; administration having been taken to his estate, the property was sold to the plaintiff by three daughters of his mother by a different father. In deciding that the plaintiffs had good title and the defendant none, de Sampayo, J. said : "Kirimudiyanse's mother if alive would of course have been his heir and *in her default I think his half sisters were his heirs*".

A similar problem arose in the case of *Kuma v. Banda*¹. One Kiri Banda died intestate in 1919. His parents were the defendant and one Kiri Menike who married each other in 1886 according to customary rites but had not registered their marriage under the then prevailing Kandyan Marriage Ordinance 3 of 1870. Kiri Menike predeceased Kiri Banda and her nearest relative was one Ranhamy, a half-brother on the mother's side. The plaintiff was a daughter of Ranhamy who was dead. She claimed the property of Kiri Banda as his sole heiress, while the defendant alleged that he was the heir of his illegitimate son Kiri Banda. A Full Bench, while holding that the defendant could not as father succeed to the acquired property of his illegitimate son, had no difficulty in upholding plaintiff's claim as heir of the deceased Kiri Banda *through his deceased mother whose illegitimate son he was*. Applying the principle adopted in these two cases I hold that the children of Siri by her husband Dingiriya are (having regard to what is said hereafter on the question of their legitimacy), heirs of Sedera, and accordingly they succeed to his acquired property subject to a life interest in the petitioner.

In regard to the question of the legitimacy of the respondents it was urged for the first time in appeal that, although ordinarily the production of the certificates of birth of the respondents (in which Siri and Dingiriya are referred to as parents and as married) may have been relevant evidence to establish a marriage between Siri and Dingiriya by reason of the provisions of section 35 of the Evidence Ordinance, in the present case such evidence must be excluded ; it was submitted that this was the effect of the provisions of sections 8 and 36 of the Kandyan Marriage Ordinance 3 of 1870 which are substantially to the following effect :—

Section 8 : No marriage contracted after 1870 is valid unless registered in manner and form as provided in the Ordinance ; and

Section 36 : An entry in a book kept under this Ordinance shall be the best evidence of the marriage so contracted.

It has been held that the expression "best evidence" in section 36 is used in the sense it is used in English Law and it thus excludes all evidence of an inferior character. See *Mampitiya v. Wegodapela*² and *Seneviratne v. Halangoda*³.

An examination of the proceedings in the lower court indicates that the question whether the marriage between Siri and Dingiriya was only a customary marriage or was one contracted under the General Marriage

² (1922) 24 N. L. R. 129.

³ (1921) 22 N. L. R. 472.

¹ (1920) 21 N. L. R. 294.

Ordinance then in force or one contracted under the Kandyan Marriage Ordinance 3 of 1870 was never in issue. There were no formal issues raised at the inquiry below ; there is nothing in the recorded submissions of counsel or in the judgment of the learned District Judge to indicate that the parties were at issue as to whether the marriage could be held to be valid unless it was contracted under the Kandyan Marriage Ordinance 3 of 1870 and a certified entry of such marriage produced. Mr. Jayewar-dene himself concedes that, while there was the Kandyan Marriage Ordinance in operation at the time, there was nothing in the law to prevent Siri and Dingiriya from having contracted a valid marriage under the General Marriage Ordinance then in operation. Under that law there was no *best evidence* rule. In all the circumstances I think it would be unjust to the respondents to permit such a point to be raised for the first time in appeal. I would accordingly affirm the finding of the learned District Judge that the respondents are the legitimate children of Siri and Dingiriya.

The appeal accordingly fails and is dismissed with costs.

SAMERAWICKRAME, J.—I agree.

Appeal dismissed.

1967 Present : T. S. Fernando, J., and Siva Supramaniam, J.

A. SAMARASINGHE and another, Appellants, and W. SAMARASINGHE, Respondent

S. C. 222 (Inty.) of 1966—D. C. Galle, 7106/L

Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963—Sections 6, 14 (1) (a), 18—Dispute relating to a contract of tenancy—Jurisdiction of a civil court to hear it—Requirement of certificate from Chairman of Panel of Conciliators—Inability to serve summons on the party complained against—Effect.

Where a Panel of Conciliators has been constituted for a Conciliation Board area, an action instituted in that area concerning a dispute as to whether or not there has been a breach of a contract of tenancy between the parties falls within the ambit of section 6 of the Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963. The action cannot therefore be instituted in, or be entertained by, a civil court without the production of a certificate from the Chairman of the Panel of Conciliators in compliance with the requirements of section 14 (1) (a) of the Act.

Where a dispute is referred to a Conciliation Board, there is no legal requirement of the presence at the inquiry of the party against whom the complaint is made. If the Board is satisfied that, despite reasonable effort, it is not possible to serve summons or otherwise secure the attendance of the party complained against, there is no legal bar to an *ex parte* inquiry and the issue of a certificate thereafter that it is not possible to effect a settlement.

A PPEAL from an order of the District Court, Galle.

M. C. Abeyewardene, for the defendants-appellants.

C. Ranganathan, Q.C., with *S. W. L. Bandara*, for the plaintiff-respondent.

Cur. adv. vult.

December 21, 1967. T. S. FERNANDO, J.—

This action was instituted on 19th March 1965 in the District Court of Galle by the plaintiff who averred in his plaint that he was at all material times a monthly tenant of his elder brother, the 1st defendant, in respect of certain premises with all buildings thereon. It was further averred that his landlord, the said 1st defendant, had forcibly ejected him from a specified part of the said premises. The 2nd defendant was made a party to the case on the allegation that he had acted in concert with the 1st defendant in the said unlawful ejectment. What was prayed for in the plaint was an ejectment of the defendants and a restoration of the plaintiff to quiet possession.

The 1st defendant filed answer denying that the plaintiff was his tenant. It seems to me that there lay the real dispute between the parties. The 1st defendant further denied unlawful entry and averred that the plaintiff was only his rent collector and manager of the buildings and of the business carried on therein. He alleged that the plaintiff was dismissed from service on account of misappropriation of certain monies, and that the 2nd defendant was the person employed to succeed to the duties performed by the dismissed plaintiff.

The 1st defendant, in his answer, took up also the plea that this action could not have been instituted by the plaintiff or entertained by the court without the production of a certificate from the Chairman of the Panel of Conciliators constituted for the area in which the premises from which the plaintiff claimed he was ejected are situated. The point so pleaded was tried by way of a preliminary issue and decided by the learned District Judge against the defendants. This appeal raises solely the correctness of that decision of the District Judge.

Section 14 (1) (a) of the Conciliation Boards Act, No. 10 of 1958, as amended by Act No. 12 of 1963, enacted as follows:—

“Where a Panel of Conciliators has been constituted for any Conciliation Board area—

no proceedings in respect of any dispute referred to in paragraphs (a), (b) and (c) of section 6 shall be instituted in, or be entertained by, a civil court unless the person instituting such proceedings produces a certificate from the Chairman of such Panel that such dispute has been inquired into by a Conciliation Board and it has not been possible to effect a settlement of such dispute by the

Board, or that a settlement of such dispute made by a Conciliation Board has been repudiated by all or any of the parties to such settlement in accordance with the provisions of section 13 ; ”

It did appear in the proceedings held in the District Court on the preliminary issue that a dispute between the plaintiff and the 1st defendant had been referred as contemplated in section 6 of the Act for inquiry to a Conciliation Board. D4, a certificate dated 25th August 1965, has been issued by the Chairman of the relevant Panel. By that time the answers of the defendants had been filed in the District Court. This certificate recites that a complaint was made by the plaintiff against the 1st defendant “ for having entered unlawfully the service station ” (which is the important part of the premises we are concerned with in this case), that it was inquired into by a Conciliation Board and that a settlement could not be effected. The learned District Judge has construed the complaint made to be one relating to a criminal offence of trespass, but we are satisfied that he was in error in so doing. He appears to have been influenced by the fact that the matter was referred to the Panel of Conciliators by the Police, but the evidence of the Police Inspector is clear enough that he treated the plaintiff’s complaint to him correctly as one relating to a land dispute—a dispute of a civil nature, in respect of which the Police could necessarily make no useful decision.

It would appear that service of summons could not be effected on the 1st defendant so that a Conciliation Board may proceed to make an inquiry *inter partes*, but, as we apprehend the position, there is no legal requirement of the presence at the inquiry of the party against whom the complaint is made. If, after reasonable effort to serve summons the Board is satisfied that it is not possible to serve summons or otherwise secure the attendance of the party complained against, there is no legal bar to an *ex parte* inquiry and the issue of a certificate thereafter that it is not possible to effect a settlement. That the Chairman was aware of his power to issue a certificate in circumstances such as those I have above set out is evident from the very existence of certificate D4.

The learned District Judge, after referring to the *obiter dictum* of Basnayake, C.J., in *Asiz v. Thondaman*¹ that the right of a citizen to invoke the aid of the courts is one that “ is so fundamental that it cannot, in my view, be taken away by our legislature itself ”, has gone on to say that the plaintiff’s right to sue cannot be taken away unless a statute in express and unambiguous language so states. We do not think that the Conciliation Boards Act makes any pretensions of depriving the citizen of his right of access to the established Courts. What it seeks to do is to place a bar against the entertainment by Court in certain stated circumstances of civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute over which the parties appear set on embarking on litigation which is often expensive to the parties as well

¹ (1939) 61 N. L. R. at p. 222.

as to the State and which almost always finishes up in bitterness. Indeed, section 18 of the Act is eloquent in regard to the mood of the legislature when it passed the law relative to conciliation, for it enacted that "the provisions of this Act shall have effect notwithstanding anything to the contrary in any written law".

I do not find it possible to agree with the learned judge in his finding that there was no dispute between the plaintiff and the 1st defendant such as is referred to in section 6 of the Act. I have already indicated above that the main dispute was that over the allegation of the existence of a tenancy. Indeed, the plaint itself, and certainly the pleadings taken together, establish that there was a dispute falling within one or more or all of the classes (a), (b) and (c) described in the said section 6. Moreover, the very conduct of the plaintiff in obtaining the certificate after the institution of the action when the pinch of the plea was being felt and the making of no effort to produce it in Court, leaving such production to be done by the 1st defendant, goes to prove that he himself realised the weakness of his position in law. The issue referred to above in this judgment had, on the facts before him, to be answered by the learned judge in the negative.

I would allow the appeal, set aside the order of 20th July 1966 appealed from, and direct that the plaintiff's action be dismissed on the ground that it could not have been instituted or entertained in view of section 14 (1) (a) of Act No. 10 of 1958.

The 1st defendant is entitled to the costs in the court below and to the costs of this appeal.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

1968

Present : Siva Supramaniam, J.

THE SUPERINTENDENT, DEESIDE ESTATE, MASKELIYA, Appellant, and ILANKAI THOZHILAR KAZHAKAM, Respondent

S. C. 63/67—Labour Tribunal Case, 3876/K

Labour Tribunal—Order made by it—Requirement that it should be against a natural or legal person—Industrial Disputes Act, s. 33 (2).

Under the Industrial Disputes Act the party against whom a Labour Tribunal is empowered to make an order must be a natural or legal person, for it is only against such a person that the order can be enforced.

A Labour Tribunal made order against "The Superintendent, Deeside Estate, Maskeliya", directing him to re-instate a labourer, whose services had been summarily terminated, and to pay him "back wages".

Held, that the order was unenforceable, because the office of "The Superintendent of Deeside Estate" was not a legal person. A Corporation Sole must be expressly created by legislative enactment.

APPEAL from an order of a Labour Tribunal.

Siva Rajaratnam, for the appellant.

No appearance for the respondent.

Cur. adv. vult.

January 31, 1968. SIVA SUPRAMANIAM, J.—

This is an appeal from an order made by the President of the Labour Tribunal of Nuwara Eliya under s. 31 of the Industrial Disputes Act, No. 43 of 1950 (hereinafter referred to as the Act), directing that one Meiappen, a labourer on Deeside Estate, Maskeliya, whose services had been summarily terminated on 22nd January 1965, be reinstated and be paid "one and a half years' back wages" amounting to Rs. 1,080.

The application for relief was made by the respondent Trade Union of which Meiappen was a member. "The Superintendent, Deeside Estate, Maskeliya", was named as the Employer against whom the application was made. In the written application that was filed it was stated that Meiappen "was summarily dismissed from work by the Management with effect from 22nd January 1965" and that the applicant-Union considered the dismissal "unlawful and unreasonable". The name of the employer who made the order of dismissal was not mentioned.

The person who held the office of Superintendent of the said estate filed a statement that Meiappen was lawfully dismissed on the ground that on the night of 24th December, 1964 he, along with three young female labourers of the estate, had entered the bungalow of A. Wijesundera, the Assistant Superintendent of the estate, in the latter's absence and had danced and made merry in the sitting room of the bungalow and consumed beer and arrack belonging to the Assistant Superintendent. After enquiry, the President of the Tribunal held that he found it difficult to accept the evidence of the Assistant Superintendent and his witnesses and made the order referred to earlier.

At the hearing of this appeal, which was filed by the person who held the office of Superintendent, Counsel for the appellant strongly attacked the finding of the President on the facts as unreasonable. Under s. 31D of the Act, however, no appeal lies on questions of fact.

The appeal was also pressed on a question of law which, in my opinion, is entitled to succeed. Under the Act, the Tribunal is empowered to make any order as may appear to it to be just and equitable. The party against whom the order can be made is the employer or, under certain circumstances, a person who has ceased to be the employer. The order, therefore, has to be made against a natural or legal person for it is only against such a person that the order can be enforced.

In the instant case, the party against whom the application was made by the respondent and against whom the order has been made by the President is "The Superintendent, Deeside Estate, Maskeliya". The office of "The Superintendent" is not a legal person. Under our law, a Corporation Sole must be expressly created by legislative enactment—Vide the Judgment of the Privy Council in *The Land Commissioner v. Ladamuttu Pillai*¹. The order made by the President is, therefore, unenforceable.

Under s. 33 (2) of the Act, where an order is made for payment of money by any employer to any workman, the amount of such money, if unpaid, can be recovered by a Magistrate's Court in like manner as a fine imposed by the Court. In the instant case, since "The Superintendent of Deeside Estate" is not a Corporation Sole, there is no one from whom the amount ordered can be recovered. It is a fundamental principle that a Court should not make an order which it cannot enforce.

I set aside the order made by the President of the Labour Tribunal and dismiss the applicant-respondent's application. I make no order in regard to costs.

Order set aside.

1967

Present : Alles, J.

I. K. WIJEWARDHENA, Appellant, and THE INSPECTOR OF POLICE, PANADURA, Respondent

S. C. 632/1966—M. C. Panadura, 93889

Charges of criminal trespass and intentional insult—Jurisdiction of Magistrate's Court—Objection that alleged offences were committed in a Conciliation Board area—Burden of proof—Conciliation Boards Act No. 10 of 1958, as amended by Act No. 12 of 1963, ss. 3 (2), 3 (3), 14 (1) (b).

Where, in a prosecution in a Magistrate's Court for an offence specified in Part I of the Schedule to the Conciliation Boards Act, it is submitted on behalf of the accused that the Court has no jurisdiction to entertain the prosecution in view of the provisions of section 14 (1) (b) of the Conciliation Boards Act, the burden is on the accused to show that the area in which the offence is alleged to have been committed has been declared to be a Conciliation Board area.

APPEAL from a judgment of the Magistrate's Court, Panadura.

M. M. Kumarakulasingham, with F. N. D. Jayasuriya, for the accused-appellant.

Wakeley Paul, Crown Counsel, with S. W. B. Wadugodapitiya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

¹ (1960) 62 N. L. R. 169 at page 182.

September 13, 1967. ALLES, J.—

Plaint was filed in this case charging the accused-appellant and his wife in the Magistrate's Court of Panadura on three counts. On the first count they were charged with committing criminal trespass by entering Ward No. 1 of the Panadura Hospital and remaining there to the annoyance of Dr. S. Weeratne, an offence punishable under section 434 of the Penal Code; on the 2nd and 3rd counts the appellant alone was charged on two counts under section 484 of the Penal Code with intentionally insulting Dr. Weeratne and Dr. M. V. O. Peiris of the same Hospital. After a lengthy trial, the appellant and his wife were acquitted on the charge of trespass but the appellant was convicted on the charges of insult and sentenced to pay fines of Rs. 100 on each of the two charges.

The case was a sequel to an incident which had taken place in Ward No. 1 of the Panadura Hospital on 11th July, 1965. On that day, Mangala Wijewardhena, the son of the appellant and his wife had met with a motor accident in which he and one Attanayake were injured. The two injured persons were admitted to the Hospital about 12 noon that day and attended on by Dr. Weeratne. Dr. Weeratne had completed examining Mangala Wijewardhena's injuries about 12.40 p.m. and sent him to the dressing room and commenced to attend on Attanayake. In the meantime, the appellant and his wife had come to the Hospital. It would appear that they had come to the Hospital soon after the visiting hours, which were from 12 noon to 1 p.m. By that time, Mangala had been brought to the ward from the dressing room. He had multiple injuries on his face and hands and also an injury on his head which had apparently escaped the notice of the Doctor. The appellant pointed out this injury to the Doctor and Dr. Weeratne examined the injury and found it to be a trivial one and only skin deep and told the appellant that he would attend to the injury after he had attended to another patient who had been admitted to the Hospital with a history of an assault with a club and asked the appellant to leave the Hospital since it was after visiting hours. The appellant then turned abusive and started creating a disturbance in the ward and uttered insulting words to Dr. Weeratne in the presence of the attendants, patients and nurses. The appellant refused to leave the ward and as Dr. Weeratne was summoned to treat another patient in the medical ward and as the appellant and his wife were continuing to create a disturbance he summoned Dr. Peiris. When Dr. Peiris came to the ward, he too told the appellant that the injury was a trivial one and that Dr. Weeratne would attend to the patient, whereupon the appellant began to abuse him too in insulting language. The Police who had been summoned by Dr. Weeratne then arrived and when Sub-Inspector Isurupala requested the appellant and his wife to leave the Hospital, they refused to do so. Another witness, Advocate C. M. Fernando who had arrived at the Hospital to see Attanayake, says that the appellant and his wife were creating a disturbance.

The appellant gave evidence and denied that he had used the insulting words referred to in the charges at the Doctor and stated that the Police officers who came to the Hospital for investigation abused him and his wife.

The learned Magistrate in a considered judgment has disbelieved the appellant and his witnesses and held that the appellant did use the abusive words referred to in the charges. I see no reason to interfere with the findings of the Magistrate both on the facts and the law that the appellant was guilty of the offences of which he was convicted. The case has been bitterly contested in the trial court ; the Doctors and the Police officers have been severely cross-examined ; evidence was led on behalf of the defence and Counsel have addressed the Magistrate both on questions of fact and on the law applicable to the case. There were several dates of trial and the Magistrate, after a careful analysis of the evidence, has found the appellant guilty of the charges of insult.

At the argument of the appeal, learned Counsel for the appellant raised the question of jurisdiction ; he submitted that the Magistrate's Court of Panadura has no jurisdiction to entertain the Police plaint in view of the provisions of section 14 (1) (b) of the Conciliation Boards Act No. 10 of 1958 as amended by Act No. 12 of 1963. That section states that—

“Where a Panel of Conciliators has been constituted for any village area no prosecution for any offence specified in Part I of the Schedule to this Act as is alleged to have been committed in such village area shall be instituted in, or be entertained by, any court unless the person instituting such prosecution produces a certificate from the Chairman of such Panel that the alleged offence has been inquired into by a Conciliation Board and has not been compounded.”

The offences of criminal trespass and intentional insult are offences mentioned in Part I of the Schedule to the Act and the expression “village area” has the same meaning as in the Village Councils Ordinance (Cap. 257). Under section 3 (2) of the Conciliation Boards Act, the Minister of Justice by Notification appearing in Government Gazette No. 13,956 of 21.2.64 notified that he intended to constitute a Panel of Conciliators for the Panadura Urban Council area and under section 3 (3) called for recommendations in regard to persons who are to be appointed to the Panel of Conciliators of such area. Presumably after receiving such recommendations, the Minister by Order published in Government Gazette No. 14,276 of 1.1.65 appointed certain persons to be members of the Panel of Conciliators constituted for the Panadura Urban Council area. In the Village Councils Ordinance referred to earlier, the term “village area” has been interpreted to mean a portion of a divisional revenue officer's division declared to be a village area by Order under section 3 or deemed by virtue of any written law to be a village area under the Ordinance. There is however no evidence led in this case that the Panadura Civil Hospital falls within the Panadura Urban Council area nor is there any evidence that the Panadura Urban Council area has been

declared to be a Conciliation Board area. I am not prepared to take a judicial notice of these facts ; it was incumbent on the party relying on such evidence to place that evidence before Court. The preliminary objection to the jurisdiction of the Magistrate's Court therefore fails.

On the question of sentence, although I agree that it is necessary that doctors should be able to maintain discipline in a large institution like a hospital without interference from the members of the public, I think this is eminently a case in which the Court should have acted under section 325 of the Criminal Procedure Code. The accused is not a person with a criminal record, nor is he one whom one usually associates with criminals ; he is a proprietary planter and a man of respectability ; it is in evidence that he has been a benefactor of this Hospital donating radio equipment worth over Rs. 2,000 ; he had a previous unfortunate experience in this same Hospital when a servant boy of his was brought to the Hospital after an accident, discharged a few days later and again rushed back to the Hospital from where he was conveyed to the General Hospital and died after an operation. On this occasion his only son had been entered to the Hospital after an accident, there was a head injury unnoticed by the Doctors and he was naturally anxious for the welfare of his son and must have been undergoing severe mental stress when this unfortunate episode occurred. I hold that the charges have been proved but without proceeding to conviction I order that the accused be discharged conditionally to be of good behaviour for a period of one year on his entering into a personal bond in a sum of Rs. 500. The fines already paid should be returned to the appellant.

Accused discharged conditionally.

1967

Present : Siva Supramaniam, J.

H. MARGARET NONA, Appellant, and A. H. M. BAZEER,
Respondent

S. C. 18/1966—C. R. Colombo, 89558/RE

*Landlord and tenant—Eviction of landlord by title paramount—Quantum of evidence—
Estoppel of tenant—Scope—Evidence Ordinance, s. 116—Protection of Rent
Restriction Act—Burden of proof.*

A lessee sublet the leased premises to a person who was already a tenant under the owner at the time of the commencement of the lease. After his rights under the lease bond had come to an end and the sub-tenant had been asked by the owner to pay rent to a third person, the lessee instituted the present action for recovery of arrears of rent and for the ejectment of the subtenant.

Held, that the lessee was entitled to judgment for arrears of rent till the date of the termination of the lease but not to an order of ejectment of the sub-tenant. In such a case, the lessee has been evicted by title paramount, and the provisions

of section 116 of the Evidence Ordinance are not applicable. If he relies on the protection of the Rent Restriction Act, the burden is on him to prove that the leasehold rights are still available to him despite the expiration of the period specified in the lease bond.

APPEAL from a judgment of the Court of Requests, Colombo.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, for the plaintiff-appellant.

V. Thillainathan, for the defendant-respondent.

Cur. adv. vult.

August 22, 1967. SIVA SUPRAMANIAM, J.—

The facts which give rise to this appeal may be shortly stated as follows :—

Certain Ghouse Mohammed who has been adjudged a lunatic was the owner of premises No. 75, Maligakande Road, which consisted of a large number of tenements which had been consolidated for purposes of assessment by the Colombo Municipality in terms of s. 233 (1) of the Municipal Councils Ordinance. One Marikkar who had been appointed manager of the lunatic's estate by the District Court leased the said premises to the plaintiff Margaret Nona for a period of three years by a notarially attested indenture of lease D6. In terms of D6 the period of lease commenced on 1.12.1961 and ended on 30.11.1964. The plaintiff was however placed in possession on 1.9.1961—three months before the date of commencement of the lease set out in D6. Prior to 1961, the premises had been leased out by Marikkar to other persons, for a period of three years at a time.

Since 1955, the defendant had been in occupation as a tenant of tenement No. 49, which formed part of the consolidated premises, paying rent to the lessee for the time being. On 30.8.1961, the defendant was instructed by Marikkar by letter D7 to pay the rent from 1.9.1961 to the plaintiff Margaret Nona. Thereafter the defendant entered into an informal tenancy agreement P1 with the plaintiff, thereby attorning tenancy to the plaintiff. On 29.6.1964 by letter D8 Marikkar informed the defendant that the plaintiff's lease would expire on 31.8.1964 and instructed him to pay the rent thereafter to one Gamini who had been granted a lease for 3 years commencing from 1.9.1964. This instruction was again confirmed by letter D9 dated 17.8.1964. In accordance with those instructions the defendant paid the rent to Gamini after 1.9.1964. The view that the plaintiff's lease would expire on 31.8.1964 was erroneous since under D6, the lease was valid till 30.11.1964.

The defendant ceased to pay rent to the plaintiff after May 1964. The plaintiff, by letter dated 20.8.1964, terminated the tenancy and noticed the defendant to quit the premises and deliver vacant possession thereof to her on 1.11.1964. On 15.12.1964, the plaintiff instituted this action

for recovery of arrears of rent and damages and for the ejectment of the defendant. On the footing that the tenement in question was subject to the Rent Restriction Act, the prayer for ejectment was based on the ground that the defendant was in arrears of rent for a period of over three months after it became due.

The learned Commissioner of Requests gave judgment in favour of the plaintiff for arrears of rent till 30.11.1964 but dismissed the prayer for ejectment on the ground that the plaintiff's rights as a landlord came to an end on 30.11.1964 and she could not thereafter seek to eject the defendant. The defendant stated in evidence that in view of the letters D8 and D9 received by him from Marikkar he feared eviction if he did not comply with the instructions contained therein and consequently paid the rent to Gamini with effect from 1.9.1964. Nevertheless, as was rightly held by the learned Commissioner, he was liable to pay rent to the plaintiff till 30.11.1964.

The only question that arises for determination on this appeal is whether the plaintiff was entitled to a decree for ejectment against the defendant in view of the finding that the defendant was in arrears of rent for a period of more than three months after it became due. It is argued on behalf of the appellant that the defendant, being a tenant, is estopped from denying the plaintiff's title and the plaintiff is entitled to a decree for ejectment, although her rights under the lease bond D6 may have come to an end. There was no issue raised in the case in regard to whether the plaintiff's rights as a lessee subsisted, despite the expiration of the period specified in the bond, by reason of the operation of the Rent Restriction Act or for any other reason. Since the annual value of the consolidated premises which formed the subject of the lease was more than Rs. 8,000 (as evidenced by documents P4, P5 and P6), the Rent Restriction Act would have had no application to the said consolidated premises. In any event, the onus was on the plaintiff to prove that the leasehold rights were still available to her after 30.11.1964, in view of the following express stipulations contained in the lease bond D6 :—

- (a) “The said lessor does hereby, let, lease and
demise unto the said lessee the
premises fully described in the schedule
. . . To hold the said premises for
and during the term or period of three
years commencing from 1st December 1961”
- (b) “The said lessee shall and will at the
termination of this lease peaceably quit
and surrender the said premises unto the
said lessor”

On the evidence led, the plaintiff failed to discharge that burden. *Ex facie* therefore, on the date on which this action was instituted, the plaintiff had no rights under the lease bond in respect of the premises in question.

The question, then, is whether the defendant is precluded by s. 116 of the Evidence Ordinance or by any other provision of law from denying the plaintiff's right to eject him from the premises. The relevant portion of s. 116 of the Evidence Ordinance is as follows :—

“ No tenant of immovable property,
shall during the continuance of the
tenancy, be permitted to deny that the
landlord of such tenant had, at the
beginning of the tenancy, a title to such
immovable property ; ”

There is nothing in this section which precludes a tenant from showing that the landlord has lost his title subsequent to the commencement of the tenancy. In *Cader v. Hamidu* ¹, Garvin A.J. (as he then was) said :

“ It is sound law that a lessee cannot refuse to pay rent on the ground that the lessor had no title to the premises leased at the date of lease. It is equally good law, however, that he may prove that since the tenancy commenced the landlord's title has expired and that he has been evicted by title paramount.”

This passage was cited with approval by Jayewardene A.J. in *Tillekaratne v. Coomarasingham* ². At page 189 the learned Judge proceeded to state :

“ Actual physical dispossession is not necessary, but the eviction may be constructive or symbolic. A threat of eviction is sufficient, and if the tenant in consequence of such threat attorns to the claimant, he can set this up as or by way of defence to an action for rent, subject to his proving his evictor's title.”

Learned Counsel for the appellant, however, argued, relying on the case of *Visvalingam v. Gajaweera* ³, that the defendant should first give up possession and then it would be open to him to litigate about the plaintiff's right to the premises. In that case, the plaintiff who was not the owner of the premises, let the same to the defendant on a non-notarial document. He instituted an action to eject the defendant on the ground that rent was in arrears. The defendant pleaded that he had purchased from the owners a portion of the premises and taken on lease the remainder and that, consequently, the capacities of landlord and tenant had become merged in him. Sansoni J. (as he then was) held that even assuming that the defendant had become the owner of the entire premises it was not open to him to refuse to surrender possession to his landlord. The learned Judge, after citing with approval the following passage from the judgment of Bonser C.J. in a similar case (*Alvar Pillai v. Karuppan* ⁴) :—“ Even though the ownership of one half of this land were in the defendant himself it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease.

¹ (1921) 23 N. L. R. 91 at p. 92.

² (1926) 28 N. L. R. 186 at p. 188.

³ (1954) 56 N. L. R. 111.

⁴ (1899) 4 N. L. R. 321.

He must first give up possession, and then it will be open to him to litigate about the ownership ", proceeded to state that the defence of eviction by title paramount is however available to a tenant under our law, and that the eviction may be constructive or symbolic. On the facts of the case before him he said: " But there is no question of eviction by title paramount in this case, since the respondent's position is not that he has been asked to pay rent to a third person under threat of eviction. The respondent is bluntly disputing his landlord's title and he has refused to pay rent on the ground that he has acquired title to a share of the premises which he took on rent. He cannot be permitted to do this so long as he remains in possession ". That decision cannot assist the appellant as the facts in the instant case disclosed a threat of eviction of the defendant by a paramount title holder. It has also to be borne in mind that the plaintiff at no stage let the defendant into possession of the premises but the defendant was already in possession for many years before he attorned tenancy to the plaintiff at the instance of Marikkar, the plaintiff's lessor. The plaintiff would have been entitled to institute an action for ejectment of the defendant during the pendency of the lease, but not thereafter. This action was instituted on 15th December 1964, after the expiry of the lease. The learned Commissioner was therefore right in refusing to grant the plaintiff's prayer for ejectment of the defendant from the premises in question.

I dismiss the appeal with costs.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1967 *Present : H. N. G. Fernando, C.J. (President),
Abeyesundere, J., and Manicavasagar, J.*

THE QUEEN *v.* J. A. D. Q. A. JAYASINGHE

APPEAL No. 66 of 1967, WITH APPLICATION No. 89

S. C. 222/66—M. C. Colombo, 26783/C

Trial before Supreme Court—Witness for the prosecution—Adverse evidence given by him—Proof of former inconsistent statements—Limited scope—Evidence Ordinance, ss. 154, 155 (c).

Where, at a trial before the Supreme Court, a prosecution witness gives evidence which damages the prosecution case, section 155 (c), read with section 154, of the Evidence Ordinance may permit the prosecuting Counsel to prove former inconsistent statements of the witness. In such a case, however, Crown Counsel's questions must be restricted to contradict the witness in respect only of matters concerning which the witness has already given unfavourable evidence. Section 155 cannot be utilised to prove former statements which may in advance contradict evidence which the prosecution fears that the witness may give.

The Queen v. Abilinu Fernando (70 N. L. R. 73) followed.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with M. D. K. Kulatunga, N. Wijenathan, D. Jayawickrema and S. C. Crossette Thambiah (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 2, 1967. H. N. G. FERNANDO, C.J.—

This was an appeal from a conviction of the accused at a trial by Jury of the offence of culpable homicide not amounting to murder.

It appears that the prosecution expected to prove at the trial that the accused, the deceased man, and the witnesses Thegonis and Pinto had been together on the evening of 1st December 1965, that three of the persons (not including the accused) had shared in the smoking of a ganja cigar, that the accused had complained that he was not given a share of the smoke and abused the others on that account, and that shortly after this incident the accused had stabbed the deceased man with a knife. In regard to the alleged act of stabbing itself, it would appear that the only direct evidence available to the prosecution was the evidence of the witness

Pinto. In fact Pinto was the first witness whom the prosecution called. In answer to a leading question "On this day at about 5 p.m. did you and the deceased and one Thegonis decide to smoke a ganja cigarette?", the witness replied : "Yes". Very shortly thereafter, in answer to another question "The deceased, *this accused*, Thegonis and you were the persons to smoke this ganja cigarette?", the witness replied : "The accused did not come there". In answer to five other leading questions, the witness repeatedly denied that the accused had come to the spot or been in the company of the other three men. Thereafter the learned Crown Counsel asked the following question :—

"24. Q. Did you see at any stage the accused coming and picking a quarrel with the deceased about not getting his share of the ganja cigarette ?

A. No."

At this stage Crown Counsel applied to examine the witness under the provisions of s. 154 of the Evidence Ordinance, and this was allowed by the learned trial Judge.

The further examination of the witness by the Crown Counsel was such that the deposition of the witness in the Magistrate's Court was read to him, and that the witness admitted that the sentences thus read to him had in fact constituted his evidence before the Magistrate. One such admission of the witness was that he had stated to the Magistrate that the accused had in fact been present when the other three men smoked the cigar. But, at a very early stage of this further examination, the witness repeatedly said that the accused did not come to the place where the others were smoking the ganja cigar, and in answer to Question No. 44 the witness said that his different statement to the Magistrate had been a lie. I reproduce a few of the subsequent Questions and Answers :—

"47. Q. The accused asked Egonis for his share of the ganja as he also contributed ?

A. Yes, I said so.

Q. Is that also incorrect ?

A. That is not correct. It is a lie.

Q. 'I waited there'.

A. That is correct.

Q. 'The accused then started abusing the deceased because his share of the ganja was not kept for him'.

A. Yes, I said so. That is also a lie.

Q. What you have done is to tell the Magistrate bits of truth and chunks of lies ?

A. Yes,

62. Q. Did you say : " I saw the accused and the deceased very clearly by the boutique lights " ?

A. I said so but it is false.

63. Q. " *I saw the accused stabbing the deceased* ", did you say that ?

A. I said so but it is false.

Q. The deceased was holding his chest and came up to the boutique and fell down ?

A. I said so but it is false.

Q. I saw the accused going towards his house ?

A. I said so but it is false. "

The situation which arose at the very commencement of this trial was almost precisely that which was anticipated in one of the concluding paragraphs of the recent judgment of this Court in *The Queen v. Fernando* (C. C. A. Appeal No. 17 of 1967 delivered on 18th April 1967¹). But neither the trial Judge nor Counsel were then aware of that unreported judgment. What actually occurred in the present case was that, because the witness Pinto stated at the trial that the accused had never been in the company of the persons who were smoking the ganja cigar, evidence was led which made the Jury aware that, in his deposition to the Magistrate, the witness had not only alleged that the accused was present, but had further testified directly to the facts that the accused did commit the offence charged, and also that he had some motive against the deceased man.

No doubt the witness had damaged the prosecution case by his evidence that the accused had not been present at all ; the prospective damage would have been clear to Crown Counsel, who expected that his other witness Thegonis would testify to the presence of the accused during the smoking of the cigar. This damage of course the prosecution was quite entitled to repair by proving that the witness Pinto had in the Magistrate's Court stated that the accused had been present, and proof of that former statement was sufficient and necessary to discredit the witness and to invite the Jury to disregard his denial of the accused's presence.

The complaint of Counsel for the accused relates mainly to the Question No. 47 and the subsequent questions which I have reproduced above. Prior to that stage, there had been one, and only one, statement which needed contradiction, and it was contradicted. But after that stage the witness did not at the trial give any direct testimony relevant to the commission of the offence charged. For instance, he did not say that the accused did not abuse the others, and thus there was no occasion for the prosecution to prove a former statement inconsistent with his evidence. The same observation has to be made with regard to the much more important Question No. 63.

Again, the prosecution proved the whole of the statement which the witness Pinto had made to the Police, including statements that the accused had been after liquor, and that the witness himself feared the accused ; this although the witness had not testified at the trial that the accused had been sober, or that he did not fear the accused.

Thus (apart from the one matter as to the accused not being present), s. 155 of the Evidence Ordinance was utilized, not to contradict testimony given at the trial, but to prove former statements which might in advance contradict evidence which the prosecution feared that the witness might give. If a witness has given some testimony at a trial, then s. 155 (c), read with s. 154, may permit proof of a former inconsistent statement ; but s. 155 (c) does not in law authorise the slaying of phantom dragons.

We must add that Crown Counsel was not even entitled to ask Question No. 24 without the permission of the trial Judge, because at that stage s. 154 had not yet being invoked. When Counsel is examining his own witness, and hence not relying on s. 154, it is contrary to common sense, and not only to law, to ask whether X did something on a particular occasion if the witness has already vehemently denied X's presence on that occasion.

In effect, the attempt on the part of the prosecution to discredit its own witness had the consequence that a number of former statements were proved which could well have satisfied the Jury of the guilt of the accused, although in law they were completely irrelevant as evidence of his guilt. The learned trial Judge quite properly directed the Jury that these statements must not be taken into account against the accused ; but, having regard to the gravely incriminatory nature of the statements, we cannot think with any confidence that the Judge's warning must have been heeded by the Jury.

The ideal criminal trial is one at which the prosecution leads *only* evidence which is relevant and admissible *in proof of the offence charged*, and at which there is accordingly no occasion to instruct the Jury to repress the natural human tendency to take account of all the matters proved in evidence. One major instance in which such an instruction is inevitable is a case where two or more persons are charged together, and a confession by one of them is proved. That exception to the ideal is permitted by our procedure, subject to the discretion of a Court to order separate trials. Another exception arises under s. 155 (c) of the Evidence Ordinance, but it is ordinarily the defence which utilises the section. In this case, the prosecution purported to utilize the section, but did so illegally ; hence the major part of the Crown's examination elicited evidence which was not legally admissible.

Learned Senior Crown Counsel has submitted that it is the duty of the prosecution to make its best efforts to induce a witness to speak the truth. The argument, in its application in the present context, presupposes

that if a witness gives evidence exculpating an accused person, then the evidence must be untrue. The argument seems also to be opposed to the presumption of innocence, for evidence exculpating an accused person can be thought to be false only because of a supposition that the accused must be guilty.

Learned Senior Crown Counsel made a respectful but somewhat provocative enquiry as to what questions are in our opinion permissible under s. 154 of the Evidence Ordinance, if the limitations mentioned in the recent judgment of this Court and those discussed at the hearing of this appeal are applicable. An answer to his inquiry, if given in this appeal, would be merely *obiter*, for the recent judgment, and the one now pronounced, deal only with matters provable under s. 155 (c) of the Evidence Ordinance. But Counsel is no doubt aware that research into the scope and effect of s. 154 must involve consideration also of s. 155 (a), (b) and (d), s. 140, s. 143, s. 145, s. 146, ss. 147 and 132, s. 148, s. 149, s. 150, s. 153, and perhaps of other sections of the Evidence Ordinance. The fruits of such research will presumably be available if and when the occasion arises for this Court to construe any of these sections as read with s. 154.

Before leaving the matters discussed, we should note that a situation such as that which arose at a very early stage of this trial can sometimes be retrieved if the trial Judge in his discretion seeks fit to intervene, or if the prosecutor utilises s. 154 otherwise than in the manner provided by s. 155 (c). For example, a general reference to the fact that the Court is aware of former statements made by the witness, or a suggestion that the witness may have some reason to conceal facts within his knowledge, occasionally serves to "soften up" an unwilling witness. But it is clear that any such treatment would have had no response in the case of the witness Pinto.

Evidence of the following matters was adduced by the prosecution in this case :—

- (1) Thegonis stated at the trial that the accused had been present at the smoking party, and had abused the others because he was not given a share of the smoke.
- (2) Thegonis also stated that, shortly after the smoking party dispersed, the accused had borrowed a clasp knife from him.
- (3) The deceased man was found stabbed and lying a little distance away from the scene of the smoking.
- (4) The deceased man had made a statement to the Doctor at the hospital that he had been stabbed by the accused.

The most weighty of the circumstances listed above is a statement made to the Doctor. But much of its value is reduced by the fact that, only a few minutes earlier, the deceased had stated to the Apothecary that he had fallen in a paddy field and injured himself. The Apothecary had also noticed that the deceased man was smelling of liquor. Having regard to the contradictory nature of these two statements of the deceased

man, it is difficult for us to understand why the Jury should have preferred to accept the statement made to the Doctor as being true in preference to the statement made to the Apothecary. We thought it quite likely that the preference of the Jury was influenced by their knowledge of the evidence which has been given by the witness Pinto in the Magistrate's Court and which, as we have held, should not have been led at the trial. In these circumstances, we did not think this to be a fit case in which to order a fresh trial.

For these reasons we allowed the appeal and directed a verdict of acquittal be entered.

Accused acquitted.

1967 *Present : Tambiah, J., and Siva Supramaniam, J.*

THE COMMISSIONER OF INLAND REVENUE, Appellant, and
THE WOODLAND (K. V. CEYLON) RUBBER & TEA
COMPANY LTD., Respondent

S.C. 3/66—Income Tax Case Stated, BRA/333

Income tax—Non-resident company—Remittances of such company—Imposition of 33½ per centum tax thereon—Validity—Income Tax Ordinance (Cap. 242), as amended by Act No. 13 of 1959, ss. 5, 57A, 57B, 57C—Double Taxation Agreement (Treaty Series No. 9 of 1950), Articles VI and XVIII—Double Taxation (Relief) Act, No. 26 of 1950 (Cap. 244), s. 2—Inland Revenue Act, No. 4 of 1963, s. 130 (3)—Scope of rule generalia specialibus non derogant.

In regard to the income tax years 1958/59 to 1961/62, the imposition on any non-resident company of the tax of 33½ per centum on the remittances as set out in section 57 C (1) (a) of the Income Tax Ordinance (Cap. 242), as amended by Act No. 13 of 1959, is not in conflict with either Article VI or Article XVIII of the Double Taxation Agreement (Treaty Series No. 9 of 1950 between Ceylon and the United Kingdom), the provisions of which were given the force of law by the Double Taxation (Relief) Act No. 26 of 1950 (Cap. 244). Even if there is any conflict, the Income Tax (Amendment) Act No. 13 of 1959 impliedly repealed the provisions of the Double Taxation (Relief) Act No. 26 of 1950. The rule *generalia specialibus non derogant* cannot be applied in construing the amending Act No. 13 of 1959, which prevails over all earlier provisions governing tax payable by any resident or non-resident company. The fact that the Double Taxation (Relief) Act was formally repealed by the Inland Revenue Act No. 4 of 1963 makes no difference to the fact that the Income Tax (Amendment) Act No. 13 of 1959 had impliedly repealed it earlier.

CASE stated under section 78 of the Income Tax Ordinance (Cap. 242).

Walter Jayawardena, Q.C., Solicitor-General, with Shiva Pasupathy, Crown Counsel, for the appellant.

H. W. Jayewardene, Q.C., with B. Eliyatamby and T. L. D. Fernando for the assessee-respondent.

Cur. adv. vult.

December 18, 1967. TAMBIAH, J.—

This matter comes before this Court for its opinion on a case stated by the Board of Review under the provisions of section 78 of the Income Tax Ordinance (Cap. 242). Although the sum involved is comparatively small, this case raises matters of importance and the opinion sought for will have far reaching effects since the tax recovered for the four years in review will amount to a considerable sum.

It is a matter of common knowledge that the bulk of the non-resident companies, which are affected by the agreement entered into between the United Kingdom and Ceylon in the Treaty Series No. 9 of 1950, are "Sterling Companies", that is to say, companies which have their registered office in the United Kingdom. Some of them own large tea estates and others have entered into commercial ventures in this Island. The respondent is one of such non-resident companies.

The respondent appealed to the Board of Review against the assessment for the income tax years 1958/59, 1959/60, 1960/61 and 1961/62 on the ground that the imposition of a tax, under section 57(c) of the Income Tax Ordinance (Cap. 242) as amended by Act No. 13 of 1959, of $33\frac{1}{3}$ per cent. on remittances was in contravention of Articles VI and XVIII of the Double Taxation Agreement (Treaty Series No. 9 of 1950, which will hereinafter be referred to as the Treaty), between the Government of the United Kingdom and the Government of Ceylon. The provisions of this agreement have been given the force of law by the Double Taxation (Relief) Act No. 26 of 1950 (Cap. 244). The relevant Articles of this Treaty are as follows :—

"Article VI—

Where a company which is a resident of one of the territories derives profits or income from sources within the other territory, there shall not be imposed in that other territory any form of taxation on dividends paid by the company to persons not resident in that other territory, or any form of taxation chargeable in connection with or in lieu of the taxation of dividends, or any tax in the nature of an undistributed profits tax on undistributed profits of the company, whether or not those dividends or undistributed profits represent, in whole or in part, profits or income so derived."

"Article XVIII—

(1) The residents of one of the territories shall not be subjected in the other territory to any taxation or any requirement connected therewith which is other, higher or more burdensome than the taxation and connected requirements to which the residents of the latter territory are or may be subjected.

(2) The enterprises of one of the territories shall not be subjected in the other territory, in respect of profits attributable to their permanent establishments in that other territory, to any taxation which is other,

higher or more burdensome than the taxation to which the enterprise of that other territory, and, in the case of companies to which the enterprises of that other territory incorporated in that other territory are or may be subjected in respect of the like profits.

(3) In this Article the term ' taxation ' means taxes of every kind and description levied on behalf of any authority whatsoever.

(4) Nothing in this Article shall be construed as—(a) obliging either of the Contracting Governments to grant to persons not resident in its territory, those personal allowances, reliefs and reductions for tax purposes which are, by law, available only to persons who are so resident ; (b) affecting the additional rate of tax with which Article IX is concerned."

After the Kaldor Report was adopted with modifications in Ceylon, the basis of taxation underwent radical changes. Profits tax was abolished and the simple provisions governing income tax, applicable both to persons and companies, gave way to a more sophisticated method of taxation and the Income Tax Ordinance (Cap. 242) was accordingly amended by Act No. 13 of 1959. So far as persons are concerned, the computation of taxation is based on family units. The husband, the wife, and four children are given certain units and the income tax is based on slabs ranging according to the units. So far as companies are concerned, the profits tax and all the provisions of the Income Tax Ordinance under which companies were taxed earlier, were repealed and Chapter VIIIIA of the Income Tax Ordinance was introduced by the amending Act of 1959.

The basis of taxation on resident companies is found in section 57 (B) which enacts as follows :—

"In respect of any year of assessment commencing on or after April 1, 1958, the tax to which a company resident in Ceylon in the year preceding such year of assessment shall be liable shall consist of—
(a) a sum equal to 45 per centum of the taxable income of such company for such year of assessment ; and
(b) a sum equal to $33\frac{1}{3}$ per centum of the aggregate amount of the gross dividends distributed by such company out of the profits on which the taxable income of such company is computed for such year of assessment."

The basis of taxation of non-resident companies is found in section 57 (C) of the Income Tax Ordinance which enacts as follows :—

"In respect of any year of assessment commencing on or after April 1, 1958 the tax to which a non-resident company shall be liable—
(a) shall, where there are remittances of such company in the year preceding such year of assessment, consist of a sum equal to 45 per centum, and an additional 6 per centum, of the taxable income of such company for such year of assessment and a sum which shall,

if the aggregate amount of such remittance is less than one-third of such taxable income, be equal to $33\frac{1}{3}$ per centum of such aggregate amount and, if such aggregate amount is not less than one-third of such taxable income, be equal to $33\frac{1}{3}$ per centum of one-third of such taxable income ; and

(b) shall, where there are no such remittances, consist of a sum equal to 45 per centum, and an additional 6 per centum, of such taxable income.”

The imposition of a sum computable at the rate of 45 per centum of the taxable income of resident companies and the sum at the rate of 51 per centum of the income on non-resident companies, set out in section 57 (B) (1) (a) and section 57(C) (1) (a) of the Income Tax (Amendment) Act No. 13 of 1959, respectively, is not the subject matter of controversy as it is common ground that such taxes are within the terms of the Treaty. The only dispute is over the imposition on non-resident companies of $33\frac{1}{3}$ per centum on the remittances as set out in section 57 (C) (1) (a) of the Income Tax (Amendment) Act No. 13 of 1959.

When this matter was argued before the Board of Review the appellant agreed that if there is any conflict between the provisions of section 57(C) of the Income Tax Ordinance and the provisions of the Double Taxation (Relief) Agreement, then it is the provisions in the agreement that must be given effect to. The appellant, however, strenuously maintained that there was no conflict between these provisions. The Board of Review has held that there is conflict and has sought the opinion of this Court on the point of law stated earlier.

The learned Solicitor-General who appeared for the appellant before this Court presented his arguments in a different vein. He stated that he is not bound by the concession of the appellant before the Board and urged that even if there is a conflict between the Double Taxation (Relief) Act No. 26 of 1950 and section 57 (C) (1) (a) of the Income Tax (Amendment) Act No. 13 of 1959, the provisions of the latter should prevail, not only because it is a later enactment but also because it was the clear intention of Parliament to do away with the existing tax measure affecting companies, both resident as well as non-resident, and to provide for a new and complete scheme of taxation of the aforesaid companies, by the amending Act of 1959. Therefore, he submitted that by necessary implication the Double Taxation (Relief) Act No. 26 of 1950 had been repealed.

Counsel for the respondent was not taken by surprise by the enunciation of this principle of law since he was given ample notice by the learned Solicitor-General. Although Counsel for the respondent formally objected to this matter being argued, he did not pursue it further.

It is a well known proposition that an admission on a pure question of law in a tribunal does not bind the Counsel who appears for the same party in a higher tribunal (vide *Attorney-General v. A. D. Silva*)¹. *A fortiori*, in tax matters where the opinion of this Court is sought, the Court is not precluded from reconsidering a question of law which was not before the Board of Review. In *Fernando v. Commissioner of Income Tax*² it was held that sub-section 6 of section 78 of the Income Tax Ordinance empowers the Court to hear and determine any question of law arising on the case stated (vide *M. P. Silva v. Commissioner of Income Tax*³).

The learned Solicitor-General also contended that there is no conflict between the provisions of section 57 (C) of the Income Tax (Amendment) Act and Articles VI and XVIII of the Treaty Series, the terms of which were embodied in the Double Taxation (Relief) Act of 1950. Alternatively, he argued that should there be a conflict, the provisions of the Income Tax (Amendment) Act 13 of 1959 should prevail.

Mr. Jayewardene, Counsel for the respondent, urged that there was a conflict between section 57 (C) of the Income Tax (Amendment) Act of 1959 and Articles VI and XVIII of the Treaty Series, which were embodied in the Double Taxation (Relief) Act of 1950, in so far as section 57 (C) of the Amending Act seeks to impose a tax on a non-resident company governed by the agreement on its remittances which is in fact a form of taxation in lieu of taxation on its dividends. In any event, he said that this tax was a tax on undistributed profits of the company.

He also contended that section 57 (C) of the amending Act No. 13 of 1959 is in conflict with Article XVIII (2) of the Treaty, since this tax is either higher or more than the tax to which the resident companies are subjected to; and in any event, it is a tax other than the tax which has been imposed on the resident companies of Ceylon.

Mr. Jayewardene further urged that the canon of construction enshrined in the maxim *generalia specialibus non derogant* should apply and the Treaty which was embodied in the Double Taxation (Relief) Act of 1950, being a special law, which is applicable to particular types of non-resident companies, caught up by the agreement, has not been impliedly repealed by section 57 (C) of the Income Tax (Amendment) Act of 1959 which is a general law applicable to taxation of other non-resident companies. He elaborated his contention and said that since the earlier Act gave effect to a bilateral Treaty, the Parliament could not have intended to abrogate it unilaterally by enacting section 57 (C) of the Income Tax (Amendment) Act No. 13 of 1959.

Firstly, it is convenient to consider the question whether the provisions set out in section 57 (C) of the amending Act of 1959 are in conflict with Articles VI and XVIII of the Treaty, which is embodied in the Double

¹ (1953) 54 N. L. R. 529.

² (1959) 61 N. L. R. 296 at 319.

³ (1947) 1 Ceylon Tax Cases, p. 336.

Taxation (Relief) Act of 1950. The learned Solicitor-General contended that the term "dividend", as used in Company law, is a term well known to Company lawyers and signifies the amount payable to a share holder out of the net profits of the company, as resolved by the Company. On the other hand, the remittances sent by a non-resident company from a branch office in Ceylon to its head office has no relation to the dividends that would ultimately be payable to the shareholders. A non-resident company may have business ventures throughout the world and may reap a good harvest from its investments abroad although from its properties or business in Ceylon nothing may be sent by remittances or only a small sum may be remitted to the head office. Conversely, the Ceylon office may send from their undertakings large profits whereas the non-resident company may suffer severe losses from its ventures abroad and, ultimately, no dividends may be payable to its shareholders.

The Board of Directors of a non-resident company may instruct the Ceylon office to invest the profits earned in Ceylon for a particular year or for a number of years in buying more estates, if it is an agricultural undertaking, or to enter into other businesses, if it is an industrial undertaking. Therefore no remittances may be made for that particular year or years to the head office, although dividends may be distributed to its shareholders from other business ventures outside Ceylon.

It is more profitable for a non-resident company if it accumulates its profits for a period of years and then remits them during an year succeeding a lean year. In such cases the tax payable cannot exceed the ceiling of one-ninth of the taxable income of the non-resident company for the previous year if the remittances are more than $33\frac{1}{3}$ per centum of the taxable income for that previous year. In this matter it may be legitimate for non-resident companies to wait till the taxable income for a particular year is low and obtain a tax relief of great magnitude, which the resident companies cannot avail themselves of in view of the specific provisions of the Income Tax (Amendment) Ordinance of 1959. Therefore, the remittances of a non-resident company are not the same as dividends nor is there any computable basis on which the relation between the two can be established.

Hence the provisions governing the tax on remittances by non-resident companies, imposed by section 57 (C) of the Income Tax (Amendment) Act No. 13 of 1959, are not in conflict with Article VI of the Treaty.

In this context Mr. Jayewardene asked us to look into the budget speech made by the then Finance Minister, who introduced this tax measure. The learned Solicitor-General stated that the proposals in a budget speech cannot be looked into by this Court in interpreting the provisions of a Parliamentary Statute. But he conceded that this Court could look into the facts set out in the budget speech by a Minister

in order to find out the intention of the Legislature in enacting a measure subsequently. In this context it may be useful to refer to the dictum of Lord Wright in *Assam Railways and Trading Co. v. Commissioner of Inland Revenue*¹. In dealing with the question whether the report of a Royal Commission on Income Tax of 1920 could be looked into to interpret the provisions of the Finance Act of 1920, he said :

“ But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible ; the intention of the Legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate ; as to this I agree with Farwell L. J. in *Rex v. West Riding of Yorkshire County Council* (1906 2 K.B. 676, 717) where he says : “ I think that the rule is expressed with accuracy by Lord Langdale in giving the judgment of the Privy Council in the *Gorham Case* in Moore 1852 edition, p. 462, ‘ We must endeavour to attain for ourselves the true meaning of the language employed ’—in the Articles and Liturgy—‘ assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject matter to which the instruments relate, and the meaning of the words employed ’. In this House where the judgment of the Court of Appeal was reversed (*Attorney-General v. West Riding of Yorkshire County Council* (1907) A. C. 29), no reference was made to this point. It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.”

With respect, I would adopt the dictum of Lord Wright and hold that the proposals of the Minister in his Budget Speech, in which he said that regarding non-resident companies, he proposes to impose 33½ per cent tax on remittances and which will be deemed to be a tax on dividends, is not admissible because we do not know whether his proposals were adopted ultimately. Indeed, the learned Solicitor-General cited to us certain passages from the objects and reasons for the passing of this amending Act in which it is stated that the proposals of the then Minister of Finance were amended by the Cabinet.

On the other hand, there are several passages in the Minister’s speech where he said that the finances of the State were in a parlous condition and therefore these tax proposals were brought in order to increase the revenue of the country. If these were the facts which prompted the Parliament to pass the amending Act of 1959, could it be said that they wanted to treat a non-resident company, caught up in the agreement, and the resident companies differently and imposed a tax of 33½ per centum of the gross dividends distributed by the resident companies in addition to the tax of 45 per cent on the taxable income, but intended to

exempt such non-resident companies from paying any tax on its profits and remittances sent out and granted them a concession of paying only 51 per cent tax on their taxable income? It is common knowledge that a good part of our revenue comes from tea and rubber, the main cash products of this Island, and is it likely that the Parliament wanted to exempt these "Sterling Companies" and other non-resident companies which are caught up by the agreement, from paying any tax other than a tax of 51 per cent on the taxable income?

In support of the argument that $33\frac{1}{3}$ per cent tax imposed by section 57 (C) of the amending Act of 1959, on remittances of non-resident companies is a tax in lieu of dividends, Mr. Jayewardene submitted that the same percentage of $33\frac{1}{3}$ per cent is imposed on the dividends of resident companies as well as on the remittances of profits of non-resident companies. Therefore he argued that although the word 'remittances' was used in section 57 (C) it was in fact a tax in lieu of dividends.

Mr. Jayewardene also contended that the dividends payable by the non-resident companies to its shareholders abroad is naturally affected by its remittances sent from Ceylon. No doubt the dividend payable would be affected by the profits that are sent from Ceylon but in that event no income tax can be imposed on profits, since the imposition of income tax on profits will naturally affect the dividends ultimately payable. Income tax is inherently a tax on profits and it is perfectly legitimate for any Government to tax the profits of a non-resident company and, therefore, when a tax is imposed on remittances which are sent by way of profits, it is only a method of computation of the income tax on profits and is not an attempt to tax the dividends.

Mr. Jayewardene's contention that the tax on remittances of non-resident companies imposed by section 57 (C) of the amending Act is, in any event, in the nature of an undistributed profits tax on undistributed profits of the company and therefore was in conflict with Article VI of the Treaty, is not tenable. When one refers to undistributed profits of a company, what is meant is the balance of the profits left over after paying dividends. The undistributed profits of a non-resident company can only be computed by first looking at the nett profits of that company derived from all its ventures and thereafter deducting from that amount the dividends already paid to the shareholders. It has, therefore, no direct connection with the dividends declared by a non-resident company. If remittances of profits sent by a branch office to the head office of a non-resident company do not have any computable relation to the dividends payable by a non-resident company to its shareholders abroad, it follows that the remittances sent from Ceylon to its head office have again no computable relationship with the undistributed profits of the company. Therefore a tax on profits remitted, as envisaged in section 57 (C) of the amending Act, is not a tax on the undistributed profits of a non-resident company.

The learned Solicitor-General also submitted that the provisions of section 57 (C) of the amending Act of 1959 are not in conflict with Article XVIII of the Treaty. He said that it has not been shown by the respondent, on whom the burden lies, that the taxation was wrong and that the tax imposed on non-resident companies under section 57 (C) of the amending Act is higher or more burdensome than the taxation on the resident companies of Ceylon. By a comparison of section 57 (B) with section 57 (C) of the amending Act it is clear that the resident companies in Ceylon have to pay $33\frac{1}{3}$ per cent of the gross profits whereas no such tax is imposed on the non-resident companies. As stated earlier, the non-resident companies have a greater advantage over the resident companies since they could wait for a lean year and send the profits, which have accumulated for a number of years and gain an advantage by paying 1/9th of the taxable income from that previous year. This advantage alone would outweigh all other disadvantages, if any, which a non-resident company may have in comparison with a resident company. This is a big concession given to foreign investors in Ceylon. The actual figures worked out by the Income Tax Department, which was not disputed before the Board of Review, is set out in page 2 of document X 1. The computations are in respect of the income tax years 1958/’59 to 1961/’62. A comparison has been made between the figures of the tax payable if it were a resident company. It will be seen from these figures, which are not disputed by the respondent, that if the respondent had been resident in Ceylon it would have paid a sum of Rs. 159,580 by way of a tax on dividends, whereas it paid only a tax of Rs. 35,893 for these years as tax on remittances. Therefore, by the imposition of $33\frac{1}{3}$ per cent on the remittances as tax on non-resident companies by section 57 (C) of the amending Act, it has not been shown that this tax is more burdensome than the tax imposed on resident companies or that it is higher within the meaning of Article XVIII of the Treaty.

For the purposes of Article XVIII, one must take a comparable situation. Assuming that a resident company in Ceylon gets Rs. 10,000 as nett profits and a non-resident company also has the same profits, it has to be shown that as a result of the imposition of the remittance tax by section 57 (C) of the amending Act, the taxation is more burdensome or higher. The respondent has failed in discharge the burden on this point.

The next question is whether the tax imposed by section 57 (C) of the amending Act is an “other” tax other than tax imposed on a resident company. The learned Solicitor-General submitted that the tax imposed by section 57 (C) of the amending Act is Income Tax, computed and calculated in the same way as any other component of income tax and therefore is not any other tax but income tax. He submitted that Income Tax is one tax, although its components and the method of calculation may be different. Mr. Jayewardene, on the other hand, urged that

there is no taxation on remittances of profits of resident companies, whereas there is a taxation on remittances of profits of non-resident companies and, therefore, the tax imposed by section 57 (C) of the Income-Tax (Amendment) Act is a tax other than a tax imposed on a resident company. I am unable to appreciate the argument of the Counsel for the respondent. In the first place I find it difficult to visualize a resident company sending profits by way of remittances abroad. It may have branch offices in various parts of the world. If remittances are sent they are not remittances of profits. Remittances may be sent in order to purchase articles for the purpose of the business or to defray the expenses of its offices abroad. The tax imposed on the remittances sent as profits of a non-resident company is only a component of the income tax payable by such company. Therefore, I hold that it is not a tax other than income tax, and that section 57 (C) of the amending Act of 1959 does not contravene Article XVIII of the Treaty.

For these reasons I am of the view that section 57 (C) of the amending Act is not in conflict with either Article VI or Article XVIII of the Treaty. This view alone should dispose of this matter but in view of the fact that the matter has been fully argued, it is necessary also to consider the proposition put forward by the learned Solicitor-General, namely, that even if there is a conflict, the rule of construction enshrined in the maxim *generalia specialibus non derogant* has no application in this matter.

It is necessary for this purpose to construe the provisions of section 57 (A) of Cap. VIII (A) which was brought in by the Income Tax (Amendment) Act No. 13 of 1959. It enacts as follows:—

“ 57A. (1) In respect of any year of assessment commencing on or after April 1, 1958—

(a) the rate or rates of the tax referred to in section 5, and

(b) the provisions of Chapter VII and the provisions of section 43 other than sub-section (1A) and subsection 3 of that section,

shall not apply to *any resident or non-resident company*.

(2) The provisions of subsection (1A) of section 43 shall not apply to *any resident company* after April 30, 1959, and the provisions of sub-section (3) of that section shall not apply to any person after March 31, 1960.”

The repealing of the provisions of the “rate or rates of the tax” referred to in section 5 of the principal Act and the words “*any resident or non-resident companies*” are of significance. It shows that any type of non-resident company is caught up by these provisions and the legislature did not intend to make a distinction between non-resident companies, caught up by the agreement contained in the Treaty, and

other types of non-resident companies. This disposes of Mr. Jayewardene's arguments that the intention of the Legislature was not to repeal the Double Taxation (Relief) Act which gave effect to the provisions of the Treaty and the Income Tax (Amendment) Act No. 13 of 1959 was only applicable to those non-resident companies which are not governed by the Treaty.

Relying on the case of *Ostime v. Australian Provident Society*¹, Mr. Jayewardene urged that we should hold that the Double Taxation (Relief) Act of 1950 is still in force and should be applied to the non-resident companies governed by the treaty and that the general Act only applies to non-resident companies, which were not contemplated by the Treaty entered into between the United Kingdom and Ceylon. In *Ostime's Case*, the Australian Mutual Insurance Company, resident in Australia, carried on business in Australia through a branch office in London, in the United Kingdom. This company was assessed to pay the United Kingdom income tax for the years of assessment 1947/48 to 1953/54 inclusive, on the notional amount of its profits in the United Kingdom, computed by reference to the appropriate part of the investment income of its life assurance fund under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, or (in the later years), section 430 of the Income Tax Act, 1952. It was the contention of the company that it was assessable only under the Double Taxation Relief (Taxes on Income) Australia Order, 1947, which gave effect to the Australian Double Taxation Relief Agreement that was set out in the schedule to the order.

The House of Lords (Lord Denning dissenting) held that the company should not be taxed under rule 3 of Case III of Schedule D to the Income Tax Act, 1918 (or section 430 of the Income Tax Act, 1952), because the hypothesis on which such an assessment was based (namely, that the world income from the investments of the life fund formed the first stage in the rule 3 calculation of profits) was inconsistent with the basis of taxation under Article III (3) of the Double Taxation Relief Agreement (which proceeded on the hypothesis that the branch in England was an independent enterprise) and the latter prevailed.

As stated in the Editorial Note of the All England Reports in *Ostime's Case* (at page 246), the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, which was made under the repealed Finance Act No. 2, 1945, section 51 (1) was kept in force by virtue of section 528 (2) of the Income Tax Act, 1952, as if made under section 347 of that Act.

Therefore the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, although repealed by the Finance Act No. 2 of 1945, was kept in force by virtue of section 528 (2) of the Income Tax Act, 1952. It is clear, therefore, that the provisions of the Double Taxation Relief

Act were specially preserved and the only question that the Court had to decide was whether the taxing authorities were justified in ignoring the provisions of the Double Taxation Relief Act which were expressly kept in force.

In *Ostime's case* it was never contended that the later Act repealed the earlier Act by implication. Lord Radcliffe who delivered the majority judgment said (vide (1959) 3 A. E. R. at 250) :

“ The question we have to determine is how this method of attributing a profit to a life assurance company, whose head office is outside the United Kingdom, stands up against the provisions of the Double Taxation Relief Agreement. I should find nothing surprising in the conclusion that it had been superseded. Rule 3 was an attempt at a unilateral solution of this particular aspect of double taxation in which the Australian taxing authorities were certainly no less interested than the authorities of the United Kingdom. Bilateral agreements for regulating some of the problems of double taxation began, at any rate so far as the United Kingdom was concerned, in 1946. The form employed which, for obvious reasons, employs similar forms and similar language in all agreements, is derived, I believe, from a set of model clauses proposed by the financial commission of the League of Nations. The aim is to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two, the whole claim or else by prescribing the basis on which the tax claim is to be shared between them. For our purpose it is convenient to note that the language employed in this agreement is what may be called international tax language, and that such categories as ‘enterprise’, ‘commercial or industrial profits’ and ‘permanent establishment’ have no exact counterpart in the taxing code of the United Kingdom.”

As stated earlier, in that case the Double Taxation Relief Agreement, which was entered into between the Commonwealth of Australia and the United Kingdom, was kept in force by section 347 of the Income Tax Act of 1952. It sets out a special mode of computation of income tax on Australian Companies which were not resident in the United Kingdom but which carried on business in the United Kingdom. They could only be taxed on the investments in England, as if they were carrying on a separate business and not on their world income basis. Therefore that case is not an authority supporting the proposition of an implied repeal by the application of the canon of construction set out in the maxim *generalia specialibus non derogant*.

The rule *generalia specialibus non derogant* is only a presumption and cannot be elevated to a rule of law, because no Parliament of Ceylon can bind a future Parliament. In view of the clear provisions of the amending

Act of 1959, set out earlier, which repeals all previous legislation governing the basis of taxation of companies and in view of the provisions of the earlier legislation governing the taxation of *any company, both resident and non-resident*, having no application after April 1958, it is my view that this canon of construction cannot be applied in construing this Act and the amending Act of 1959 has repealed, by necessary implication, any previous Acts dealing with the taxation of companies both resident and non-resident.

The taxing authorities can only look into the provisions of Chapter VIIIIA and other provisions of the amending Act of 1959 for the taxation of both resident and non-resident companies after the amending Act of 1959 came into force. Unlike the provisions in the Income Tax Act of 1952 of the United Kingdom, there is no provision in the Income Tax (Amendment) Act No. 13 of 1959 which keeps alive the provisions of the Double Taxation (Relief) Act of 1950. On the other hand, the amending Act of 1959 has swept away all provisions governing the taxation of *any company, resident or non-resident*, and the Legislature has also repealed the Profits Tax Act and has enacted comprehensive provisions in the Amending Act of 1959 for the taxation of all companies.

Mr. Jayewardene also urged that section 2 of the Double Taxation (Relief) Act of 1950 enacts that " notwithstanding anything in any other written law " the agreement in the Treaty will have the force of law. He therefore contended that the Double Taxation (Relief) Act of 1950 should have priority over all subsequent Acts. By the use of these words the Parliament did not intend to tie the hands of future Parliaments. It only dealt with legislation *in pari materia* and therefore gave priority to this Act over all other Acts governing taxation which existed at the time this Act was passed. If Mr. Jayewardene's contention is to be accepted then serious inroads would be made into the supremacy of the Parliament of Ceylon, because a Parliament can then bind a future Parliament.

It is an elementary rule of construction that the earlier Act must give place to the later, if the two cannot be reconciled, *lex posterior derogat priori*. An Act can repeal another Act either by express words or by necessary implication. However, a repeal by implication should not be favoured and must not be imputed to a legislature without necessity or strong reason (vide Broom's Legal Maxims, 5th Ed., page 348). The maxim *generalia specialibus non derogant* only creates a presumption. But in this case the presumption is greatly weakened in view of the fact that the agreement entered into between the United Kingdom and Ceylon, which was embodied in the Treaty, could be rescinded from by either government after a period of four years and the amending Act was

enacted after the expiration of this period. But if a statute is unambiguous, its provisions should be followed, even if they are contrary to International Law (vide Maxwell's Interpretation of Statutes, 11th Edition, p. 142). Only where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, the maxim *generalia specialibus non derogant* would apply (vide Maxwell's Interpretation of Statutes, 11th Edition, p. 168, 169). It cannot be said, in the instant case, that these considerations exist for the application of this rule of construction. As Maxwell states "In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for the special one." (ibid. p. 169).

To sum up, in view of the clear provisions of the Income Tax (Amendment) Act No. 13 of 1959, which repeal the very basis of taxation contained in section 5 of the Income Tax Act and which introduce new provisions which apply to *any* resident or non-resident company, without making any distinction between a resident company and a non-resident company caught up by the agreement in the Treaty and other non-resident companies, I am of the view that the provisions of the Income Tax (Amendment) Act of 1959 should prevail over all earlier provisions governing tax payable by companies. The fact that the Double Taxation (Relief) Act was formally repealed by Act No. 4 of 1963 makes no difference to the question whether the Income Tax (Amendment) Act of 1959 has impliedly repealed it earlier. The Legislature, through an abundance of caution, repealed the relevant provisions of the Double Taxation (Relief) Act which were already repealed by implication when the Income Tax (Amendment) Act of 1959 came into force.

For these reasons I am of opinion that the provisions of section 57 (C) of the Income Tax (Amendment) Act No. 13 of 1959 are not in conflict with Articles VI and XVIII of the Treaty entered into between Ceylon and the United Kingdom and found in Treaty Series No. 9 of 1950. Even if they are in conflict I am of opinion that the Income Tax (Amendment) Act No. 13 of 1959 has impliedly repealed the provisions of the Double Taxation (Relief) Act of 1950 on this matter and the amending Act of 1959 should prevail. The case is remitted for the tax to be assessed on this basis.

The appellant is entitled to costs of appeal.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

1968

Present: Sirimane, J.

BERTHA WALLES, Appellant, and D. V. HECTOR SILVA, Respondent

S. C. 7/67—C. R. Colombo, 90549

Rent-controlled premises—Sub-letting—Sale of premises thereafter by landlord—Purchaser has no right to eject the tenant on the ground of the prior sub-letting—Action which is null and void ab initio—Subsequent amendment of plaint to include a valid claim—Effect—Rent Restriction Act (Cap. 274), s. 9 (1) (2)—Rent Restriction (Amendment) Act, No. 12 of 1966, ss. 2, 4 (1)—Civil Procedure Code, s. 93—Sub-letting—Quantum of evidence.

Where a tenant sublets rent-controlled premises without the permission of his landlord, a person who subsequently purchases the premises from the landlord is not entitled to eject the tenant on the ground of the sub-letting which had been done when he was not the landlord.

Ratnasingham v. Cathiraraswamy (58 N. L. R. 476) not followed.

An action which is declared by law to be null and void *ab initio* cannot be given validity by a subsequent amendment of the plaint so as to include a valid claim. Accordingly, where, prior to the date when the Rent Restriction (Amendment) Act No. 12 of 1966 came into operation, a landlord instituted action for ejectment of his tenant on the ground that the rented premises were reasonably required for his own use, he is not entitled to give validity to the action after the amending Act was passed, by amendment of the plaint alleging that the defendant had sublet the premises.

A landlord who seeks to show that his tenant had sublet part of the rented premises must establish that the alleged sub-tenant had exclusive occupation of an identifiable entity to the exclusion of the tenant.

APPEAL from a judgment of the Court of Requests, Colombo.

H. V. Perera, Q.C., with *M. L. de Silva*, for the defendant-appellant.

C. Ranganathan, Q.C., with *B. Bodinagoda*, for the plaintiff-respondent.

Cur. adv. vult.

January 17, 1968. SIRIMANE, J.—

The plaintiff purchased the premises in question in December 1964. At the time of his purchase the defendant was the tenant of these premises, and in fact had been in occupation as a tenant for about twenty-four years before the plaintiff's purchase. On 19.4.65 the plaintiff filed action for ejectment on the ground that the premises were reasonably required by him for his occupation.

About a year later (on 7.5.66) the plaintiff moved to amend the plaint alleging that the defendant had sublet the premises to one "Kulendran and/or Shanmugam and/or Mrs. Madawela and/or Miss Rasiah" without specifying the dates of the alleged sub-letting. This amendment had been allowed, and an amended plaint was filed on 23.5.66.

In the meantime the Rent Restriction (Amendment) Act, No. 12 of 1966 (hereinafter referred to as the Amending Act), was passed on 10.5.66, according to the provisions of which "reasonable requirement" by the landlord was no longer a ground for ejectment of the tenant. The defendant's position was that certain other people who occupied the premises with her were her boarders and not sub-tenants.

The Commissioner accepted the evidence that Miss Rasiah had been a sub-tenant of the defendant from September 1964 to April 1965, and granted the plaintiff a decree for ejectment on that ground. This finding of fact was strongly assailed and it was urged that Miss Rasiah (a Pharmacist) was a convenient witness found by the plaintiff (a doctor) to supply a deficiency at a late stage in the case.

Assuming, however, that the finding of fact is correct, one sees that the sub-letting had been done *before* the plaintiff's purchase. Section 9 (1) of the Rent Restriction Act, Chapter 274, provides that the tenant of any premises to which the Act applies shall not sublet without the prior consent in writing of the landlord. Sub-section 2 of that section then goes on to say, "where any premises or any part thereof is sublet in contravention of the provisions of sub-section (1) the landlord shall.....be entitled.....to a decree for ejectment.....of his tenant, and.....of the persons to whom the premises or any part thereof has been so sublet".

When does the right to a decree for ejectment under this section arise ? It arises on the subletting. A sub-tenancy continues from month to month ; but the subletting is done on a particular day, and it is this act of subletting that gives rise to the right.

To whom does the right accrue ? In my opinion it accrues to *the landlord* at the time of the sub-letting.

When a sale takes place the purchaser no doubt steps into the shoes of the seller as a singular successor to title, and, on the principle that hire goes before sale, a tenancy or a sub-tenancy will continue with the purchaser as the new landlord.

But, rights of action which have accrued for *breaches* of the contract of tenancy do not pass to the purchaser unless there is an assignment of those rights. If, for example, a tenant has defaulted in payment of rent when A was his landlord; and A thereafter sells the premises to B, then

the purchaser B cannot sue the tenant for ejectment on the ground that he has been in arrears of rent. Voet says (book 19, title 2, section 19, Gane's translation, page 428) :

“ On the other hand also whenever by statute or custom sale gives place to lease a particular successor is only bound to bear up to the end with a resident in occupation or a tenant in enjoyment if the lessee is ready to pay the rents to him *for the ensuing period.*”

Similarly, if a tenant has sublet premises without the permission of the landlord a purchaser cannot eject the tenant on that sub-letting, particularly so, if the sub-tenancy has terminated at the time he comes into Court.

I am unable to accept the argument of learned Counsel for the respondent that once a tenant sublets in contravention of section 9 of the Rent Restriction Act he renders himself liable for ejectment not only by the landlord at that time, but by any of his successors in title. According to this argument if a tenant sublets premises without permission from his landlord even for a month, then a subsequent purchaser can sue the tenant for his past act of sub-letting even though there are no sub-tenants at the time he brings his action. Section 9 (1) of the Rent Restriction Act is not a punitive section and the right to a decree for ejectment does not in the context of that section accrue to a person other than the landlord at the time of the subletting.

My attention was drawn to the case of *Ratnasigham v. Cathirasasamy*¹, where a contrary view has been expressed. The learned Judges who decided that case were of the view that the definition of the word “landlord” in the Rent Restriction Act as “the person for the time being entitled to receive the rent”, enabled any landlord of the premises at any time after the subletting to sue for a decree for ejectment. With great respect, I am unable to share this view. The definition of the word “landlord” is of little assistance in construing the true meaning of the section. The real question is whether a person for the time being entitled to collect rent is entitled to sue for a decree for ejectment on the ground of a subletting which had been done when he was not the person entitled to collect rent.

The appeal must succeed on this ground even assuming that Miss Rasiah's evidence that there was a subletting is correct.

I pass on to the second ground urged in the appeal.

It is admitted that the standard rent of the premises is below Rs. 100 per month. In the case of such premises section 2 of the Amending Act provides that no action or proceeding for the ejectment of the tenant shall be instituted in or entertained by any Court except on four grounds, *viz.*—

- (a) Rent being in arrears for three months or more,
- (b) Subletting without the landlord's written consent,
- (c) The premises being used for an immoral or an illegal purpose, and
- (d) Wanton destruction or wilful damage being caused to the premises.

Section 4 (1) makes these provisions effective retrospectively from 20.7.62 and proceeds to enact that—

“accordingly any action which was instituted on or after that date and before the date of commencement of this Act for the ejection of a tenant from any premises to which the principal Act as amended by this Act applies shall, if such action is pending on the date of commencement of this Act, be deemed at all times to have been and to be null and void.”

For the purpose of giving it retrospective effect one has to assume that this section was in operation on 19.4.65 when this action was instituted on the ground that the premises were reasonably required by the landlord. So that the action must “be deemed at all times to have been and to be null and void”. No doubt, an amendment does, for certain purposes (e.g. for purposes of prescription), relate back to the date of the plaint. But an application to amend pleadings is a step (under section 93 of the Civil Procedure Code) in a valid action pending before a Court. An action which is declared to be null and void *ab initio* cannot, by an amendment, be given validity.

The appeal must succeed on this ground too. Lastly, there is the question of fact.

Miss Rasiah's evidence has to be viewed with the utmost care and circumspection. She did say that she paid Rs. 75 per month and occupied a certain part of the house. This evidence was flatly contradicted by the defendant who said that Miss Rasiah was a boarder brought in by her mother whom the defendant had known earlier. The mere fact that a door leading to the rooms they occupied had been closed does not necessarily negative the fact that they could have been boarders; nor even the fact that they had been seen doing some cooking—(assuming that this evidence is true). It would be an unsafe inference to draw from Miss Rasiah's evidence that she had exclusive occupation of an identifiable entity to the exclusion of the tenant.

The plaintiff then called one Mr. Oliver Wijesinghe, an Assistant Registrar-General, whose evidence apparently impressed the Commissioner. He had been a neighbour of the defendant for about four years and would surely have known whether the plaintiff had sublet any part of the premises. In the course of his evidence he said that for the first time the plaintiff asked him in 1966 as to who was staying in the premises in question in 1965, and went on to say “then I gave him a list of names. As to whether they were living as boarders or as sub-tenants I do not know”.

The learned Commissioner has failed to consider this evidence, which is certainly not inconsistent with the version of the defendant. When one considers all the circumstances in this case it seems to me that the defendant's version was the more probable one.

The appeal is allowed, and the plaintiff's action is dismissed with costs in both Courts.

Appeal allowed.

1966

Present : Abeyesundere, J., and G. P. A. Silva, J.

CEYLON MINERAL WATERS, LTD., Petitioner, and DISTRICT JUDGE, ANURADHAPURA, and 3 others, Respondents

S. C. 457/65—Application for Writs of Certiorari and Prohibition

Certiorari—Prohibition—Applications made prematurely—Effect.

An application for Writs of Certiorari and Prohibition should not be made prematurely.

APPLICATION for Writs of Certiorari and Prohibition.

E. R. S. R. Coomaraswamy, with Nimal Jayawardene and Anil Obeyesekera, for the Petitioner.

S. D. Jayawardene, for the 4th Respondent.

March 4, 1966. ABEYESUNDERE, J.—

The application made by the petitioner for Writs of Certiorari and Prohibition is premature. At the present moment there is no order of the District Court of Anuradhapura to be reviewed by this court and so there is no reason to issue a writ of certiorari. As there is no evidence to show that the District Court of Anuradhapura is about to determine the claim made to the motor car seized in execution of the decree of that Court, no writ of prohibition can be issued. We therefore dismiss the petition. The dismissal of this petition should not be considered as a bar to the petitioner, if so advised, filing a new petition in appropriate circumstances.

G. P. A. SILVA, J.—I agree.

Application dismissed.

[PRIVY COUNCIL]

1968 Present : Viscount Dilhorne, Lord Guest, Lord Devlin,
Lord Wilberforce, and Lord Pearson

MEERUPPE SUMANATISSA TERUNNANSE, Appellant,
and WARAKAPITIYA PANGNANANDA
TERUNNANSE, Respondent

PRIVY COUNCIL APPEAL No. 8 of 1967

S. C. 639/1960—D. C. Matara 289/L

Estoppel of tenant and licensee—Applicability of English law—Evidence Ordinance, ss. 100, 116—Interpretation of s. 116—Buddhist ecclesiastical law.

Section 116 of the Evidence Ordinance reads as follows :—

“ No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property ; and

no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.”

Held, (i) that it is legitimate, when applying s. 116, to consult and give effect to the English cases, even if they appear to go further than the language of the section ; and specific authority for so doing is given by s. 100 of the Evidence Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

(ii) that, where a person entered into possession of immovable property by the licence of the person in possession thereof, it is unnecessary, and indeed irrelevant, for the purposes of an argument on estoppel, to consider what the licensor's title truly was. The question is what was the title which the licensee was apparently recognizing, and this depends on the title which the licensor was apparently claiming.

(iii) that the construction put on s. 116 that under it the estoppel operates only in favour of the first landlord of a tenancy or the original grantor of the licence, and that it cannot operate in favour of their successors in title, truncates the English doctrine. The scope of the first and second paragraphs of s. 116 must by virtue of s. 100 be expanded to give full effect to the English law of estoppel.

(iv) that a revocable licence is automatically determined by the death of the licensor or by the assignment of the land over which the licence is exercised. If the licence is then renewed, and the licensee continues to remain on the land, there is no moment at which the tenant or licensee physically leaves the land and re-enters it. There is none the less a new taking of possession in law, and it cannot be contended by the licensee that he did not “ come upon ” the land by virtue of the new licence but by virtue of that which had expired.

G was the Viharadhipathi of a Buddhist temple. In 1942 the defendant-respondent, who was a bhikku belonging to that temple, entered into possession of a land of the temple as licensee under G and paid his dues in the form of crops or cash to G's agent, the plaintiff-appellant. After G's death in 1944 the respondent continued to pay the dues to the appellant who claimed them in his own right as the person whom G had appointed as Viharadhipathi by a deed executed in 1930. Until 1953 the respondent acknowledged the appellant's title of Viharadhipathi. After that year he refused to pay the dues because he claimed that he, as senior pupil of the deceased G, succeeded G as Viharadhipathi upon G's death in 1944. In the present action, which commenced on 20th September 1954, the appellant asked for a declaration that he was entitled to the land and for an order of ejectment of the respondent from the land. There was also a specific issue on the basis of estoppel. The Supreme Court held that the appellant's action failed because he could not establish his title as Viharadhipathi.

Held, that the English law relating to estoppel of tenant and licensee is wholly applicable in Ceylon. Whether or not the appellant was the lawful Viharadhipathi, the respondent was estopped from challenging the appellant's title to possession of the land in dispute. Not even the most limited construction of the second paragraph of s. 116 of the Evidence Ordinance would avail the respondent. The licence which was granted to him in 1942 was clearly a revocable one. If the licence was not originally granted in 1942 by the appellant in his own right, after the death of G the grant of a new licence must be implied.

APPEAL from a judgment of the Supreme Court reported in (1963) 66 N. L. R. 394.

E. F. N. Gratiaen, Q.C. with *H. Wanigatunga* and *Mark Fernando*, for the plaintiff-appellant.

H. A. Koattegoda, with *M. L. S. Jayasekera*, for the defendant-respondent.

Cur. adv. vult.

January 23, 1968. [Delivered by LORD DEVLIN]—

The respondent, who was the defendant in the original proceedings in the District Court of Matara, is a bhikku, that is, a monk or priest, belonging to a temple in Welihinda. In 1942, he was permitted by the appellant, who was or who claimed to be the Viharadhipathi, that is, the Chief Priest or Chief Incumbent of the Temple, to live on a piece of land of about 18 acres in extent situated at Warakapitiya, about a mile away from the Temple but part of its property. The land had previously been leased for cultivation. Shortly after 1942 the respondent built on this land an avasa or residence in which he lived with dayakas attached to him. It was the respondent's obligation to hand over to the Chief Incumbent the paraveni share, that is, the landowner's share of the produce of the land. This the respondent did until 1953. It is his refusal or failure to do so after that year that has led to the present dispute, the claim with which the Board is concerned being a claim by the appellant to eject the respondent from the land.

In the courts below the principal matter in issue was whether the appellant was the rightful Viharadhipathi of the Welihinda Temple. It is common ground that, if he was, he was entitled to possession of the land and to eject the respondent. Proceedings were begun on 20th September 1954, the appellant in his amended plaint asking for a declaration that he was entitled to the land and for an order of ejectment. The respondent in his amended answer denied that the appellant was the rightful Chief Incumbent and entitled to the land. The respondent claimed also that, if he was ejected, he ought to be compensated for the cost of the avasa and other improvements made to the land. He claimed further that in any event he was as a bhikku entitled to reside in the Temple or on land belonging to it and to be maintained out of the revenues of the Temple. It is not disputed that this is his right as a bhikku unless he has forfeited it by his contumacy.

The trial began in September 1957 and after a number of adjournments was concluded in December 1960. The District Judge by a judgment delivered on 21st December 1960 decided that the appellant was the lawful Viharadhipathi and so declared. The learned judge made an order for the ejectment of the respondent. He refused him any compensation, finding that the buildings had been paid for out of the income from the land ; and this claim for compensation has not been further pursued. The learned judge also held that the respondent had by his contumacy forfeited his right to residence. On 15th May 1963 the whole of this judgment was reversed in the Supreme Court which held that the appellant's action failed because he could not establish his title as Viharadhipathi.

The course which the argument has taken before the Board makes it unnecessary for their Lordships to do more than indicate the nature of the dispute as to title. It is agreed that in 1928 the Reverend Gunananda became the lawful Viharadhipathi of the Welihinda Temple and of three other temples as well. On 26th December 1930 Gunananda, who was residing in one of his other temples and found it difficult to manage the Welihinda Temple, executed an Adhikari Deed which conferred certain rights and duties on the appellant. In the opinion of the District Judge the Reverend Gunananda by this Deed renounced his rights as Viharadhipathi of the Welihinda Temple in favour of the appellant. The Supreme Court on the contrary held that the Deed was not a renunciation and that even if it were, the Reverend Gunananda could not lawfully appoint the appellant as his successor. The Court said that under the rule of sisyanu sisya paramparawa, which governed the succession, the Viharadhipathi must choose his successor from among his pupils. The appellant was not one of Gunananda's pupils ; the two men were in fact co-pupils of the previous Chief Incumbent. The respondent is Gunananda's senior pupil. The Court held that the true effect of the Deed was to appoint the appellant to act for Gunananda as the *de facto* Viharadhipathi of the Welihinda Temple so that he could manage that Temple on Gunananda's behalf.

The Reverend Gunananda died in 1944 and therefore any authority to act merely as his deputy would have come to an end in that year. Indeed, the respondent contends that on Gunananda's death, he as the senior pupil and in default of any valid appointment succeeded him as Viharadhipathi ; but he concedes that he is now barred under the Prescription Ordinance from asserting his claim.

In the argument before the Board Mr. Gratiaen for the appellant invited their Lordships to decide the appeal in his favour on the simple ground that, whether or not the appellant was the lawful Viharadhipathi, the respondent was estopped from challenging his title to possession of the land in dispute. This contention was not considered in either of the judgments in the courts below. The plea was introduced while the appellant was giving evidence. It was then accepted as an additional issue and the point was put in argument by the appellant's counsel but the District Judge did not decide it. There is no note of the argument before the Supreme Court but it has not been suggested that the point was there abandoned. It was clearly raised in the appellant's case in this appeal and has not been objected to before the Board. Their Lordships are obviously at a disadvantage in considering a point which was left undecided by the courts of Ceylon. The disadvantage is to some extent diminished by the fact that, as will appear, the point is governed by English law.

The appellant relies on s. 116 of the Evidence Ordinance which reads as follows :

“ No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property ; and

no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.”

The respondent concedes that he was a licensee of the land in dispute. His argument against the estoppel rests, as will appear, upon a narrow interpretation of the Ordinance. Section 116 is one of three sections that compose Chapter X of the Ordinance, which is headed Estoppel. This Chapter is a very condensed version of the English common law on estoppel *in pais*. Their Lordships consider that it must be interpreted, and if necessary expanded, in the light of the common law. The Ordinance is one of a number, which follow the Indian Evidence Act 1872. This Act, as is well known, was drawn up by Sir James Stephen. In 1876 he reproduced it in substance for English lawyers in his Digest of the Law of Evidence. The object of the Digest was to supply a concise code and not an elaborate treatise and so principles are briefly stated ; but in his introduction to the first edition Stephen said that it was “intended to represent the existing law exactly as it

stands". Section 116 of the Ordinance corresponds with Article 112 of the Digest. It is therefore in their Lordships' opinion legitimate, when applying s. 161, to consult and give effect to the English cases, even if they appear to go further than the language of the section ; and specific authority for so doing is given by s. 100 of the Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

The authorities which settle the English law are conveniently collected in Spencer Bower & Turner on "Estoppel by Representation", 2nd Edn. p. 170. This form of estoppel, although it has since the decision in *Doe v. Baytup*¹ been extended to licensor and licensee and other similar relationships, originated out of the relationship of landlord and tenant. The basis for it is the acknowledgment or recognition of the landlord's title. The acknowledgment may be formal as by the execution of a lease or of a deed of attornment ; an attornment has been defined by Holroyd, J. in *Cornish v. Searell*² as "the act of the tenant's putting one person in the place of another as his landlord". Estoppel can also arise informally from any act of recognition, the most common being the payment of rent after entry or after attornment. But then it is always open to the tenant to explain that the act relied upon was not intended or understood as a recognition. In *Harvey v. Francis*³ Patteson J. held "that where a tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received". See also *Jones v. Stone*⁴.

It will be observed that s. 116 does not in terms embrace the situation in which there has been a change of landlords during the tenancy nor does it deal with the effect of payment of rent. It is on this sparseness of language that the respondent relies. He concedes, as their Lordships have said, that he is the licensee of the land in dispute ; he admits also that he was let into possession of it by the appellant as licensor and it was found against him that until 1953 he paid his dues to the appellant in the form of crops or cash. But he points to the words in the second paragraph of s. 116 "at the time when such license was given", which correspond to the words "at the beginning of the tenancy" in the first paragraph. He says that he does not deny that the appellant had as *de facto* Viharadhipathi at the time when the license was given in 1942 the title to possession of the land. But, he says, the situation changed in 1944 when the death of the Reverend Gunananda deprived the appellant

¹ (1835) 3 Ad. and El. 188.

³ (1837) 3 M. and Rob. 37.

² (1828) 8 B. and C. 471 at 476.

⁴ (1894) A. C. 122.

of his *de facto* title; and he contends that there is nothing in the Ordinance to prevent him from challenging the *de jure* title which after 1944 the appellant assumed.

For the purposes of the argument on estoppel it is unnecessary, and indeed irrelevant, to consider what the appellant's title truly was. The question is what was the title which the respondent was apparently recognising, and this depends on the title which the appellant was apparently claiming. There is clear evidence to show that the appellant and the Reverend Gunananda both considered that the Deed of 26th December 1930 was effective to pass the full title of Viharadhipathi to the appellant and not merely the power of management. In 1933 the appellant's title was challenged by another bhikku of the Welihinda Temple. On 16th July 1933 the appellant filed a plaint in the District Court of Matara seeking against this bhikku a declaration that he, the appellant, was the Chief Incumbent of the Welihinda Temple. The issue was fought and went to the Supreme Court which on 7th June 1937 granted the appellant the declaration for which he asked. The meaning and effect of the Deed of 26th December 1930 was not directly in issue, since the defendant based his claim on a title which he sought to derive from an earlier Chief Incumbent. But the Reverend Gunananda gave evidence in support of the appellant's claim to be Viharadhipathi; and, referring to the Deed, said he gave it "not temporarily".

If the appellant was to the knowledge of the respondent claiming his dues as Viharadhipathi *de jure* and they were paid to him as such, it would be no answer to an estoppel to say that he could have claimed them in some other capacity or as agent for the Reverend Gunananda, when undoubtedly they would have been payable. The question is whether acknowledgment or recognition of title is to be inferred from the transactions between the parties and the inference depends on what the nature of the transactions was and not what it might have been. In a case where the bare fact of payment is consistent with an inference either way, the transactions would have to be closely investigated before the correct inference could be drawn. The payments of the paravani share made before the death of the Reverend Gunananda covered only a short period and occurred a long time before the trial took place. There is no satisfactory evidence of the terms on which they were demanded and made and, though there may be suspicion, there is no proof that the respondent then knew exactly what the plaintiff was claiming his position to be. Their Lordships will therefore assume in favour of the respondent that he intended to pay his dues to the appellant only as agent for the Reverend Gunananda and will treat the case as if it was not until after the Reverend Gunananda's death that the appellant claimed the dues in his own right.

After this there was no room for misunderstanding. The respondent knew himself to be the senior pupil of the Reverend Gunananda and knew therefore that, if the appointment of the appellant was invalid, it was he himself who was the lawful Viharadhipathi. Yet the payment of dues

continued as before. From 1948 onwards there is documentary evidence of accounts rendered and payments made. In 1953 when payment was first withheld by the respondent, the appellant prosecuted him for criminal misappropriation and on the complaint form the appellant was styled as Viharadhipathi of the Welihinda Temple. The record shows that the value of the produce appropriated was thereafter paid to the complainant and the accused was discharged. Neither formally then nor later in a letter which he wrote to the appellant in September 1953 did the respondent challenge his title. The envelope in which this letter was sent was addressed to the appellant under his title of Viharadhipathi in the respondent's own handwriting and it expresses only distress at the bringing of criminal proceedings.

The construction which the respondent puts on s. 116 is that under it the estoppel operates only in favour of the first landlord of a tenancy or the original grantor of the license; and that it cannot operate in favour of their successors in title. This truncates the English doctrine. Until attornments were virtually abolished by the Law of Property Act 1952 s. 151, it was customary, if not necessary, when a reversion was assigned, for the tenant to attorn to the new assignee. Many of the cases of estoppel in the books relate to tenants who are prevented by their attornment from denying the title of the assignee. Their Lordships need not pause to consider whether the language of the first paragraph of s. 116 would, if literally construed in its application to a term of years, ignore an attornment and confine the estoppel to the landlord in possession at the beginning of the tenancy. If it does, the scope of the paragraph must by virtue of s. 100 be expanded to give full effect to the English law of estoppel. The same considerations apply to the second paragraph which, since the present case is concerned with a license, is the one on which the appellant relies.

Their Lordships must however add that in their opinion not even the most limited construction of the second paragraph would on the facts of the present case avail the respondent. The license which was granted to him in 1942 was clearly a revocable one. A revocable license is automatically determined by the death of the licensor or by the assignment of the land over which the license is exercised. Thus if the license was not originally granted in 1942 by the appellant in his own right, after the death of the Reverend Gunananda the grant of a new license must be implied. The respondent argues nevertheless that he did not "come upon" the land by virtue of the new license but by virtue of that which had expired. In their Lordships' opinion the reference in the paragraph to the licensee coming upon the land does not mean only, or even primarily, a physical entry; it imports a taking of possession under the license. When a lease or license is renewed, there is no moment at which the tenant or licensee physically leaves the land and re-enters it. There is none the less a new taking of possession in law. In *Foster v. Robinson*¹ Evershed M.R. said at

¹ (1950) 2 All E.R. 342.

p. 348 : "The determination of the former tenancy was equivalent to delivery up of possession under that tenancy and then a resumption of possession under a new transaction immediately afterwards. I think, to use the language of Cockburn C.J. in *Oastler v. Henderson*¹, there was a virtual taking of possession." The principle was applied again by the Court of Appeal in *Collins v. Claughton*² where Lord Evershed's dictum was cited at 98.

Their Lordships conclude that the plea of estoppel succeeds. It applies only to the respondent's interest as a licensee and does not affect his rights as a bhikku. Mr. Gratiaen said that he would not contest these rights. Their Lordships will therefore humbly advise Her Majesty to allow the appeal and to restore the order and decree of ejectment made in the District Court, subject to the right of the respondent to continue to reside in the avasa on the land in suit and to be maintained out of the income of that land or of other temporalities belonging to the Welihinda Temple. The respondent must pay the costs of this appeal. As to the costs in the courts below their Lordships consider that a large part of them must have been incurred on the issue of title on which the respondent succeeded in the Supreme Court and which the appellant has not asked the Board to resolve. Moreover, the final result of the proceedings is to restore to the respondent his rights of residence and maintenance of which he was deprived by the judgment of the District Court. Their Lordships consider that in these circumstances each party should pay its own costs of the proceedings in the courts below and they will humbly advise Her Majesty to vary accordingly the order of the Supreme Court.

Appeal mainly allowed.

1967

Present : T. S. Fernando, A.C.J., and Alles, J.

G. B. DE SILVA, Applicant, and E. L. SENANAYAKE and
2 others, Respondents

S.C. 185 of 1967—Application for a mandate in the nature of a Writ of Mandamus on the Mayor of Kandy and others

Municipal Council—General meeting for transaction of business—Notice of motion given by member—Scope of Mayor's power to refuse to place the motion on the agenda—Remedy of member—Mandamus—By-law 12 (1) (2)—Municipal Councils Ordinance (Cap. 252), ss. 17, 19, 20, 40 (1) (r).

¹ (1877) 2 Q. B. D. 575 at 578 by Noolaham Foundation. ² (1959) 1 All E. R. 95.
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Prior to the date when a statutory monthly general meeting of the Municipal Council of Kandy was due to be held on 30th April 1967, the applicant, who was a member of the Council, gave notice in writing to the Commissioner that he would then move the following motion :—

“ In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967. ”

The notice of the motion was given as required by by-law 12 (1) of the Council's by-laws. By-law 12 (2) reads as follows :—

“ All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda.”

The applicant's motion was not included in the agenda for the meeting of 30th April 1967 for the reason that before the agenda was prepared the Mayor (the 1st respondent) had ruled the motion out of order. On the present application for *mandamus* to compel the inclusion of the motion in the agenda, it was claimed on behalf of the Mayor that he had an absolute power of ruling any motion out of order.

Held, that, inasmuch as the motion was one raising a general question of financial policy, section 40 (1) (r) of the Municipal Councils Ordinance conferred on the applicant the right to give notice of the motion. Where a member has a right to give notice of a motion, by-law 12 (2) cannot be construed so as to frustrate the exercise of the power conferred by the statute itself. By-law 12 (2) does not vest in the Mayor an absolute power or discretion to rule out motions. By making the ruling complained of in the present case, the Mayor failed or refused to perform his statutory duty, and *mandamus* was the appropriate remedy. The remedy could be granted although the date of the meeting had already passed, if the motion could be brought forward at a subsequent meeting of the Council and could still serve some purpose.

Held further, that section 20 of the Municipal Councils Ordinance did not provide an alternative remedy.

APPLICATION for a writ of *mandamus* on the Mayor of Kandy.

Felix R. Dias-Bandaranaike, with *Nihal Jaywickrama*, for the applicant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte* and *N. S. A. Goonetilleke*, for the respondents.

Cur. adv. vult.

November 10, 1967. T. S. FERNANDO, A.C.J.—

The applicant, a member of the Municipal Council of Kandy elected to represent Ward No. 11 thereof, seeks a mandate in the nature of a writ of mandamus from this Court to compel the inclusion in the agenda of the first statutory monthly general meeting of the Council to be held following the determination of this application of a motion notice of which had been duly given by him, but which he complains was unlawfully excluded from the agenda of the general meeting held in April, 1967.

The respondents to this application (filed within a fortnight of the alleged unlawful exclusion) are : (1) The Mayor, (2) The Municipal Commissioner, and (3) The Secretary of the said Municipal Council. The duty of including a motion in the agenda falls in terms of the Council's by-laws on the Municipal Commissioner, but the mandate is sought primarily on the Mayor for reasons which become apparent on an examination of the relevant facts and of the by-laws governing the question in issue. No relief is sought as against the Commissioner and the Secretary who, it has been stated, have been made parties so that they may have notice of the application for this mandate. A previous decision of this Court, *Cooray v. Grero*¹, has ruled that in similar circumstances the remedy should be sought against the Mayor and not on an executive officer of the Council who is bound to carry out the Mayor's orders.

Section 17 of the Municipal Councils Ordinance (Cap. 252) enacts that there shall be twelve general meetings of each Municipal Council in every year for the transaction of business. One such meeting of the Kandy Municipal Council was due to be held on April 30, 1967. By-law 12(1) of the Council's By-laws—proclaimed in *Gazette* No. 8,987 of August 14, 1942—requires notice of motion to be given in writing, signed by the member giving the notice and addressed to the Commissioner. Notice as required by this by-law was duly given by the applicant on April 16, 1967, and the text of his motion is as set out hereunder :—

“ In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967.”

It would appear from the affidavits that in the 1967 budget of this Council a sum of Rs. 5,000 had been allocated for “ civic receptions ”, and a further sum of Rs. 5,000 as “ entertainment allowance ” of the Mayor and to meet the cost of receptions and refreshments at meetings. Before these sums were exhausted, the Council had at the general meeting held on March 27, 1967 passed a supplementary estimate sanctioning certain expenditure aggregating some Rs. 6,050, apparently already incurred on account of civic receptions, entertainment and attendance of the Mayor at a Conference abroad.

The motion set out above of which notice, as already stated, had been duly given was not included in the agenda for the meeting of April 30, 1967 for the reason that before the agenda was prepared the Mayor had ruled the motion out of order. It is claimed on his behalf that he had an absolute power of ruling any motion out of order. This claim necessitates an examination of the source of the alleged power, which is said to be by-law 12 (2), reproduced below :—

“ 12 (2)—All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda. ”

The applicant contends that his motion was not one which the Mayor had power to rule out of order. I agree with the observation of Swan J. in *Cooray v. Grero (supra)* that, if the motion is one which a councillor had a statutory right to move, there is a duty cast on the Mayor to place such a motion on the agenda unless it is out of order for the reason stated in that case which need not concern us here on this application. Some attempt was made by Sinnetamby J. in the later case of *Wijesuriya v. Moonesinghe*¹ to illustrate what kind of motion may be out of order. Illustrations can, of course, never be exhaustive as the circumstances in which the question can arise may be legion. He did, however, point out that even a motion which a councillor ordinarily has a right to move may be out of order for want of the requisite notice or on account of its being couched in improper language or being unintelligible, unlawful or illegal. No reason is advanced here as a justification for ruling the motion out of order save the plea of absolute power or discretion. A court must surely be slow to recognise the existence of such a power in an officer elected to head a local body exercising powers affecting the public and functioning apparently within a democratic framework.

The applicant points to section 40 (1) (r) of the Municipal Councils Ordinance which confers upon the Council for the purpose of the discharge of its duties thereunder the power to bring forward general questions connected with the Municipal Fund. The exercise of this power of the Council can normally be invoked only by some one or more of the councillors bringing forward the question for discussion in the Council. The motion we are concerned with in this case is one raising a general question of financial policy, and ordinarily no question can be more germane to a prudent administration of the revenue of the Council which the councillors are under an implied duty to foster. There is some suggestion in the Mayor's affidavit that the motion has been induced by malice and with a desire to ventilate private grievances, but one fails to see any reason for these suggestions in the text of the motion which on its face appears to be entirely proper. We entertain no doubt that any chairman of a meeting has inherent power to prevent a speaker making use of an occasion which has lawfully presented itself to him to make some improper or illegal use of it to give vent to his malice. There was,

¹ (1959) 64 N. L. R. 180 at 183.
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however, no justification for a premature fear which could not fairly have arisen from the text of the motion without more. If, as I hold, the applicant had the right to give notice of this motion, then I agree with the contention on behalf of the applicant that the by-law cannot be construed so as to frustrate the exercise of the power conferred by the statute itself. Correctly interpreted, by-law 12 (2) does not, in my opinion, vest in the Mayor an absolute power or discretion to rule out motions. In the instances in which the discretion is available and has been exercised, even where it may have been exercised erroneously, this Court will not ordinarily grant the remedy of *mandamus*. Subject, however, to the exceptional cases of which some indication has been given in the judgment of Sinnetamby J. referred to above, I am of opinion that the Mayor has no discretion to rule out of order motions of which a member has a statutory right to give notice. The motion we are concerned with here was one such, and there was neither power nor ordinarily a discretion to rule it out of order. By making the ruling complained of in this case the Mayor has failed or refused to perform his statutory duty, a duty he owed to the applicant on behalf of the ratepayers of Kandy, and *mandamus* is the appropriate remedy. It is pertinent to point out that Basnayake C.J. in *Mohamed v. Gopallawa*¹, in ordering by way of *mandamus* that a certain special meeting of a Municipal Council which had been declared closed by its chairman be continued, stated as follows:—

“In view of the chairman’s wrong decision on the point of order that was raised he failed to discharge his duty to give the meeting an opportunity of deciding whether or not the resolution should be confirmed. The chairman by an erroneous decision on the point of order could not disable himself from performing the duty enjoined by law of transacting the business of the meeting at which he presided.”

As a reason against the issue of a writ of *mandamus* in this case, learned counsel for the respondents advanced the argument that the local authority is master of its own house and that this Court will not seek to review the correctness of what is essentially a domestic question. He cited certain University cases, but it is sufficient to point out that the bodies there concerned with were not public bodies in the sense local authorities are and that the jurisdiction to compel by *mandamus* the performance by local authorities of statutory duties has been exercised in this Country by this Court for long years.

Another ground advanced for a refusal of the remedy sought is that an alternative remedy was available. The contention is that if the applicant was aggrieved by his motion being ruled out of order *in limine* he could have brought it before the meeting by obtaining the permission of the Council as indicated in section 20 of the Ordinance. Counsel for the applicant referred to the proceedings as indicating that the Mayor who presided at the meeting of the Council held on April 30, 1967 had refused to allow the applicant an opportunity to obtain the permission of the

members present at the meeting to move his motion which had been ruled out of order. We did not find it possible to agree with learned counsel that the minutes of the proceedings disclosed that such permission had been sought. We must therefore decide this application on the basis that there was no attempt made to invoke the provisions of section 20 of the Ordinance. It may be mentioned that De Kretser J. in *Goonesinghe v. The Mayor of Colombo*¹ and Swan J. in *Cooray v. Grero* (*supra*) have both stated that the procedure indicated in sections similar to section 20 provides an alternative remedy. Sansoni J. in *Seenivasagam v. Kirupamoorthy*² and again in *Sameraweera v. Balasuriya*³, however, did not think that this was a remedy at all because it was conditional on the party aggrieved obtaining the permission of the Council. Sinnetamby J., who considered all the previous views in *Wijesuriya v. Moonesinghe* (*supra*) preferred to adopt the view taken by Sansoni J. As he put it, “in respect of a resolution which is not out of order a member has a right, even if the majority of the other members of the council are against it, to have it discussed at a meeting of the Council, but under rule 2 (b) he cannot even move it unless the majority permit him to do so”. The true construction of the relevant provisions of the Ordinance appears to be that while section 19 which requires the Mayor to cause notice of the business to be transacted at every general or special meeting or adjourned meeting (other than a special meeting convened by the Commissioner under section 18 (2)) to be served on each councillor recognises the right of the individual councillor to have his motions discussed, section 20 recognises the right of the Council (which in practice is the majority of the councillors) to discuss business even though not specified in the agenda. I agree with the contention of learned counsel for the applicant that where a councillor has a statutory right to bring forward a question for discussion, he has a duty to give valid notice of it in the form of a motion, and that once that notice has been so given the Mayor is under a duty to have it inscribed on the agenda. When a motion has been thus inscribed on the agenda, the Council has no right to stop a discussion. It is therefore apparent that section 20 does not provide an alternative remedy. In these circumstances it is unnecessary to consider whether, even if there was an alternative remedy, such remedy was “equally convenient, beneficial or effectual”. Nor should one fail to take note of current practice in two-party assemblies where the chances of obtaining the permission of the majority to bring up for discussion a motion already ruled out by the Mayor before notice of meeting had been served cannot ordinarily survive beyond the realms of theoretical possibility.

I would for the reasons outlined above grant the remedy prayed for by the applicant. As Swan J. said in *Cooray v. Grero* (*supra*), a writ of mandamus, if available, could be issued although the date of the meeting has already passed. We were informed that a monthly meeting of this Council is due to be held towards the end of this month, and as the budget year has not yet ended, the motion could still serve some purpose. It

¹ (1944) 46 N. L. R. 85.

² (1954) 56 N. L. R. 450 at 454.

³ (1955) 58 Noolaham R. 118 at 120.

is well to remember that the democratic tradition is better ensured by not denying to the minority the opportunity of ventilating grievances which the majority may regard as but fancied. Argument is still a potent medium capable of converting honest sceptics.

Let, therefore, a mandate in the nature of a writ of *mandamus* issue forthwith directing the 1st respondent to include the motion in question on the agenda of the first statutory general meeting of the Municipal Council of Kandy to be held following the date of this judgment. The 1st respondent must pay to the applicant his costs of this application.

ALLES, J.—I agree.

Application allowed.

1965

Present : Abeyesundere, J., and G. P. A. Silva, J.

COMMISSIONER OF INLAND REVENUE, Appellant,
and J. DE FONSEKA, Respondent

S. C. 1/65—Income Tax BRA/325

Income Tax Ordinance—Section 6—“Profits from any employment”—“Holiday passage”.

The value of a free air passage granted as a “favour” by Air Ceylon to an employee of that body is not part of his profits from any employment within the meaning of section 6 of the Income Tax Ordinance.

CASE stated under section 78 of the Income Tax Ordinance.

V. Tennekoon, Q.C., with *P. Naguleswaran*, Crown Counsel, for the appellant.

H. V. Perera, Q.C., with *N. Nadarasa* and *K. Kanthasamy*, for the respondent.

September 15, 1965. ABEYESUNDERE, J.—

The question of law that arises from this case stated under section 78 of the Income Tax Ordinance for determination by this court is whether the value of the free air passage granted by the body called Air Ceylon to the assessee-respondent, who is an employee of that body, is part of the assessee-respondent's profits from any employment within the meaning of Section 6 of the said Ordinance, and if such value is part of such profits, what is such value.

The free air passage granted by Air Ceylon to the assessee-respondent is a “holiday passage” according to the appellant who is the Commissioner of Inland Revenue. As Section 6 of the Income Tax Ordinance

declares that the expression "profits from any employment" includes a holiday passage, the expression "holiday passage" must be interpreted by reference not only to that expression but also to the expression "profits from any employment". If a holiday passage is received from any employment, its value is part of the profits from that employment. It is, therefore, necessary to interpret the meaning of the expression "from any employment". I am of the view that the expression "from any employment" means "in reference to service rendered in any employment". There is support for this view in the following passage from the judgment of Upjohn, J. in the case of *Hochstrasser (H. M. Inspector of Taxes) v. Mayes*, which is quoted with approval by Viscount Simonds, L.J., in his judgment in appeal in that case to the House of Lords:—"In my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services" (*38 Reports of Tax Cases at page 705*).

According to the Staff Travel Scheme set out in the case stated, a free air passage granted under such Scheme is a "favour" which is granted by the officer of Air Ceylon competent to do so under such Scheme to an employee of Air Ceylon who has rendered service for not less than one year or to a member of the family of such employee. The reference to service for not less than one year is for the purpose of limiting the class of employees from whom or from whose families the recipient of such favour may be selected. The selection of a recipient of such favour is dependent on the arbitrary choice of the officer of Air Ceylon competent under such Scheme to grant such favour. Although the employees of Air Ceylon who are eligible to ask such favour are determined by reference to their services in their employments under Air Ceylon, the grant of such favour is not in reference to the service of the recipient of such favour in his employment under Air Ceylon. I, therefore, hold that the grant of the free air passage to the assessee-respondent by Air Ceylon was not in reference to his service in his employment under Air Ceylon and that consequently such free air passage was not received by him from any employment within the meaning of the expression "from any employment" as interpreted by me above. Accordingly I am of the opinion that the value of the free air passage granted by Air Ceylon to the assessee-respondent is not part of his profits from any employment. In view of this opinion it is unnecessary for me to determine the value of the free air passage granted by Air Ceylon to the assessee-respondent.

The assessee-respondent is entitled to his costs of the proceedings in this Court and such costs shall be paid by the appellant who is the Commissioner of Inland Revenue.

G. P. A. SILVA, J.—I agree.

Appeal dismissed.

1967 *Present : Manicavasagar, J., and Samerawickrame, J.*

G. JOHANAHAMY and 3 others, and K. W. SUSIRIPALA, Respondent

S. C. 46/64—D. C. Galle, 6708/L (N)

Debt Conciliation Ordinance, as amended by Act No. 5 of 1959—Sections 30, 40, 43, 56, 64—Conditional transfer of immovable property—Limited extent to which it is deemed to be a “mortgage”—Evidence Ordinance, s. 92—Prevention of Frauds Ordinance, s. 2.

A debt, in respect of which a conditional transfer of immovable property had been executed, was subsequently the subject matter of proceedings before the Debt Conciliation Board. In a settlement which was arrived at, it was agreed between the parties that the capital and interest due to the creditor should be paid by the debtors on dates fixed in the settlement and that in the event of a single default the right to redeem would be at an end. After the debtors committed default in making payments, the creditor sued them in the present action claiming declaration of title to the land described in the conditional transfer. It was submitted on behalf of the defendants that the conditional transfer was in fact a mortgage retaining title in the debtors, that the proceedings before the Debt Conciliation Board were still pending and that, therefore, the plaintiff was not entitled to maintain the action in view of the provisions of sections 43 and 56 of the Debt Conciliation Ordinance.

Held, that the action was maintainable. The amendment to the definition of “mortgage” made by Act No. 5 of 1959 has not altered the law relating to the creation of a mortgage over immovable property and has not recognized as a mode of creating a mortgage the execution of a conditional transfer. It merely permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage for the purpose of exercising jurisdiction under the Ordinance in respect of such a transaction. Accordingly, title to the property which is the subject of a conditional transfer falling within the definition is in the transferee and is not retained by the debtor-transferor.

APPEAL from an order of the District Court, Galle.

C. Ranganathan, Q.C., with N. Jayawickrema, for the defendants-appellants.

H. W. Jayewardene, Q.C., with G. P. J. Kurukulasooriya and V. Basnayake, for the plaintiff-respondent.

Cur. adv. vult.

December 3, 1967. MANICAVASAGAR, J.—

I agree with the order made by my brother. The sole purpose of the amendment of 1959 is to enable a vendor, who has entered into an agreement to have the immovable property which he had sold reconveyed to him by the vendee, to seek the intervention of the Board to effect a settlement either in regard to the consideration payable by him on reconveyance, or extension of time, or any other matter which may appear just and reasonable to the Board. Prior to the amendment,

the vendor did not have this remedy because an agreement to reconvey was not a contract of security in respect of a debt within the meaning of the Ordinance. The amendment, as my brother points out, did not create an exception, in respect of an execution of a mortgage, to the formalities imposed by Section 2 of the Prevention of Frauds Ordinance.

The question whether a matter is pending before the Board is one of fact, dependent on the terms of settlement. The settlement effected by the Board and contained in document P1 concluded the matter before the Board, which was *functus* thereafter.

SAMERAWICKRAME, J.—

The plaintiff-respondent brought this action against the defendants-appellants for declaration of title to the land described in schedule B to the plaint and for ejectment of the defendants from it.

It would appear that upon deed 2613 dated 11th January, 1958, the defendants-appellants and one Leelaratne transferred their interests in the said land to the plaintiff-respondent subject to an agreement to reconvey the said interests on payment of a sum of Rs. 11,400 within two years from 11th January, 1958. The defendants-appellants and the said Leelaratne made an application to the Debt Conciliation Board and in proceedings held upon that application a settlement was arrived at between the plaintiff-respondent on the one hand and the defendants-appellants and Leelaratne on the other, whereby it was agreed that the arrears of interest due to the plaintiff-respondent and the capital amount due to him should be paid on dates fixed in the settlement. The last two paragraphs of the settlement were as follows :—

- (5) that in the event of any single default the right to redeem will be at an end ;
- (6) that on payment of the full sum the creditor should execute a deed of reconveyance to the debtors at the cost of the debtors.

Thereafter the Proctor for the plaintiff-respondent wrote a letter to the Chairman of the Debt Conciliation Board stating that the debtors had committed default in making payments and asked that the Board should make an order dismissing the application made to it. By his letter (P. 3), the Chairman wrote to the Proctor for the plaintiff-respondent referring to clause 5 of the settlement and stating that an order dismissing the application was not necessary. The plaintiff-respondent thereafter filed the present action against the defendants-appellants alone as Leelaratne had died and his interests had devolved on the defendants-appellants.

The defendants-appellants took up the position in their answer that the conditional transfer executed by them was in fact a mortgage, that the proceedings before the Debt Conciliation Board were pending at the time the action was filed and that the plaintiff was not entitled, therefore,

to have and maintain the action in view of the provisions of Sections 43 and 56 of the Debt Conciliation Ordinance.

At the trial, various issues were framed and the Court took up for decision as preliminary issues the following :—

- (14) Is the plaintiff entitled to maintain this action in view of the provisions of Sections 43 and 56 of the Debt Conciliation Ordinance ?
- (15) Was the matter pending before the Debt Conciliation Board at the time this action was instituted ?
- (16) If so, can the plaintiff have and maintain this action ?

The learned District Judge has answered these issues in favour of the plaintiff-respondent and the defendants-appellants have appealed against his order.

Mr. Ranganathan, Q.C., appearing for the defendants-appellants, submitted that the amendment to the Debt Conciliation Ordinance made by Act No. 5 of 1959 had recognised the creation of a mortgage by the execution of a conditional transfer of land. He submitted, therefore, that the title to the land was at all times in the defendants and that the plaintiff, therefore, could not maintain the action. He further submitted that upon a settlement under Section 30 of the Debt Conciliation Ordinance, the contract in respect of the debt was merged in the settlement and that the mortgage or security created by the conditional transfer subsisted under the settlement to the extent of the amount payable under it in respect of the debt. He submitted that this was the effect of Section 40 of the Debt Conciliation Ordinance. He further submitted that the plaintiff's only remedy was that given by Section 43 of the Ordinance.

It was held as far back as the year 1921 by the Privy Council in the case of *Adaicappa Chetty v. Caruppen Chetty*¹ that Section 2 of the Prevention of Frauds Ordinance prevented the creation of a mortgage otherwise than by a notarial instrument duly executed according to law. It has also been held in a long line of cases that where a person transferred land on a notarial deed, which on the face of it is a transfer, it is not open to the transferor to lead oral evidence to show that the transaction was in fact a mortgage. The leading of such oral evidence is directly prohibited by Section 92 of the Evidence Ordinance. The principles laid down in these cases has been upheld by the Privy Council in the case of *Saverimuttu v. Thangavelautham*², and by a Divisional Bench of Five Judges of this Court in the case of *William Fernando v. Cooray*³. Accordingly, if it had been the intention of the Legislature to alter the law so as to permit the creation of a mortgage by an agreement other than one set out in an instrument which is notarially attested, one would have expected that such alteration of law would have been done by an unambiguous and substantive enactment. I find it difficult to

¹ (1921) 22 N. L. R. 417.

² (1954) 55 N. L. R. 529.

think that the Legislature intended such a far-reaching alteration in the law by inserting a definition of the term 'mortgage' in the Debt Conciliation Ordinance by Amendment Act No. 5 of 1959.

That amendment provides for the insertion of the following definition of mortgage in Section 64 of the Act which sets out the meanings to be given to terms contained in the Ordinance "unless the context otherwise requires". The definition is as follows:—" 'Mortgage', with reference to any immovable property, includes any conditional transfer of such property which, having regard to all the circumstances of the case, is in reality intended to be security for the repayment to the transferee of a sum lent by him to the transferor". Inclusion of this definition permits the Debt Conciliation Board to regard a conditional transfer in certain circumstances as a mortgage and to exercise jurisdiction under that Ordinance in respect of such a transaction. The Board would, therefore, be entitled to seek to effect a settlement between the transferor and the transferee in respect of the conditional transfer. The settlement would obviously relate to the terms and conditions of payment upon which the transferor would be entitled to obtain a retransfer and would provide for a transfer to be effected by the transferee upon the conditions being satisfied. The settlement P1 provides in clause 6 for such a transfer between the transferee to the transferor upon the payment of the full sum due under the settlement. In clause 5 it further provided that if there was default in any payment the right to redeem would be at an end. As the settlement itself provides that the right to redeem would be at an end, upon the debtors committing a default in payment, I do not see that there can be any disability for the plaintiff to bring an action upon the title that he obtained by the deed of transfer in his favour upon the footing that there had been a default resulting in the right to redeem having come to an end.

Upon the view that I have taken that the amendment to the Debt Conciliation Ordinance does not have the effect of enabling persons to create mortgage other than by notarially attested instruments and that, therefore, the transferee upon conditional transfer has the title, it is unnecessary to consider the elaborate argument put forward by Mr. Ranganathan upon the basis that the title remained in the debtors. I am also of the view that, upon the assumption that a default in payment had been committed as alleged by the plaintiff-respondent, in terms of clause 5 of the settlement, the right to redeem would have ceased to exist and the Board could have no further jurisdiction to deal with any matter relating to this transaction and that, therefore, the application in respect of it could not be said to have been pending thereafter.

I am, accordingly, of the view that the learned District Judge has come to correct findings in respect of the preliminary issues and that his order must be affirmed. The case will now have to go back for trial in respect of the other issues. The plaintiff-respondent will be entitled to his costs of appeal.

Order affirmed.

1965

Present : Sri Skanda Rajah, J., and Alles, J.

J. E. D. MARTIN, Appellant, and S. THENUWARA, Respondent

*S. C. 110 (Inty.)/1964—D. C. Colombo, 58601/M**Amendment of pleadings—Scope—Civil Procedure Code, ss. 93, 146.*

Pleadings may be amended after issues which do not strictly arise from the pleadings are permitted to be framed.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *Cecil de S. Wijeratne*, for defendant-appellant.

C. Ranganathan, Q.C., with *Vernon Martin*, for plaintiff-respondent.

Cur. adv. vult.

October 8, 1965. SRI SKANDA RAJAH, J.—

The plaintiff is the administrator of the estate of the late Dr. A. S. Thenuwara, who was the owner of the premises in question.

The plaintiff averred that Dr. Thenuwara left a last will in which his widow Catherine was named executrix. She proved the will in D. C. Colombo 16607/T and became entitled to the premises. She rented the premises to the defendant from 1st June, 1956. Later it was held that Catherine was not entitled to succeed to her husband's estate as she was aware of the plot to kill her husband. In consequence probate was recalled and plaintiff was appointed administrator of the estate. Therefore, the contract of tenancy was null and void and the defendant was a trespasser. The prayer was for a declaration that the premises were part of the estate of the late Dr. Thenuwara, ejectment of the defendant and damages.

The answer admitted the averments in the plaint but maintained that the tenancy was valid, the plaintiff had recognised the defendant as tenant of the premises and prayed that the action be dismissed.

On these pleadings the plaintiff sought to frame the following, among other issues :—

“ In the event of the Court holding that the defendant is a tenant of the estate as from 1.9.57, is the plaintiff entitled to claim from the defendant all rents from 1.9.57 ? ”

The defendant objected. The objection was upheld. The plaintiff was, however, given the opportunity to amend the plaint.

Thereafter, the plaintiff filed an amended plaint in which he set out every averment in the original plaint and added :—

“ In the alternative the plaintiff states that the defendant was in occupation of the said premises as from 1st June, 1956, as a tenant under the estate of the late Dr. A. S. Thenuwara on a monthly rental of Rs. 200 and the plaintiff as administrator of the estate of the late Dr. Thenuwara is entitled to claim from the defendant all rents from 1st June, 1956, to the end of January, 1963.”

To this averment, objection was taken unsuccessfully. Hence this appeal by the defendant.

As was pointed out by me in *Thirumalay v. Kulandavelu* ¹, the whole purpose of pleadings is to define, to clarify and to limit the issues which are to be the subject of the pending contest.

The scope of the action may be determined by the pleadings, i.e., the plaint and answer. On the plaint and answer the above issue arose for consideration and it should not have been disallowed.

In recent times, there has been a tendency to insist that pleadings should be amended before issues which do not strictly arise from the pleadings are permitted to be framed. This tendency has been the result of losing sight of the observations of this Court in some of the earlier decisions, e.g., *Attorney-General v. Smith* ² and *Silva v. Obeyesekera* ³.

In *Attorney-General v. Smith* (supra) at 241, Layard, C.J., compared our system of pleadings with those in England and India and went on to say, “ By section 146 of our Code, if the parties are agreed, the issues may be stated by them ; if not agreed, then the Court must frame them (see *Fernando v. Soysa*, 2 N. L. R. 41). In this case ; the defendant’s counsel, i.e., pleader, expressed a wish to have a further issue settled. *There is no necessity under our law to restrict the issues to the pleadings*, as was done in this case ; it appears to me to be contrary to our law, and I think the Judge should have allowed an issue to be framed as to whether the burns contributed to the death of the deceased.”

In *Silva v. Obeyesekera* (supra) at 107, Bertram, C.J., said, “ Counsel for the plaintiff raised the objection that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken, the learned District Judge disallowed the issues. Here the learned Judge was led into a mistake. No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and *it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.*”

¹ (1964) 66 N. L. R. 285 at 287.

² (1905) 8 N. L. R. 229.

In the recent case of *The Bank of Ceylon, Jaffna v. Chelliahpillai*¹ Lord Devlin said, "The Civil Procedure Code gives in section 93 ample power to amend pleadings. Moreover, the case must be tried upon the 'issues on which the right decision of the case appears to the Court to depend' and it is well settled that the framing of such issues is not restricted by the pleadings; see section 146 of the Code, *Attorney-General v. Smith* (supra) and *Silva v. Obeyesekera* (supra)".

In permitting the amendment in the present case, the learned Judge was trying to grant relief on the basis of the defence set up. The defendant cannot, therefore, be heard to complain that he is prejudiced by this amendment.

The above are the reasons for the order we made dismissing the appeal with costs.

ALLES, J.—I agree.

Appeal dismissed.

1966

Present : Manicavasagar, J.

A. H. M. LAFIER and another, Appellants, and
A. D. A. EDIRIWEERA (Veterinary Inspector), Respondent

S. C. 614-615/65—M. M. C. Colombo, 25112

Municipal Council of Colombo—By-law prohibiting sale of meat of an animal not slaughtered in the Municipal Slaughter-House—Invalidity—By-law 30 of chapter 13 of the By-laws and Regulations—Butchers Ordinance (Cap. 272), ss. 2, 13, 14, 15, 18.

By-law 30 of chapter 13 of the By-laws and Regulations of the Municipal Council of Colombo is *ultra vires* of the Butchers Ordinance in that it restricts the sale of meat to sale only of meat of animals slaughtered in the Municipal Slaughter-House and thus prohibits the sale of meat of animals slaughtered at other authorised places.

APPEAL from a judgment of the Municipal Magistrate's Court, Colombo.

G. F. Sethukavalar, with S. G. Wijesekera and A. Puthumainayagam, for the Accused-Appellants.

H. Wanigatunga, with N. Kasirajah, for the Complainant-Respondent.

Cur. adv. vult.

September 29, 1966. MANICAVASAGAR, J.—

Mr. Sethukavalar's argument is that by-law 30 in Chapter XIII of the By-laws and Regulations of the Municipal Council of Colombo (Revised Edition, 1958), which the two appellants are said to have contravened, is invalid as it is repugnant to the general law contained in the Butchers Ordinance (Cap. 272, Revised Edition 1956). He submits that the purpose and effect of this by-law is to prohibit the sale or the exposure for sale, in a public or private market, of the meat of an animal not slaughtered in the Municipal Slaughter-House ; whereas, the Butchers Ordinance does not prohibit the slaughter of animals by a licensed butcher at (i) a public slaughter house or (ii) any place appointed by the proper authority (section 14), or by any person other than a licensed butcher, on a permit granted to him, at any place specified in the permit (section 18 and Form D in the Schedule).

The 1st accused-appellant is, on the finding of the Magistrate, an employee of the 2nd accused-appellant ; the latter is a licensed butcher. A licensed butcher includes every person who obtains a licence under section 4 of the Butchers Ordinance (Section 2). The 2nd accused-appellant has a licence (D 1) for the year ending 31st December, 1964, issued by the proper authority to slaughter animals and carry on the trade of a butcher at private beef stall at 11, Vystwyke Road, Mattakuliya, in Colombo, conforming himself to the Butchers Ordinance. A butcher (section 2) includes every person who slaughters animals or exposes for sale the meat of animals slaughtered in Ceylon. The licence issued to the 2nd accused-appellant authorises him to slaughter animals, and sell the meat at the private beef stall mentioned in the licence. By-law 30 prohibits the sale at a public or private market, of meat of an animal not slaughtered at the Municipal Slaughter-House.

Mr. Sethukavalar submits that there is, therefore, a conflict between the by-law and the Butchers Ordinance. Mr. Wanigatunga for the complainant-respondent contends against this ; he submits that the slaughter of animals should be according to the law and section 14 of the Butchers Ordinance gives no right, but places a restriction on a butcher's right to slaughter animals.

To my mind section 14 enacts that a licensed butcher should not slaughter any animal except at a public slaughter house or at a place appointed by the proper authority : there is, undoubtedly, a restriction placed on a licensed butcher as to the venue of the slaughter : he may not slaughter at any place he chooses. Mr. Wanigatunga is right in his submission that slaughter should conform to the requirements of the law ; for a licensed butcher whether he slaughters in a public slaughter house, or a place appointed by the proper authority, must comply with the provisions of sections 13 and 15 of the Butchers Ordinance, and any other provision applicable to the slaughter of animals, provided it does not conflict with the general law. My opinion is that by-law 30 by confining the sale of meat of only animals slaughtered in the Municipal

Slaughter-House forbids and makes unlawful that which the general law has impliedly authorised. A by-law is said to be repugnant if it says something inconsistent with the general law contained in a Statute or if it expressly or by necessary implication seeks to run counter to the general law. I agree with Mr. Sethukavalar's submission, and I hold that by-law 30 is *ultra vires* of the Butchers Ordinance.

No doubt, the by-laws and Regulations relating to slaughter-houses and markets have been framed with the essential object of safe-guarding the health of the community by providing for the sale of wholesome and clean meat, and other food in clean surroundings : the opinion I have expressed may fail to achieve this object as some of the by-laws may not be applicable to animals slaughtered in a licensed private market. If my opinion be right, the remedy lies with the legislature and the Municipal Council.

The charges on which the appellants have been convicted fail, and the convictions entered are set aside and they are acquitted : the fine, if paid, should be returned to them.

Appeal allowed.

[PRIVY COUNCIL]

1968 *Present : Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Wilberforce, and Lord Pearson*

CEYLON THEATRES LTD., Appellant, and CINEMAS LTD. and others, Respondents

PRIVY COUNCIL APPEAL No. 3 OF 1967

S. C. 573/61—D. C. Colombo, 8603/P

Partition action—Interlocutory decree—Order for sale of land—Reservation therein of encumbrances—Validity—Meaning of the terms “the land” and “the title”—Partition Act (Cap. 69), ss. 2, 4, 5, 16 (2), 18, 25, 26, 46, 47, 48, 50, 51, 54.

In proceedings under the Partition Act (Cap. 69) the Court has power, when ordering a sale of land held in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land sold. It cannot be contended that such sale must be made so as to pass a title free from the life interest.

Almost the whole of the corpus in the present partition action was occupied by a building and no physical partition of the property was practicable. Plaintiff, 1st defendant and 3rd defendant were entitled respectively to undivided 11/18, 5/18 and 2/18 shares, of which 3/18, 2/18 and 1/18 shares, totalling 1/3 share, were subject to the life interest in favour of the 2nd defendant. The life interest of the 2nd defendant arose by way of usufruct and was confined to an interest in the income of the property. It was subject to forfeiture on remarriage.

Held, that an interlocutory decree for the sale of the property, subject to the life interest in favour of the 2nd defendant in respect of 1/3 share of the soil and 1/3 share of the buildings, was in conformity with the provisions of the Partition Act, more especially of sections 25, 26, 46, 47 and 48. In such a case it cannot be contended that a sale under the Partition Ordinance must be free from all encumbrances.

APPEAL from a judgment of the Supreme Court reported in (1965) 67 N. L. R. 97.

E. F. N. Gratiaen, Q.C., with *M. P. Solomon*, for the 1st defendant, appellant.

S. Nadesan, Q.C., with *N. Chiniwasagam, Mark Fernando and L. B. Rajapakse*, for the plaintiff-respondent.

Cur. adv. vult.

January 23, 1968. [Delivered by LORD WILBERFORCE]—

This appeal from the Supreme Court of Ceylon raises the question whether, in proceedings under the Partition Act (No. 16 of 1951) the court has power, when ordering a sale of land held in co-ownership, to direct that such sale is to be subject to a life interest subsisting in an undivided part or parts of the land sold (as was held by the District Judge) or whether (as was held by the Supreme Court) such sale must be made so as to pass a title free from the life interest.

The property in question consists of land and buildings at Panchikawatte Road in the Municipality of Colombo. It is not necessary further to particularise it beyond stating that almost the whole of the land is occupied by a building called the Tower Hall Theatre. The relevance of this is that no physical partition of the property is practicable. The common interests in the property arose under the Will of one G. A. Don Hendrick Appuhamy (or Seneviratne) dated 7th April 1929 and in consequence of certain subsequent devolutions.

For the purpose of this appeal it is sufficient to set out the findings of the District Judge, which, on this matter, are not challenged. He held the parties to be entitled as follows :

“ Plaintiff (1st Respondent) to an undivided 11/18 share of which 3/18 share is subject to the life interest in favour of the 2nd Defendant (2nd Respondent).

The 1st Defendant (Appellant) to an undivided 5/18 share of which 2/18 share is subject to the life interest in favour of the 2nd Defendant (2nd Respondent).

The 3rd Defendant (3rd Respondent) to an undivided 2/18 share of which 1/18 share is subject to life interest in favour of the 2nd Defendant (2nd Respondent).

All the buildings will belong to the parties in the same proportion as their soil rights above mentioned, and the 2nd Defendant (2nd Respondent) also will be entitled to the life interest in respect of 1/3 share of soil and 1/3 share of the buildings.”

It may be material to add that the life interest of the 2nd defendant (2nd respondent) was under the terms of the Will subject to forfeiture on remarriage.

The decree then continued :

“ It is further ordered and decreed that the said land and premises be sold by Public Auction in conformity with Partition Act No. 16 of 1951 subject to the life interest in favour of the 2nd Defendant in

respect of 1/3 share of the soil and 1/3 share of the buildings, and the proceeds thereof be entitled [sic] to the parties according to their proportionate shares."

Although the 2nd defendant, who as stated was entitled to the life interest in 1/3 of the land and buildings, was duly made a party to the partition proceedings, she took no part in the present appeal which was argued between the appellant (1st defendant) on the one side and the respondent (plaintiff) on the other. No objection was raised on either side to this procedure.

The present law in Ceylon as to partition of immovable property is contained in the Partition Act (No. 16) of 1951. It is upon the construction of that Act that the issues in this appeal must be decided. It may be convenient to preface examination of the relevant sections with some observations of a general character as to the nature of the rights and interests involved in the case.

First, rights of co-ownership, under the Roman Dutch Law, are regarded as *quasi-contractual*. One of the obligations so imposed, or treated as accepted, by the co-owners is the obligation to allow a division of the property—*in communione nemo compellitur invitus detineri*. Both by the common law, and under the successive pieces of legislation which have been passed in Ceylon concerning partition, partition may be effected by agreement or by decree of a competent court. Partition, when effected by judicial decree, appears, according to the prevailing opinion, to be in the nature of an alienation by purchase, the alienees deriving their title from the decree of the court. The position under the Partition Ordinance (Cap. 56) of 1863, the legislation which preceded the Act of 1951, has been described as follows :—

"When common ownership becomes burdensome the Partition Ordinance enables it to be determined at the instance of a co-owner by the conversion of undivided shares into shares in severalty by partition, or when that is not possible by the sale of the land. Upon the issue of a certificate of sale to the purchaser under decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser and the lands cease to be held in common by the original owners." *Fernando v. Cadiravelu*¹ per Garvin J.

Thus, the conception underlying judicial proceedings for partition or sale is that of dissolving the bond of common ownership by alienation of the co-owners' shares.

It must be obvious that cases will arise where there are encumbrances affecting either the common property as a whole or individual shares and that their existence may give rise to difficulty in cases of sale. Some

recognition of this difficulty and an attempt to deal with it is to be found in the Partition Ordinance (Cap. 56) of 1863. Express provision was there made for sale, under order of the court, subject to "any mortgage or other charges or encumbrances" on the property and there were other provisions dealing with the case where there was a mortgage over an undivided share. These provisions were evidently incomplete, and in the interval between 1863 and 1951 a number of cases came before the courts where the property was subject to *fideicommissa* or trusts. These are referred to in the judgment of Tambiah J. in the Supreme Court where he expresses the opinion that such complex questions were never contemplated by the framers of the Ordinance. The Act of 1951 deals somewhat more fully with the position of encumbrances and the ultimate question for decision must be how far it has altered, or extended, the pre-existing law.

Secondly, as to the life interest of the 2nd respondent (2nd defendant). In this case the interest arises by way of usufruct and is confined to an interest in the income of the property. It is subject to forfeiture on remarriage. There is no doubt that it constitutes an encumbrance within the meaning of the Partition Act, 1951. But it is necessary to bear in mind that the Act applies generally to life interests and usufructs of any character, whether affecting the whole or a part only, and whether conferring a mere interest in income or a closer interest in the land itself. Any interpretation of the Act must take account of the varied character of these rights.

With these preliminary observations the relevant statutory provisions contained in the Partition Act 1951 may now be considered. The Act commences with a general statement of the nature and purpose of partition proceedings (section 2). These may be brought where land belongs in common to two or more owners, and may be instituted by any one or more of them for the partition or sale of the land. This follows and adopts the common law conception that partition (or sale) is a right attaching to co-ownership and that the purpose of partition proceedings is to give effect to that right.

Section 4 requires the plaintiff to specify in his plaint particulars of any right, share or interest in the land and the names of all persons claiming to be entitled thereto and section 5 requires that such persons are to be made parties to the action. Section 5 (a) (i) describes these persons as those who are entitled or claim to be entitled :

"to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, *fideicommissum*, life interest, or otherwise."

The comprehensive nature of this list is noticeable : it includes rights and interests (i) which can without difficulty be given a value in money—*e.g.*, mortgages, (ii) which could be given a value in money by an

appropriate procedure of valuation, *e.g.*, usufructs, trusts, *fideicomissa*, or life interest, though this would be a matter of some difficulty in the case of *fideicommissary* interests, or other interests subject to a contingency or (as in the present case) subject to defeasance, (iii) which could hardly be the subject of compensation at all, *e.g.*, certain servitudes essential for the dominant land, where the compensation would, in effect, be equivalent to its value (see for a description of the variety of servitudes recognised in Roman Dutch Law Lee, *An Introduction to Roman Dutch Law* 5th Ed. pp. 164 ff.).

It will be seen that the Act returns to this list in a later important section (section 48).

The Act continues with a number of procedural provisions, of which it is only necessary to mention section 18 which deals with the report to be made by the commissioned surveyor. This must state the nature and value "of the land surveyed" and the details of the computation of such value : it must also refer to the parties to the action present at the survey and the name of any person not a party who has preferred any claim and the nature of such claim. Thus, although no explicit reference is made to any encumbrances on the land, it would seem that the surveyor, whose commission is accompanied by a copy of the plaint (section 16 (2)), is assumed to be aware of their existence and nature. Sections 25 and 26 are of cardinal importance. Section 25 relates to the trial of the partition action. It requires the court to examine the title of each party, to try any issue of law and fact in regard to the right share or interest of each party to, of, or in the land, and to consider and decide which of the orders mentioned in section 26 should be made. The word "title" in this context evidently includes a title which may be subject to an encumbrance : it is, as Garvin J. said in the passage quoted above "the title declared to be in the co-owners". Section 26 requires the court, at the conclusion of the trial, to pronounce an interlocutory decree in accordance with the findings. It states (subsection (2)) that the interlocutory decree may include one or more of the following orders, namely :

- "(a) order for a partition of the land ;
- (b) order for a sale of the land in whole or in lots "

or orders . . . whether for partition or sale relating to specified portions or shares of the land.

The form of the interlocutory decree in practice is well illustrated by the decree made in the present case, the relevant portion of which has been set out above.

Much of the rival arguments submitted in the appeal has been focussed upon these sections and in particular upon the use of the words

“ the land ”. On the one side (for the respondents) it is said that the only reference here is to “ the land ” which must mean the actual physical property the subject of the suit, so that all that may be partitioned or sold, under the order of the court, is this property. No power is conferred, and none consequently exists, to sell the land subject to any encumbrance: so the inference must be that the land is to be sold free from all encumbrances.

On the other side (for the appellants) it is said that, recognition having been given by the Act to the possibility that encumbrances may exist, these must be assumed to continue unless provision is expressly made for their discharge and satisfaction. Neither does section 26 provide for their discharge nor elsewhere in the Act (except in section 50, to be referred to later) is any provision made for their satisfaction. On the contrary, such subsequent references as there are to encumbrances assume that (with certain carefully specified exceptions) they continue to affect the land. On this argument “ the land ” means simply “ the land the subject of the action ” such as it is, with all its burdens and advantages.

Their Lordships, at this stage of the argument, would be disposed to prefer the latter of these two views. The absence from section 26 of any such words as “ free from encumbrances ”, if the intention was that they should be discharged, appears to them more significant than an omission to add “ subject to encumbrances ”, if the intention was to preserve them. The reason for this is that, as has been stated, the basic object of the partition action is to sever the co-ownership, as between the co-owners, so that if the rights of other persons are to be affected, the Act might be expected so to state. To compel persons other than co-owners having encumbrances on the land or on shares in it, including owners of servitudes, owners of usufructs or life interests, or *fideicommissaries*, to accept some assessed compensation for their rights, though no doubt a possible result of legislation, amounts to a substantial interference with their rights. This should not be imposed upon them in the absence of clearly expressed provisions including adequate methods of assessing the value of their rights. Silence as to these rights appears to indicate that they are not to be affected. But the argument is not conclusive at this stage and the rest of the Act has to be considered for other indications.

The Act continues with a number of additional sections governing the manner in which partition or sale (as the case may be) is to be carried out. These contain references to “ the land ” but they do not in their Lordships’ opinion carry the argument as to the meaning of these words any further. The sections can be operated according to their terms whether “ the land ” which is ordered to be partitioned or sold is the land subject to existing encumbrances, or whether it is the land free

from encumbrances. They provide little assistance in choosing between these alternatives. The next critical provisions are contained in sections 46 and 47. It is convenient to reproduce these in full.

" 46. Upon the confirmation of the sale of the land or of any lot, the court shall enter in the record a certificate of sale in favour of the purchaser and the certificate so entered under the hand of the Judge of the court shall be conclusive evidence of the purchaser's title to the land or lot as on the date of the certificate. The court may, on the application of the purchaser, attach to the certificate a plan of the land or lot prepared at the cost of the purchaser and authenticated by the court.

47. (1) The court shall cause to be prepared by a party named by the court a schedule of distribution showing the amount which each party is entitled to withdraw out of the money deposited in court.

(2) No money shall be withdrawn from court by any party until the schedule of distribution has been approved by the court.

(3) A party entitled to compensation in respect of a plantation or a building or otherwise shall share proportionately with the other parties in any gain or loss, as the case may be, resulting from the sale of the land at a figure above or below the value determined by the court under section 38".

These sections were strongly relied upon by the respondent and indeed they formed the principal basis for the judgment of Tambiah J. in the Supreme Court. Section 46, it was said, shows that what the purchaser takes is "the land" and the effect of the section is that, when he receives the certificate of sale, he acquires an indefeasible title free from encumbrances. Section 47 is the necessary counterpart of this : it provides the mechanism by which encumbrances, from which the land is liberated, pass and attach to the proceeds of sale. This section, it was claimed (and the argument logically follows) applies to all encumbrances of whatever nature with the sole exception of the interest of a proprietor of a *nindagama* which is specially preserved by section 54.

In spite of the force which these arguments derive from their acceptance by the Supreme Court, their Lordships feel obliged to take a contrary view. In their opinion these sections are unable to support the weight placed upon them. Section 46 they cannot regard as more than a conveyancing section the purpose and effect of which is to establish the certificate of sale as a new and conclusive root of title without the necessity of any conveyance from the co-owners or any investigation of their title. Reference has already been made to the use of the words "the title" in section 25, in an open sense, meaning merely the title such as it is—free from, or subject to encumbrances : it means no more in the present context. The words "the land" here repeated, carry the matter no

further than it already stands under section 26. It is noticeable that a provision in terms very similar to section 46 appears in section 8 of the Partition Ordinance of 1863, a section which in terms provides for a sale to be made “subject to any mortgage, charge or encumbrance”. Although these latter words have been dropped, this fact alone is not sufficient reason to ascribe to similar terminology now appearing in section 46 a totally different effect, *i.e.*, to pass the land free from encumbrances.

Section 47, similarly, in their Lordships’ opinion, fails adequately to support the respondents’ argument. It provides merely for a schedule of distribution to be prepared by a party and approved by the court. If the intention was that encumbrances, of the varied character mentioned in section 5, were to be compulsorily discharged out of the proceeds of sale, it appears to their Lordships inconceivable that so scanty a mechanism should have been provided. On the one hand it can never have been intended that the amount to be paid to an encumbrancer should merely be fixed by the party presenting the schedule : on the other hand no procedure for valuation—which, as has been shown, may in some cases be complicated and controversial—is so much as indicated. The argument for the respondent extends, and necessarily must extend, to all encumbrances, whether those affecting the land as a whole, or those affecting undivided shares : and if it is right, it represents a considerable departure from the scheme of the former Ordinance, even as this was interpreted by the courts : yet this departure is founded entirely on inference. That inference their Lordships cannot draw.

There remain for consideration three sections which appear in the Act under the heading “Special Provisions Relating to Decrees”. Section 48 (1) is significant. It reads :

“ Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action ; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection ‘encumbrance’ means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a *ninagama*.
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The drafting of this subsection is not entirely clear. It refers, in the first place to the interlocutory decree entered under section 26 : this, in addition to declaring the rights of the parties, would contain an order for partition or for sale. The subsection continues with a reference to the final decree of *partition*, and to the right share or interest *awarded* to any persons, expressions in each case appropriate to partition and not to sale. The explanation of this appears to be that whereas in the case of partition, there is a decree of the court giving effect to the partition, in the case of sale this takes place upon the basis of the order contained in the interlocutory decree. The subsection, therefore, at the least, makes it clear, that, after the interlocutory decree has been made, the land is freed from all encumbrances *not specified* in it and the only question remains whether it goes on to prescribe, or whether it merely assumes, that, as regards encumbrances *specified* in the decree, the land remains, on a sale (as it clearly does on a partition), subject to these encumbrances. Their Lordships do not find it necessary to express a final opinion on these alternatives, since on either view the subsection must be taken to support the conclusion that the land is sold subject to encumbrances. To repeat an argument already used in other connections, it is difficult to understand how this subsection could have been drafted as it is if the intention were that, on a sale, the land were, *ipso facto*, to be freed from encumbrances specified in the interlocutory decree.

Next there is section 50 which deals with cases where an undivided share is subject to a mortgage or lease. Subsection (1) deals with the case of partition and, in effect, confines the mortgage or lease to the divided share allotted to the mortgagor or lessor.

Sub-section (2) is as follows :—

“ If in an interlocutory decree for sale any undivided share of the land constituting the subject-matter of the partition action in which such decree is entered is declared to be subject to a mortgage or lease, the rights of the mortgagee or of the purchaser of the mortgaged share under a mortgage decree, or of the lessee, shall be limited to the mortgagor’s or lessor’s share of the proceeds of the sale of the land.”

In their Lordships’ opinion this provision must be regarded as strong support for the argument that encumbrances generally, apart that is to say from those here dealt with, continue to attach to the land. For if the respondents’ arguments were correct, these mortgages and leases, like all other encumbrances, automatically would be transferred to the proceeds of sale by virtue of sections 26, 46 and 47 and this provision would be entirely otiose. Comparison between this section, with its reference to mortgages and leases, and section 48 (1) with its listed reference to encumbrances generally, strongly points the contrast between those encumbrances which remain attached to the land, or to shares in it, and

those which, exceptionally attach to the proceeds of sale. It may be added that the language used in subsection (2) which after mentioning the declaration contained in the interlocutory decree of sale, then continues by stating the consequences to the purchaser of the land, when compared with that used in section 48 (1), suggests that the latter subsection is intended to effect (rather than that it assumes) that other encumbrances continue to bind the land.

Thirdly there is section 51. This provides for registration of any interlocutory decree made under section 26, any final decree of partition, or any certificate of sale under section 46. The fact that an interlocutory decree, which, under sections 25 and 26, must specify encumbrances, is required to be registered, suggests, somewhat strongly, that such specified encumbrances continue to bind the land. Moreover, when the section continues by requiring registration of the certificate of sale, the natural conclusion to draw from this would be that the certificate of sale would conform with and produce the same result as the interlocutory decree itself—*i.e.*, that under it, encumbrances would be preserved. For if, as the respondent contends, the certificate of sale was intended to pass an unencumbered title, it would be expected either that an interlocutory decree providing for sale should not be registered, or that, if registered, it should be removed when, or before, registration of the certificate of sale. But the section requires the respondent to register each document as an instrument affecting the land to which it relates.

Finally section 54 contains an express reservation of the rights of a proprietor of a *nindagama*. The Supreme Court relied upon this as inconsistent with the view that the encumbrances generally should be preserved. This section however is contained in a section of the Act dealing with Special Cases and is confined to those specifically mentioned. They are not within the general category of rights or interests previously dealt with. The section therefore affords no guidance as to the intention of the general portion of the Act.

For these reasons their Lordships are of opinion that the order made by the learned District Judge was correct. They will humbly advise Her Majesty that the appeal be allowed, and the order of the District Judge restored. The 1st respondent must pay the appellant's costs of this appeal and in the Supreme Court.

1968 *Present : H. N. G. Fernando, C.J., Abeyesundere, J., and G. P. A. Silva, J.*

THE ATTORNEY-GENERAL, Applicant, and
W. K. DON SIRISENA and 2 others, Respondents

*S. C. 327/67—In the matter of an Application for Revision in
M. C. Colombo, 37693/C*

Indictable offence—Preliminary inquiry—Opinion of Magistrate that the evidence is not sufficient to put the accused on his trial—Power of Magistrate to discharge the accused—Stage at which it may be exercised—Power of Attorney-General subsequently to direct the Magistrate to commit the accused for trial—Magistrate's refusal to comply with such direction—Right of Attorney-General then to move Supreme Court in revision—Constitutional validity of Attorney-General's power to order committal of accused—“Judicial power”—Principle of Separation of Powers—Criminal Procedure Code, ss. 5, 159 to 164, 191, 337, 356, 391—Courts Ordinance, ss. 19, 37.

At the preliminary inquiry under Chapter XVI of the Criminal Procedure Code, sub-section (1) of section 162 which provides that “if the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith order him to be discharged” can apply before the stage of compliance with sections 159, 160 and 161. Sub-section (1) of section 162 will apply at the close of the prosecution case if the Magistrate at that stage considers that the evidence is not sufficient to put the accused on his trial. If an order of discharge is then made by the Magistrate for the reason stated in the sub-section, it is made in exercise of the statutory power conferred by the sub-section, and not by virtue of the inherent or other power referred to in sub-section (2) of section 162. In such a case, the Attorney-General can subsequently give directions to the Magistrate in terms of section 391 to commit the accused for trial.

At the preliminary inquiry into a case of alleged murder by shooting, the Magistrate made order on 18th February, 1967, discharging the 2nd, 3rd and 4th accused (respondents to the present application) without proceeding to read the charge to them and act under sections 159, 160 and 161 of the Criminal Procedure Code. On 8th April, 1967, the Attorney-General directed the Magistrate, in terms of section 391, to comply with the provisions of sections 159, 160 and 161. The Magistrate then complied with the sections but again made order discharging the respondents. On 18th June, 1967, the Attorney-General again returned the record to the Magistrate, this time with a direction to commit the respondents for trial before the Supreme Court. On 14th August, 1967, the Magistrate refused to comply with this direction, stating as his ground of refusal that he had made his original order of discharge under his inherent power, and that the Attorney-General was not entitled to give directions under section 391 in a case where an order of discharge is made by a Magistrate under his inherent power. The Attorney-General then made the present application to the Supreme Court for the revision of the Magistrate's order of 14th August, 1967.

The Magistrate's order of 18th February, 1967, showed that he had two main grounds for deciding to discharge the three respondents : firstly, the prosecution witnesses contradicted each other, and their evidence was to some extent contradicted by their previous statements ; secondly, the witnesses had failed or delayed to make statements incriminating the respondents.

Held, (i) that the order of discharge made on 18th February, 1967, was made by the Magistrate in exercise or purported exercise of the power conferred by section 162 (1) of the Criminal Procedure Code. Accordingly, the Attorney-General had the power to give his subsequent directions under section 391. The Magistrate's refusal to comply with those directions was unlawful.

(ii) that the Supreme Court had revisionary power to direct the Magistrate to comply with the Attorney-General's directions. The refusal by the Magistrate to comply with the Attorney-General's directions was an order within the meaning of section 356 of the Criminal Procedure Code and section 37 of the Courts Ordinance. Alternatively, the Magistrate had in substance made order holding that the Attorney-General had no power to give the directions which he did give; such an order could be reversed or corrected by the Supreme Court. Section 19 of the Courts Ordinance, read with section 5 of the Criminal Procedure Code, is wide enough to confer power of revision in relation to non-summary proceedings.

(iii) that the exercise by the Attorney-General of powers under section 391 of the Criminal Procedure Code is not an interference with the powers of a Court and, therefore, does not constitute an infringement of the principle of the Separation of Powers recognized in the Constitution of Ceylon. A Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial. Moreover, the powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of the system of Criminal Procedure in Ceylon.

A PPPLICATION to revise an order of the Magistrate's Court, Colombo.

V. S. A. Pullenayegum, Crown Counsel, with *R. Abeysuriya*, Crown Counsel, and *R. Gunatilleke*, Crown Counsel, for the Attorney-General.

G. E. Chitty, Q.C., with *A. S. Vanigasooriar* and *Nihal Jayawickrama*, for the 1st Respondent.

Colvin R. de Silva, with *Nihal Jayawickrama* and *P. Ilayperuma*, for the 2nd Respondent.

K. C. Nadarajah, with *D. T. P. Rajapakse*, for the 3rd Respondent.

Cur. adv. vult.

January 27, 1968. H. N. G. FERNANDO, C.J.—

On 26th October, 1966 proceedings were instituted in the Magistrate's Court, Colombo, against one Premasiri and the three respondents to the present application, on a charge of alleged murder by shooting. At the inquiry under Chapter XVI of the Criminal Procedure Code the learned Magistrate committed Premasiri for trial, but he made order on 18th February 1967 discharging the three respondents without proceeding

to act in respect of them under Sections 159, 160 and 161 of the Code. Thereafter on 8th April 1967 the Attorney-General in purported exercise of powers conferred by s. 391, directed the Magistrate—

- (a) to record such further evidence as may be adduced on behalf of the prosecution ;
- (b) to read the charge to the 2nd, 3rd and 4th accused and inform them that they have the right to call witnesses and if they so desire to give evidence on their own behalf ;
- (c) to comply with the provisions of sections 160 and 161 of the Criminal Procedure Code in regard to the said accused ;
- (d) to commit the said accused for trial before the Supreme Court on the said charge and to take such other and further steps as are required or authorised by law.

Subsequently, the Attorney-General directed the Magistrate to strike out paragraph (d) of his instructions, and directed him instead to "conduct and conclude the inquiry in accordance with law". On 4th June 1967, Counsel for the Crown stated in Court that he was not calling any further evidence, and it thus became unnecessary for the Magistrate to comply with paragraph (a) of the instructions. He then read the charge to the three respondents in terms of s. 159, and proceeded to comply with ss. 160 and 161 ; but thereafter he again made order discharging these respondents.

On 18th June 1967, the Attorney-General again returned the record to the Magistrate, this time with a direction to commit the respondents for trial before the Supreme Court. On 14th August 1967, the learned Magistrate refused to comply with this direction, stating as his ground of refusal that he had made his original order of discharge under inherent powers, and that the Attorney-General has no power to give directions under s. 391 in a case where an order of discharge is made under such power. The present application of the Attorney-General is for the revision by this Court of the Magistrate's order of 14th August 1967.

During the argument of learned Crown Counsel, reference was made to the judgment of a Divisional Bench in the case of *de Silva v. Jayatillake*¹, expressing the opinion that the power of discharge referred to in s. 191 of the Code is an inherent right of the Court. Having regard to the similarity of the language employed in s. 191 and in sub-section (2) of s. 162, that opinion is probably applicable to the last-mentioned section as well. We informed Counsel that for present purposes we would regard the power of discharge referred to in sub-section (2) of s. 162 as being an inherent power, and would hear argument to the contrary only if that course became unavoidable. It turns out that the present case can be decided without the need to rule on the question whether or not s. 162 (2) refers to inherent power.

The order discharging the three respondents, which the learned Magistrate made on 18th February 1967, sets out his reasons for the discharge, and in that order the three respondents are referred to respectively as the 2nd, 3rd and 4th accused. A witness, *Wijesuriya*, had testified that the 2nd, 3rd and 4th accused had been present with the 1st accused at the time of the alleged incident, that the 2nd accused had handed a gun to the 1st and instigated him to shoot at the deceased, and that the 3rd and 4th accused had been armed with clubs. Another witness, *Wickremapala*, testified that he had seen the 2nd accused handing a gun to the 1st and the latter shoot in the direction of a Co-operative Store, and that he then saw the deceased man running from the steps of the same Store crying out that he had been shot. This witness stated that he did not hear any instigation by the 2nd accused, and that he did not see the 3rd and 4th accused at the scene. The learned Magistrate was of opinion that these two witnesses “contradicted each other hopelessly”. He relied also on the fact that *Wijesuriya*, in his statement to the Police, had stated that the 3rd and 4th accused did not have anything in their hands, and on the further fact that all the prosecution witnesses had apparently failed or delayed to inform the Police of the names of the alleged assailants. The Magistrate further stated his opinion that the Police had conducted their investigations in an unorthodox and irregular manner, and had built up a false case implicating the 2nd, 3rd and 4th accused. On these and other grounds, the learned Magistrate took the view that the evidence of the principal prosecution witness was totally unworthy of credit, and reached the conclusion that “the evidence does not justify the committal of the 2nd, 3rd and 4th accused”.

Sub-section (1) of s. 162 of the Code provides that “if the Magistrate considers that *the evidence against the accused is not sufficient to put him on his trial*, the Magistrate shall forthwith order him to be discharged”; s. 163 provides that “if the Magistrate considers *the evidence sufficient to put the accused on his trial*, the Magistrate shall commit the accused for trial”. One of the main arguments urged for the respondents is that both these provisions of the Code come into operation only after an accused has been charged in terms of s. 159 and after ss. 160 and 161 have been complied with. This argument is manifestly correct in relation to s. 163, because a Magistrate can only commit for trial after ss. 160 and 161 have been followed. But, for reasons which I am about to state, sub-section (1) of s. 162 can apply before the stage of compliance with ss. 159, 160 and 161.

Section 159 quite clearly applies at the stage when the prosecution has led all its evidence and imposes a particular duty to be performed by the Magistrate at that stage. This duty is to consider whether “the case should be dealt with in accordance with the provisions of s. 162”. If the Magistrate gives an answer in the affirmative to the question which he is thus directed to consider, he must discharge the accused.

In terms then, s. 159 directs the Magistrate's attention to s. 162 at the stage when the prosecution's case is closed. Sub-section (1) of s. 162 provides for discharge if *the evidence is not sufficient to put the accused on his trial*, and the most common ground for discharges in non-summary cases is stated in this sub-section. There is literally nothing in the terms of the sub-section to exclude its application at the stage when the prosecution has led all its evidence, and no grounds of law or common-sense were urged in favour of the contrary contention. Indeed, the contention was that a discharge at this stage is referable only to sub-section (2) of s. 162, which means in effect that the Legislature, in directing the Magistrate by s. 159 to consider whether the case should be dealt with "in accordance with the provisions of s. 162", intended to refer the Magistrate only to sub-section (2) of s. 162. Moreover, if the assumption on which we are acting for present purposes be correct, namely that sub-section (2) of s. 162 refers only to an inherent power of discharge, then the contention means that the Legislature failed to provide a statutory power to discharge in the clear and eminently fit case where the prosecution evidence is insufficient to put the accused on his trial.

I must note here that learned Crown Counsel himself appeared to support this same contention. That support was apparently based on the judgment of Macdonell, C.J. in *Samsudeen v. Marikar*¹ in a case decided before the 1938 amendments of the Criminal Procedure Code. The Code formerly contained 3 provisions relating to discharges in non-summary proceedings:—1. s. 156 (2) provided that when all the prosecution evidence had been adduced, the Magistrate shall discharge the accused if the evidence does not establish a *prima facie* case of guilt; 2. s. 157 (1) provided that "when the inquiry has been concluded, the Magistrate shall discharge the accused if there are not sufficient grounds for committing the accused for trial"; and 3. s. 157 (3) was the same as the present s. 162 (2). In that context, it was perfectly clear that s. 157 (1) applied only when the whole inquiry was concluded. But the present Code has no section like the former s. 156 (2). In place of that Section and of Section 157 (1), there is the present s. 162 (1) providing for discharge when the Magistrate considers that the evidence is not sufficient. Unlike the former s. 157 (1), this present s. 162 (1) is not prefaced by the words "when the inquiry has been concluded"; the omission of these words was quite clearly intentional, and its only apparent purpose was to provide that the statutory power or duty to discharge is to be exercised when the evidence is considered insufficient, whether at the stage when the prosecution evidence has been led or at the later stage after the accused has made his statement and/or led evidence.

The contention that the operation of sub-section (1) of s. 162 must be restricted to a case in which a non-summary inquiry has been concluded, although propounded on behalf of the respondents in this case, is clearly unfavourable to accused persons; it means that although a

Magistrate may consider the evidence to be insufficient at the close of the prosecution case, he has no statutory power to make the obvious order of discharge, which the operation of the presumption of innocence demands in such a situation.

The contention also involves the proposition that s. 164, which refers to "a conflict of evidence", only applies in a case where evidence has been led on behalf of an accused, and not also where (as stated in the order of the Magistrate in the instant case) a conflict is thought to arise upon the evidence led for the prosecution. But the language of s. 164 does not admit of a construction so unfavourable to accused persons. This Section permits a Magistrate to rely on evidence "*in favour of the accused*" in case of a conflict, and is not in terms limited to a contradiction between prosecution evidence on the one hand, and defence evidence or evidence *on behalf of* the accused on the other.

Let me take a charge of stabbing, in which a witness called by the prosecution gives evidence that he saw the complainant being stabbed, not by the accused, but by some other person. Surely such evidence is "evidence in favour of the accused" which contradicts other prosecution testimony on a material point. Hence s. 164 will permit the Magistrate on this ground to consider that the evidence is not "sufficient to put the accused on trial". If such is the opinion of the Magistrate when the prosecution case is closed, it would be absurd that he cannot give effect to his opinion at that stage and must instead defer the making of an order of discharge.

Section 164 echoes the language of s. 162 (1) in using the words "consider the evidence sufficient to put the accused on his trial". When, therefore, there is a conflict of testimony on material points, whether on the prosecution evidence alone, or else between that evidence and evidence for the defence, the discretion to discharge is statutory (s. 164) and the power to make the order of discharge is also statutory (s. 162 (1)).

For these reasons, I would hold that sub-section (1) of s. 162 will apply at the close of the prosecution case if the Magistrate at that stage considers the evidence not sufficient to put the accused on his trial. If an order of discharge is then made for the reason stated in the sub-section, it is made in exercise of the statutory power conferred by the sub-section, and not by virtue of the inherent or other power referred to in sub-section (2) of s. 162.

The summary which I have earlier made of the learned Magistrate's order of 18th February 1967 shows that he had two main grounds for deciding to discharge the three respondents: *firstly* the prosecution witnesses contradicted each other, and their evidence was to some extent contradicted by their previous statements; *secondly*, the witnesses had failed or delayed to make statements incriminating the respondents. The first ground is that which is expressly stated in s. 164, and I have already shown that a discharge on that ground is one made in exercise of the statutory power conferred by s. 162 (1). I do not propose to

consider whether it is lawful for a Magistrate to take any account of the second ground ; but even if a discharge on that ground is lawful, I hold that the power to make the order of discharge is again that conferred by sub-section (1) of s. 162. Where, as in such a case, the Magistrate's opinion is based on a consideration of the evidence and on the probability that a Jury would not believe it, the reason for the order of discharge (if lawful) would be that the evidence is insufficient. I am quite unable to accept the submission that, if the Legislature did intend to permit a discharge for such a reason, it left the validity of the discharge to rest on inherent power.

I accordingly hold that in law, the only power which the Magistrate had to make his order of 18th February 1967 was the power conferred by sub-section (1) of s. 162. Indeed a reading of the order itself leaves no room for doubt that the learned Magistrate had in mind the provisions of that sub-section and of s. 164. Even in the order of 4th June 1967, the learned Magistrate stated : "I have already held that *there is no prima facie case* made out against the 2nd, 3rd and 4th accused ". Although this is not the precise language of s. 162 (1), it conveys much the same idea : if the evidence is not sufficient, then there is no *prima facie case*. At the end of the order of 4th June, the Magistrate stated his "considered view that *the evidence is not sufficient to warrant a committal*" ; here he actually employed the language of s. 162 (1) with only an immaterial variation. It is only in the last order, that of 14th August 1967, that the Magistrate claims to have made the first order of discharge under inherent power referred to in sub-section (2) of s. 162. I regret that, in the face of the reasons stated in the two earlier orders, I have to declare that claim to be untenable.

In the result, I hold that the first order of discharge was in exercise or purported exercise of the power conferred by s. 162 (1). Accordingly the Attorney-General clearly had the power to give his subsequent directions under s. 391. It was not and could not be argued that a Magistrate may in any circumstances refuse to comply with such directions, and I must hold that the Magistrate's refusal so to comply was unlawful.

Even on the basis that the directions of the Attorney-General in this case were in due exercise of the powers conferred by s. 391 of the Code, Counsel for the respondents contended that this Court has no power, in the present application, to direct the Magistrate to comply with the Attorney-General's directions in this case.

It was argued that the powers of this Court in revision are not exercisable in the present case because there is not within the meaning of s. 356 of the Code *any sentence or order* which may now be examined by this Court. The Magistrate (it was submitted) was directed to make an order of committal ; but he made no such order, and therefore there does not exist any order which we may now reverse or correct under s. 37 of the Courts Ordinance. A simple answer to this argument, it seems to me,

is that in law the Magistrate in this case has made an order refusing to make the order of committal which the Attorney-General directed him to make, and that such an order of refusal is an order within the meaning of s. 356 of the Code and s. 37 of the Courts Ordinance. Alternatively, the Magistrate has in substance made order holding that the Attorney-General had no power to give the directions which he did give, and that is an order which this Court can reverse or correct.

Counsel for the 1st respondent drew an analogy between the omission or refusal of a Magistrate to comply with directions under s. 391 and a refusal to issue process. He urged that if the cases are analogous, then in each case the only remedy open to the Attorney-General would be by way of mandamus. The unsoundness of this argument is demonstrated by s. 337 of the Code; although the section provides that a Mandamus shall lie to compel a Court to issue process, it expressly contemplates that an appeal will also lie against a refusal of process, though only at the instance or with the sanction of the Attorney-General. If, therefore, the cases are in truth analogous, s. 337 might even afford ground for the contention that the Attorney-General had a right of appeal in the present case.

It was also argued that s. 356 is limited to cases already tried or pending trial, and that proceedings under Chapter XVI of the Code do not involve the trial of any case. This same submission was rejected in *Attorney-General v. Kanagaratnam*¹, following previous decisions, and I am in agreement with the judgment in the cited case holding that s. 19 of the Courts Ordinance, read with s. 5 of the Criminal Procedure Code, are wide enough to confer powers of revision in relation to non-summary proceedings.

There was also a further argument of a nature which in my opinion is being adduced in our Courts far too frequently. Relying on recent decisions holding that the principle of the Separation of Powers is recognised in the Constitution of Ceylon, it was argued that an order of discharge in non-summary proceedings is a judicial order, and that the purported exercise by the Attorney-General of powers under s. 391 is an interference with the powers of a Court and is therefore illegal. Counsel for the 1st respondent emphatically urged that the order of a Magistrate, to commit an accused for trial or else to discharge him, "satisfied every test" requisite for holding it to be a judicial order. The fallacy of this argument is exposed in the judgment of Griffith, C.J. in *Appleton v. Moorehead*², which has been recognised by many Courts in other Commonwealth countries as being the most acceptable explanation of the words "judicial power".

The learned Chief Justice gave to the words "judicial power" the meaning "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property". Decisions in other jurisdictions, including Ceylon, have in adopting the dictum of Griffith, C.J., laid down as an essential feature of the exercise of judicial power the requisite that there must be a determination of rights as between citizen and citizen, or citizen and the State. In the case of an order committing a person for trial before a Court or discharging him from liability to trial, there is no determination of any right of a citizen or of the State.

Any order may of course be called a "judicial order", if and on the ground that it is made by a Judge; but it does not follow that therefore the order is made in the exercise of the judicial power of the State. The Magistrate conducting an inquiry under Chapter XVI of the Code makes no determination whether or not the accused person has committed an offence; all that he decides is whether or not the evidence is sufficient to put the accused on his trial. Nor do I see anything in the argument that, because a committal for trial may be followed by a remand, the committal thus interferes with the accused person's right to liberty and is therefore the exercise of judicial power. A committal need not in law be followed by a remand, and even when it is, the committing Magistrate, does not in his capacity as such, make any determination as to whether or not the accused person is to be deprived of his liberty. Purely administrative orders are daily made which deprive citizens of their rights, while not at the same time determining or deciding any controversy as to such rights. A common and simple example is the case of an order for the compulsory acquisition of land or movable property whether with or without the payment of compensation.

The judgment of Griffith, C.J. in itself deals at some length with the nature of the power of Magistrates to commit for trial or discharge in pre-trial proceedings. I see no reason whatsoever to disagree with the grounds stated in that judgment for the conclusion that a Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial.

There is also I think another answer to the argument invoking the doctrine of the Separation of Powers in this case. Our law has, since 1883 if not earlier, conferred on the Attorney-General in Ceylon powers, directly to bring an alleged offender to trial before a Court, to direct a

Magistrate who has discharged an alleged offender to commit him for trial, and to direct a Magistrate to discharge an offender whom he has committed for trial. These powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers. This Court has, upon similar considerations, upheld the validity of Statutes conferring criminal jurisdiction on Courts Martial and conferring on revenue authorities the power to impose penalties for the breach of revenue restrictions.

I should add lastly that the instant case appears to have taken the turn it did, only because of some idea in the mind of the learned Magistrate that the Attorney-General was attempting improperly to interfere with judicial proceedings, and that the directions given by the Attorney-General were a reflection on the correctness of views formed by the Magistrate on the evidence in this case. It is well to remember that, just as much as Chapter XVI of the Code confers a certain measure of discretion on a Magistrate before whom non-summary proceedings are taken, other provisions of the Code equally confer on the Attorney-General a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter XVI will terminate in a manner determined in the exercise of that discretion. Indeed, the arguments of Counsel who appeared in this case for the respondents actually involved the alarming proposition (which I am certain none of them would concede in a different situation) that the Attorney-General may not lawfully direct the discharge of a person whom a Magistrate commits for trial.

For these reasons, I would, in exercise of the powers of revision of this Court, set aside the order of discharge made by the Magistrate on 14th August 1967, and remit the record to the Magistrate's Court for compliance by that Court with the direction given by the Attorney-General on 18th June 1967 to commit the three respondents for trial before the Supreme Court on the charge specified in that direction and to take further steps according to law.

ABEYESUNDERE, J.—I agree.

SILVA, J.—I agree.

1963

Present : Tambiah, J.

PABILIS, Appellant, and N. SIVANDIYEN, Respondent

S. C. 197/63—M.C. Badulla, 33521

Criminal procedure—Withdrawal of plea of guilt—Circumstances when it is permissible—Criminal Procedure Code, s. 188.

A plea of guilt may be withdrawn by the accused person at any time before an order of conviction has been made.

APPEAL from an order of the Magistrate's Court, Badulla.

M. Kanagaratnam, for the Accused-Appellant.

Nimal Senanayake, for the Complainant-Respondent.

July 24, 1963. TAMBIAH, J.—

The accused in this case was charged with having committed house trespass by remaining in a line room in the occupation of the complainant, Sivandiyen.

On 23.2.62 the accused withdrew his former plea of not guilty, tendered on 22.12.61, and stated that he was guilty. He also undertook to leave the estate on or before 30th April, 1962. Further it is recorded that this undertaking is without prejudice to the right of the accused in any other legal proceeding.

The complainant also agreed and undertook not to plead, canvass or put in issue the undertaking in any other judicial proceeding or before the Labour Tribunal. The complainant also undertook to reinstate the accused if an award favourable to the accused was made by the Labour Tribunal.

It may be noted that no plea of guilt was entered by the learned Magistrate as required by Section 188 of the Criminal Procedure Code. The case was called on 30.4.62 and on that day Mr. Devarajan, who appeared for the accused, stated that the accused wanted to withdraw his former plea of guilt and plead not guilty. The learned Magistrate then postponed the case and subsequently on 14.5.62 he refused to allow the accused to withdraw his earlier plea of guilt. The learned Magistrate then sentenced the accused to two weeks' rigorous imprisonment. From this order the accused has appealed.

Mr. Senanayake brings to my notice that there are also some revision papers filed. The journal entry under the date 15.5.62 bears out his statement.

I do not think it necessary in this case to file formal revision papers. In my view an error in law has been committed by the learned Magistrate and the proper way to bring this matter before this Court is by way of appeal. There are several rulings of this Court which lay down the principle that an accused person can withdraw his plea of guilt before an order of conviction has been made. Where an accused person withdraws his plea of guilt before an order of conviction is made the case against the accused should proceed as if the admission has never been made. (*Vide Leembrugen v. Pitchaipillai*¹, *Fernando v. Costa*² and *Roosemalacocq v. Sally*³.)

Mr. Nimal Senanayake contended that this case comes within the ruling of *John v. Charles Silva*⁴. But that is a case where the accused pleaded guilty and after the plea was recorded it was postponed for the passing of sentence. When the case was postponed for the passing of sentence the learned Magistrate had accepted the plea of guilt tendered by the accused. Therefore the case of *John v. Charles Silva* is clearly distinguishable from the present case.

In the instant case no plea of guilt, either expressly or impliedly, has been entered by the learned Magistrate before the accused wanted to withdraw his plea of guilt. Therefore, in my view, the learned Magistrate should have recorded the plea of not guilty tendered by the accused and proceeded to trial.

For these reasons I set aside the order of the learned Magistrate convicting the accused and the sentence of two weeks' rigorous imprisonment. I remit the case back for trial in due course.

Order set aside.

1966 *Present : Sansoni, C.J., and Sri Skanda Rajah, J.*

INDRASUMANA THERO, Appellant, and KALAPUGAMA UPALI, Respondent

S. C. 96/1964—D. C. Panadura, 750

Buddhist ecclesiastical law—Pudgalika property of a bhikkhu—Scope of temple's right to it after bhikkhu's death—Buddhist Temporalities Ordinance, ss. 20, 23.

Section 23 of the Buddhist Temporalities Ordinance reads as follows :—

“ 23. All pudgalika property that is acquired by any individual bhikkhu for his exclusive personal use, shall, if not alienated by such bhikkhu during his life-time, be deemed to be the property of the temple to which such bhikkhu belonged unless such property had been inherited by such bhikkhu.”

Held, that leaving a Last Will is not an alienation contemplated by Section 23.

¹ (1940) 17 C. L. W. 49. Digitized by Noolaham Foundation.

² (1918) 5 C. W. R. 224. noolaham.org | avananaham.org

³ (1935) 37 N. L. R. 139.

⁴ (1952) 54 N. L. R. 20.

APPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *S. S. Basnayake* and *R. C. Gooneratne*, for Petitioner-Appellant.

No appearance for the Respondent.

September 3, 1966. SANSONI, C.J.—

The petitioner-appellant who is the Controlling Viharadhipathy of the Paramavisuddaranaya temple, Gangula, Panadura, applied for an order of payment in his favour for a sum of nearly Rs. 38,000 which was deposited in two Banks.

That money was the pudgalika property of one Rambukewela Seelananda Thero, the former Viharadhipathy of that temple. Under Section 23 of the Buddhist Temporalities Ordinance, the money not having been alienated by the deceased in his lifetime, became the property of the temple. Although he has left a Last Will that is not an alienation contemplated by Section 23.

Under Section 20 the money vests in the petitioner and he is entitled to withdraw it.

The order of the District Judge is set aside, and we direct that the money be paid out to the petitioner.

SRI SKANDA RAJAH, J.—I agree.

Order set aside.

1968 *Present : H. N. G. Fernando, C.J., and Abeyesundere, J.*

E. COATES & CO. LTD., Appellant, and *A. F. JONES & CO. LTD.*, Respondent

S. C. 173 (Inty.)/66—D. C. Galle, 3447/M

Conciliation Boards—Scope of their functions—Conciliation Boards Act, No. 10 of 1958, ss. 2, 6, 14.

The Conciliation Boards Act, No. 10 of 1958, does not apply to an action upon a contract which was made in an area prior to the date when it became a Conciliation Board area and in respect of which the dispute between the parties also arose prior to that date.

APPEAL from an order of the District Court, Galle.

C. Ranganathan, Q.C., with *Ananda Paranavitane*, for the Defendant-Appellant.

H. W. Jayewardene, Q.C., with *Nimal Senanayake*, *Bala Nadarajah* and *Mark Fernando*, for the Plaintiff-Respondent.

February 11, 1968. H. N. G. FERNANDO, C.J.—

This is an action upon a contract which was made after the enactment of the Conciliation Boards Act No. 10 of 1958, but before the Wards of the Municipality of Galle were declared by order under Section 2 of that Act to be a Conciliation Board area. It appears that the dispute between the parties also arose before that order was made.

The point taken by the defence was that Section 14 of the Act applies in relation to the present action. That section only applies to a dispute referred to in Section 6 of the Act. Section 6 of the Act *prima facie* applies only to disputes arising after a particular area becomes a Conciliation Board Area, and paragraph (c) of that Section appears *prima facie* to apply to disputes in respect of contracts made in an area after it becomes a Conciliation Board Area. We hold therefore that since the contract in the present case was made before the Galle Municipality Area became a Conciliation Board Area and since the dispute also arose before that time, the provisions of Section 6 do not apply in this case. Accordingly Section 14 also does not apply.

The learned District Judge has held that the Conciliation Boards Act No. 10 of 1958 is *ultra vires* of the powers of Parliament. But in view of the opinion we have formed that the Act does not apply in regard to the present action, it is unnecessary to decide the constitutional question as to the validity of the Act, and the judgment of the learned District Judge must not be regarded as having decided it.

The appeal is dismissed with costs, and the case will go back to the District Court for trial on the remaining issues.

ABEYESUNDEE, J.—I agree.

Appeal dismissed.

1968

*Present : H. N. G. Fernando, C.J., Tambiah, J.,
and Siva Supramaniam, J.*

**Mrs. M. NAVARATNAM, Appellant, and S. H. SOMAWATHIE
SIRIWARDENA and 2 others, Respondents**

S. C. 170/64—D. C. Anuradhapura, 6070/MB

Partition action—Erroneous interlocutory and final decrees—Power of Court to amend them subsequently—Finding in judgment that a share is subject to a mortgage—Omission to reserve in the interlocutory and final decrees the rights of the mortgagee—Sale of the share prior to amendment of the decrees—Effect—Scope of final and conclusive effect of interlocutory and final decrees—Civil Procedure Code, ss. 5, 187, 188, 189—Partition Act (Cap. 69), ss. 6 to 9, 26, 36, 48 (1), 48 (3), 51, 79.

Held by TAMBIAH, J., and SIVA SUPRAMANIAM, J. (H. N. G. FERNANDO, C.J., dissenting) :—Where, in an action governed by the Partition Act, the decree which the Court purports to enter under s. 26 of the Act is not in accordance with the findings in the judgment, such decree is not an interlocutory decree which has a final and conclusive effect under s. 48 (1). If the interlocutory decree is not such a decree as the Judge is empowered to sign under s. 26, the final decree for partition entered in pursuance of that decree is also not a valid “final decree under s. 36” having the final and conclusive effect under s. 48. In such a case the Court has the power, by virtue of the provisions of s. 189 of the Civil Procedure Code read with s. 79 of the Partition Act, to amend on a subsequent date the erroneous interlocutory and final decrees so as to bring them into conformity with the findings in the judgment, even though a divided share as described erroneously in the unamended decrees has already been sold and the purchaser’s rights under the sale would be adversely affected by the subsequent amendment of the decrees.

In partition action No. 4417 the trial Judge found in his judgment that an undivided one-half share of the corpus was subject to a mortgage bond executed on 30th November 1954. Nevertheless the rights of the mortgagee, who was a party to the action, were not reserved either in the interlocutory decree or in the final decree entered on 11th October 1956 and 11th September 1958 respectively. Both decrees were registered. Thereafter, the person who was allotted the mortgaged share sold it “free from any encumbrance” on 24th June 1960. On 14th October 1960, upon the joint consent motion of the parties’ Proctors seeking amendment of the decrees, the Court brought the decrees into conformity with the finding in the judgment by declaring that the divided share that had been allotted in lieu of the mortgaged undivided half-share was subject to the mortgage. The present action was subsequently brought by the mortgagee to enforce her rights on the mortgage.

Held (H. N. G. FERNANDO, C.J., dissenting), that the interlocutory decree and the final decree that were originally entered on 11th October 1956 and 11th September 1958 respectively did not have the final and conclusive effect contemplated in s. 48 of the Partition Act, and the Court had the power, under s. 189 of the Civil Procedure Code, to effect the amendments made subsequently on 14th October 1960. Accordingly, the divided share which had been sold on 24th June 1960 “free from any encumbrance” was subject to the mortgage executed in favour of the present plaintiff on 30th November 1954. The plaintiff was, therefore, entitled to a hypothecary decree.

APPEAL from a judgment of the District Court, Anuradhapura. This case was referred to a Bench of three Judges in terms of section 38 of the Courts Ordinance, owing to a difference of opinion between the two Judges before whom it was previously argued.

C. Thiagalingam, Q.C., with *T. Parathalingam*, for the 3rd Defendant-Appellant.

H. W. Jayewardene, Q.C., with *E. S. Amerasinghe* and *C. A. Amerasinghe*, for the Plaintiff-Respondent.

Cur. adv. vult.

February 18, 1968. H. N. G. FERNANDO, C.J.—

I regret that I am unable to agree with the conclusion of law which my brothers have reached in this appeal. That conclusion, it seems to me, is based on a literal construction of s. 189 of the Code, and fails to take account of the intention of the Legislature expressed in that section and in the relevant provisions of the Partition Act.

Section 189 empowers a Court—

- (a) to correct any clerical or arithmetical mistake in a judgment;
- (b) to correct any error arising from an accidental slip or omission in a judgment;
- (c) to make any amendment necessary to bring a decree into conformity with a judgment.

In each of these cases, there will have been a fault on the part of the Court resulting in prejudice to a party, and justice demands that the Court corrects its wrongful act. Nevertheless I cannot agree that s. 189 casts on the Court a peremptory duty to make the correction. Such a peremptory duty would arise only if the section provided that the Court *shall* make the correction or amendment. Instead the section has only the word "may" which (save in exceptional cases) is merely empowering and not compelling. The fact that the Court is not bound to exercise the power to correct or amend its own errors is brought out in the dictum of Lord Watson on which my brother Tambiah relies:— "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". The words which I have italicized constitute in my opinion a just and necessary limitation of the power of correction.

It is not difficult to envisage cases in which it would be inexpedient or inequitable for a Court to amend a decree. Let me mention some examples:

(a) The judgment in a divorce action brought by a wife provides for a divorcee and for alimony of Rs. 200 per month. But by a typing error the decree orders the payment of Rs. 400 per month. The parties do not notice the error, and the amount of Rs. 400 per month is regularly paid for 2 years and received in good faith by the wife, and she spends the full amount for her maintenance. After two years, the former husband applies to the Court for amendment of the decree. If the usual amendment is made, that is, to take effect from the date of the original decree, the consequence will be that the former wife must either repay the Rs. 4,800 which was over-paid, or else set off the alimony for the next two years against the amount due from her. Re-payment is not possible, because the wife has no other property or income ; and if there is to be a set-off, then the wife will have nothing with which to maintain herself for the next two years. Surely, in such circumstances, it would be neither expedient nor equitable to amend the decree, except perhaps prospectively.

(b) A guardian files action for personal injuries, such as the loss of a limb, sustained by a minor. The judgment awards Rs. 3,000 as damages, but by error the decree orders payment of Rs. 5,000 as damages. Rs. 5,000 is paid by the defendant, and is received in good faith by the guardian, who expends it for the medical treatment and education of the minor. The error is noticed after three years when the minor has still not attained majority. Will it be expedient or equitable for the Court now to amend the decree, with the consequence that the minor will become a debtor in a sum of Rs. 2,000 ?

(c) In a partition action, to which only two co-owners having equal shares are parties, the judgment allots Lot A to the Plaintiff and Lot B to the Defendant. But by error, the decree allots Lot B to the Plaintiff, and *vice versa*. Lot B, which has on it a house which is subject to Rent Control, is advertised To Let, and a prospective tenant is advised by his lawyer, on the faith of the decree as registered, to take Lot B on rent. If the error in the decree is noticed two years later, is the Court to make an amendment of the decree, with the consequence that the tenant becomes a trespasser on Lot B ? (I must add that there has been at least one error of the exact nature mentioned in the first part of this paragraph. It was corrected in Revision in an Application which I myself decided, but unfortunately I am not able to cite the reference to the Application.)

(d) A claims a right of cart-way by necessity over B's land on a route marked X-X¹ shown in a Plan P1 filed with the plaint. B answers that a different route, marked Y-Y¹ on a fresh plan, is more convenient and less injurious to his land. The judgment upholds B's contention, but the decree by error declares A entitled to a cart-way "over the route X-X¹ as shown in the Plaintiff's Plan P1 ". The decree is duly registered, and A commences to use the route X-X¹. Soon thereafter, B sells his land to C, who erects a building on the land,

part of which building covers the route Y—Y¹. If A subsequently discovers the error in the decree, is the Court bound at A's instance to amend the decree and thus compel C to demolish his building?

Having regard to general considerations of equity and expediency, I am satisfied that the power conferred by s. 189 of the Code is purely discretionary, and that a Court is not bound to correct every error which might occur in its decrees. I must note also that in the present case we are concerned only with the third limb of s. 189, namely, the correction of a decree in order to bring it into conformity with the judgment. Consideration of relevant provisions of the Partition Act leads me to the conclusion that, in the case of Partition Decrees, the discretion to amend must be exercised with special caution.

Sections 6 to 8 of the Act impose on the Court the duty to cause the *lis pendens* of a partition action to be registered, and s. 9 requires a declaration from a proctor certifying to his inspection of the appropriate registers and containing a statement of the names of all persons found on such inspection to have interests or claims affecting the land. It is only after these requirements are observed that the Court can order the issue of summons. In this way the Legislature has done all that is possible to ensure that a partition action will not proceed to trial unless all persons having interests in the land have notice of it through the Court.

At this stage s. 67 comes into operation. By virtue of that section, the registration of the *lis pendens* becomes a warning to third parties that the law prohibits any dealings in the land prior to the final determination of the Partition action. Even dealings in the interests to be ultimately allotted in the Partition decree take effect only when the decree is entered (*Karunaratne v. Perera*¹). But once the decree is entered, all these restrictions cease to operate, and it is significant that they so cease in consequence of an act of the Court. For again, s. 51 requires the Court to transmit a copy of the decree for registration. Where, as in the present case, the final decree is thus registered *at the instance of the Court*, the public has notice through the register of the termination of the action and of the interests allotted in a decree having the final and conclusive effect specified in s. 48.

The only qualifications of this final and conclusive effect of the decree are those specified in sub-section (3) of s. 48, namely that the Court had no jurisdiction and that the action had not been duly registered as a *lis pendens*. Hence a notary who examines title flowing from a partition decree will have a duty to investigate these two matters, both of which should involve only a consideration of matters recorded in the registers. But I do not agree that a notary (except *ex abundanti cautela*) need inspect the record of a partition action to search for defects in procedure, if any; for s. 48 does not provide that any such defects can qualify the final and conclusive effect conferred on a decree.

It cannot be denied that the power conferred by s. 189 of the Code to amend a decree conflicts with the provision in s. 48 of the Partition Act which renders a partition decree final and conclusive. Where such a conflict exists and it cannot be resolved otherwise, then the principle that the later statute prevails over the earlier must apply. But it is not necessary to go so far as to hold that s. 189 will not apply in the case of partition decrees. The language of Lord Watson, which I have already cited, propounds a test which will enable a Court to have regard to s. 48 in deciding whether or not to exercise its powers under s. 189 in the case of a partition decree. By causing a partition decree to be registered, a Court in my opinion "holds out" to the public that the decree has been entered and that it has the final and conclusive effect provided in s. 48. And if, on the faith of the registration of such a decree, a third party acquires an interest in a land or share allotted by the decree, then it will not be expedient or equitable to amend the decree in such manner as will deprive the third party of that interest.

In my opinion, therefore, the powers conferred by s. 189 cannot be exercised to amend a partition decree unless the Court first ascertains whether or not interests allotted by the decree have been acquired by third parties under duly registered instruments. If interests have been so acquired, the question whether an amendment of the decree is expedient and equitable will obviously arise for consideration by the Court, and it seems to me that ordinarily a Court will not in such a case allow an amendment which will defeat such interests.

The learned District Judge who tried the present case reached a finding of fact that the 3rd defendant purchased the land which is the subject of this case with knowledge that there had been a prior mortgage to the present plaintiff, and that the mortgage was not specified in the earlier partition decree through an omission on the part of the judge who entered that decree. It is not now necessary for me to state any agreement or disagreement with this finding, because in my opinion such a finding was not relevant to the decision of the present case. If the matter of the knowledge, or else of the ignorance, of the 3rd defendant concerning the error or omission in the partition decree was relevant at all, it was a matter which should have been decided by the Judge who entertained the application to amend the partition decree. The illegality which I hold took place, namely, that that Judge amended the decree without taking proper and simple steps to ascertain whether the amendment would be expedient and equitable, cannot in my opinion be cured by a finding as to knowledge reached many years later by a different Judge in a different action.

My brother Tambiah's observations in this case include the following statement concerning the provisions of ss. 26 and 48 of the Partition Act :—

" It is only a decree which is contemplated by s. 26 of the Partition Act which is given the final and conclusive effect under s. 48 of the Act. It is not any type of decree which does not reflect the findings of the

Judge which is given the final and conclusive effect. When a peremptory duty is cast on the Court, to enter a decree which is in accordance with the findings of the Judge, it will be a monstrous proposition to state that when a Judge does not follow the peremptory provisions of the law and enters any type of decree, final and conclusive effect is given to such a decree."

With much respect, my own opinion does not substantially differ from that expressed by my brother. I seek only to qualify his statement by introducing the two words "without exception" after the word "given" in the last line of that statement. Section 189 of the Code provides for what I trust is the exceptional situation in which a Judge signs a decree which is not in accordance with the findings in his judgment. And I do agree that if such an exceptional situation does arise in a partition action, s. 189 can be utilised by the Court to correct its own error. At the same time, although I have just referred to the Court's "own error", the parties to an action must take the blame at least equally with the Court for such errors, and particularly for that which occurred in this case, namely, that the decree did not specify the mortgage in favour of the present plaintiff. I must decline to be blind to the inveterate practice of our Courts, whereby in fact decrees are prepared by parties, and not by the Court. Having regard to that practice, the present plaintiff's proctor was very much to blame for his neglect to ensure that the decree which was submitted for signature in the Partition action did not specify her mortgage, and for the consequence that a defective decree was subsequently registered at the instance of the Court. That neglect on the proctor's part was in the circumstances the prime cause of the Court's error, and we unfortunately are not unfamiliar with situations in which clients have to suffer for the neglect on the part of their proctors. If in such circumstances, the Court signs an erroneous decree and causes it to be registered, and if a third party acquires rights on the faith of the decree as registered, it is not in my opinion "monstrous" for the Court to decline to exercise its powers under s. 189 of the Code. On the contrary, it seems to me quite clearly "monstrous" that a Court should be bound by s. 189 (which I repeat is an empowering and not a compelling provision) to amend errors in decrees which have misled third parties into transactions such as those I have envisaged in the examples lettered (c) and (d) in an earlier part of this judgment. In the case of a partition decree, there is the additional consideration that third parties may act on the faith of a decree required by law to be registered at the instance of the Court.

I must lastly express my fear that the majority decision in this appeal might be relied on in future even in situations different from that which arise in the present case. The decision, it seems to me, has been much influenced by the opinion that the third defendant's proctor should have looked into the record of the earlier partition action, and that such a search by him would have revealed the error in the decree. But the question whether a decree is in conformity with a judgment of a Judge

may not always be readily capable of solution ; a notary applying reasonable skill and judgment may advise his client that a proper decree has been entered, and the client may yet have to suffer if another Judge is satisfied, after having the advantage of learned debate, that there has been some lack of conformity between the judgment and the decree. Furthermore, a decision that there is a duty to compare a partition decree with the judgment can well be relied on for the contention that there is a duty also to examine various other matters, including the correctness of the record of the action. I myself doubt very much whether the Legislature contemplated that such considerations can afford grounds for denying to partition decrees the final and conclusive effect so clearly conferred on such decrees by s. 48 of the Partition Act.

For these reasons I would hold that the partition decree was not lawfully amended and that the amendment was null and void. In the result I would allow this appeal and dismiss, with costs in both Courts, the plaintiff's action for a hypothecary decree in respect of the land of the third defendant.

TAMBIAH, J.—

I agree with the reasons set out by my brother Siva Supramaniam, J. It is common ground that the unamended decree did not preserve the mortgage and is not in accordance with the judgment of the learned District Judge who decided the case. Counsel for the appellant contended that once the interlocutory decree is entered, although it may not be in accordance with the findings of the Judge, when it is followed up by the final decree, both the decrees are final and conclusive in view of the provisions of section 48 of the Partition Act. He further urged that although a Judge is given the power to amend an interlocutory decree, once the final decree is entered and the decree is sent up for registration by the Judge under the provisions of the Partition Act (Cap. 69) and is registered, he has no more power to amend the decrees however erroneous they may be. There is nothing in the Partition Act (Cap. 69) to support the propositions advanced by the learned Counsel for the appellant. No where in this Act is it stated that once the decree is registered the Court has no power to amend a decree which is not in conformity with the judgment.

Section 189 of the Civil Procedure Code (Cap. 101), in its unamended form, empowers a judge to correct clerical or arithmetical errors in entering up a decree. But later by Ordinance 36 of 1936, the Court was also empowered to correct any accidental slip or omission in the decree so as to bring it into conformity with the judgment. The powers conferred on a court by section 189 of the Civil Procedure Code to bring the decree into conformity with the judgment are co-extensive with the powers vested in the English Courts by virtue of Order 28 Rule 11 of the Rules of the Supreme Court to correct decrees. Commenting on the English

provisions Lord Watson said : (vide *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." Under our procedure, the court could correct any decree to bring it into conformity with the judgment at any time, subject to the limitations set out in the dictum of Lord Watson (vide *Thambipillai v. Muttukumaraswamy*²).

The Partition Act (Cap. 69) has a specific provision governing interlocutory decrees. It enacts : " At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court *shall pronounce the judgment* in open court and the judgment shall be dated and signed by the Judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the court shall enter an interlocutory decree *in accordance with the findings in the judgment*, and such decree shall be signed by the Judge." (vide section 26 (1) of Cap. 69) A peremptory duty is cast on the Court to enter only a decree which is *in accordance with the findings in the judgment*. It will be illegal for a Judge to enter any other type of decree. It is only a decree which is contemplated by section 26 of the Partition Act which is given the final and conclusive effect under section 48 of the Act. It is not any type of decree which does not reflect the findings of the Judge which is given the final and conclusive effect. When a peremptory duty is cast on the Court, to enter a decree which is in accordance with the findings of the Judge, it will be a monstrous proposition to state that when a Judge does not follow the peremptory provisions of the law and enters any type of decree, final and conclusive effect is given to such a decree.

In this case the learned District Judge made order in his judgment stating that the decree will be entered accordingly. By that he meant, in accordance with the evidence which showed that the mortgage is preserved. It will be a travesty of justice if the plaintiff is denied the right to bring this action on the mortgage bond because the Judge, on whom the duty is cast by law, has failed to follow the provisions of section 26 of the Partition Act. In view of the far-reaching effect of section 48 of the Partition Act which gives finality to a decree entered under section 26, it became necessary for the Legislature to limit the finality and conclusive effect only to decrees which are entered in accordance with the findings of the judgment as set out in section 26 of the Act.

Mr. Thiagalingam urged that once a court sends a decree for registration, even though the decree may not be in accordance with the judgment, title to property will be affected if we adopt any other construction, since a bona fide purchaser may buy on the strength of the decree which is registered. It is not possible for any injustice to be done to a bona fide purchaser who is diligent. A proctor or notary employed by him should

¹ (1892) A. C. 547 ^{Digitized by Noolaham Foundation} ² (1955) 57 N. L. R. 97.
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not only see that the decree is registered but also that the decree is in accordance with the findings of the Judge. If a decree is not in accordance with the findings of a Judge, he cannot pass title. Therefore no bona fide purchaser would in any way be affected. But if he buys without diligence a property on an erroneous decree, then the rule *caveat emptor* applies.

In view of section 79 of the Partition Act (Cap. 69), the provisions of section 189 of the Civil Procedure Code would apply empowering a court to amend a decree in order to bring it into conformity with the judgment.

After careful consideration of the evidence led in this case, I find no reason to interfere with the findings of facts in this case. The learned District Judge has held that no consideration has been paid on deed P3 by which the property was transferred to the second defendant. Sitting in appeal it is not possible for me to differ from this judgment. Therefore in this case, the second defendant is not a bona fide purchaser.

Finally, Mr. Thiagalingam submitted that a decree which is not in accordance with a judgment, yet is final and conclusive in view of the provisions of section 48 of the Partition Act which confers finality on such decrees despite errors or defects in procedure. He urged that entering of a decree which is not in accordance with the judgment is an error in procedure and therefore despite such errors finality is given to the decree by section 48 of the Act. But as stated earlier, it is only a decree which is contemplated by section 26 of the Act which is given finality by section 48 despite omissions and errors in procedure or defect in proof of title. Such finality does not apply to decrees which are entered by Judges, not in accordance with the peremptory mandatory provisions of section 26 of the Act which enjoins the Judge only to enter a decree in accordance with the judgment.

For these reasons I affirm the judgment of the learned District Judge and dismiss the appeal with costs.

SIVA SUPRAMANIAM, J.—

This appeal raises an important question in regard to the effect of an erroneous decree entered under s. 26 of the Partition Act, No. 16 of 1951, (Cap. 69) (hereinafter referred to as the Act) and the powers of a Court to amend such a decree.

The plaintiff instituted this action to enforce her rights on a mortgage bond No. 1372 dated 30th November (P1) granted by one Lewishamy Weeramantri in her favour. One of the properties mortgaged was an undivided one-half share of a land called Haggemuwakelle, described as item 2 in the 1st schedule to the plaint. The mortgagor is now dead and the 1st defendant is the legal representative of his estate. After executing the mortgage bond P1 Lewishamy Weeramantri, by deed

No. 1374 dated the same day (P3), transferred his half share of the said land subject to the said mortgage to Dissanayake, the 2nd defendant. In April 1955 one Podinona who was entitled to the remaining half share instituted a Partition action (No. 4417 D. C. Anuradhapura) to partition the said land. Dissanayake and the plaintiff (the mortgagee of Dissanayake's share) were made parties-defendants. The action was not contested by the defendants. Podinona gave evidence setting out the title of herself and Dissanayake to the land and concluded her evidence as follows :—

“ The parties are each entitled to the land in the following shares :— Plaintiff to an undivided half share, the 1st defendant to an undivided half share. I have made the 2nd defendant a party inasmuch as she is the mortgagee under deed No. 1372 of 30.11.54 attested by C. B. Kumarakulasinghe and I produce it marked P20. The 1st defendant's interests are also subject to an agreement to transfer his $\frac{1}{2}$ share to the 2nd defendant as allotted after the final decree of this partition action. I produce deed No. 133 of 30.11.54 attested by C. B. Kumarakulasinghe marked P21 I pray that the land described in the schedule be partitioned in terms of the provisions of the Partition Act, No. 16 of 1951, that I be declared entitled to a divided specific lot in lieu of my undivided $\frac{1}{2}$ share in the said land and that the 1st defendant be declared entitled similarly to a specified divided lot subject to the mortgage and agreement mentioned above in P20 and P21 respectively, that I be placed in possession of the divided lot awarded to me and for costs pro rata.”

At the conclusion of the aforesaid evidence, the trial Judge made order as follows :—

“ Enter interlocutory decree for partition accordingly.”

He did not write a judgment setting out, *inter alia*, the points for determination and the decision thereon as required by s. 187 of the Civil Procedure Code.

It was common ground, however, between the parties at the hearing of this appeal that the aforesaid Order made by the trial Judge should be interpreted to mean that he accepted the testimony of the witness Podinona, that his findings were in accordance with that testimony and that his judgment was that interlocutory decree for partition should be entered in accordance with those findings. The findings therefore included that the share of the 1st defendant was subject to a mortgage in favour of the 2nd defendant (the plaintiff in the instant case) under bond No. 1332 of 30.11.54 (P1).

Interlocutory decree for partition (3D5) was entered on 11th October 1956. Final decree for partition (3D6) was entered on 11th September 1958 in terms of which the divided allotments described in the schedule to the plaint in the instant case were allotted to Dissanayake in lieu of

his undivided interests in the said land. There was, however, no reservation of the rights of the 2nd defendant (the plaintiff in the instant case) on mortgage bond P1 in either the interlocutory decree or the final decree. Both decrees were sent to the Registrar of Lands for registration in terms of s. 51 of the Act and were duly registered in January 1957 and February 1959 respectively. On 24th June 1960 by deed No. 1867 (3D11) Dissanayake transferred to the 3rd defendant the divided allotments to which he had become entitled upon the final decree 3D6. The transfer was declared by the vendor to be free from any encumbrance.

Thereafter, on 10.10.1960 the Proctor for the plaintiff in the partition action, with the consent of the Proctor for the defendants, moved the Court to amend the interlocutory and final decrees that had been entered to bring them into conformity with the judgment of the Court by setting out that the 1st defendant's share of the land was subject to a mortgage in favour of the 2nd defendant and also to an agreement to sell the divided share to the 2nd defendant. The motion was allowed by the District Judge. In accordance with the said Order an amended interlocutory decree (P6) was entered on 14.10.1960, in terms of which the undivided share of Dissanayake was declared to be subject, *inter alia*, to the mortgage in favour of the present plaintiff on bond P1. An amended final decree (P7) was also entered on the same date in terms of which the divided blocks allotted to Dissanayake in lieu of his undivided share were declared to be subject to the same mortgage.

The principal question that arises for determination in this case is whether the divided allotments transferred to the 3rd defendant by the 2nd defendant under deed 3D11 on 24.6.1960 are subject to the rights of the plaintiff under mortgage bond P1. The answer to this question depends on whether the interlocutory decree 3D5 and the final decree 3D6 that were originally entered had the final and conclusive effect under s. 48 (1) of the Act and, if so, whether the Court had the power to effect the amendments made subsequently.

S. 48 of the Act (omitting parts not relevant for the point under consideration) provides as follows :—

“(1) the interlocutory decree entered under s. 26 and the final decree of partition entered under s. 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have or claim to have to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons

concerned are not parties to the partition action ; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

(2) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance and accordingly such provisions shall not apply to such decrees.

(3)

It was argued that since s. 48 (1) does not limit the final and conclusive effect to interlocutory decrees "duly" entered under s. 26, even an erroneous interlocutory decree that had been signed by the Judge is a "decree entered under s. 26" and should be final and conclusive under s. 48. The argument of counsel was somewhat as follows :—A court has jurisdiction to sign a right decree or a wrong decree. A wrong decree is nevertheless a decree. The provisions of s. 26 of the Act are similar to those contained in s. 188 of the Civil Procedure Code but in less stringent terms, since the latter requires that the decree should specify "in precise words the order which is made by the judgment". But s. 189 recognises what is signed by the Judge under s. 188 as "a decree" even if it does not correctly specify the order made by the judgment, since it provides that a Judge "may make any amendment which is necessary to bring a decree into conformity with the judgment". Similarly, a decree entered in pursuance of the provisions of s. 26 of the Act, whether it is in accordance with the findings in the judgment or not, is nevertheless "a decree entered under s. 26 of the Act" and should, therefore, have the final and conclusive effect under s. 48 (1).

The whole argument, in my view, is based on a fallacy that a court is entitled to enter a wrong decree. It is undoubtedly correct that in matters where a court has to make a decision, it may decide wrong as well as right and until and unless the decision is reversed by a superior court it is valid and binding, however wrong it may be. This principle, however, does not mean that a Judge has jurisdiction to act in contravention of the express terms of a statute. In regard to decrees, both s. 188 of the Civil Procedure Code and s. 26 of the Act give a mandatory direction to a Judge to sign a decree which is in accordance with the judgment. I am unable to agree that a Judge has jurisdiction to sign a decree in contravention of that direction or that a "decree" so signed is an effective decree. The fact that an erroneous decree signed by the Judge under s. 188 is referred to as "a decree" in s. 189 does not mean that it is enforceable as a valid decree until it is brought into conformity with the judgment.

Counsel also sought to derive support for his argument from the judgment of this court in *Rasah v. Thambipillai*¹ in which it was held that where an interlocutory decree had been entered in terms of s. 26 of the Act, a person is not entitled to avail himself of the provisions of s. 48 (3) in order to intervene subsequently and have the decree set aside on the ground of failure to register the action duly as a *lis pendens* under the Registration of Documents Ordinance. Special emphasis was laid by him on the following passage in the judgment of Sansoni C.J. at page 147 :—

“ Finally, Mr. Ranganathan who laid stress on the word “ under ” argued that an interlocutory decree entered under s. 26 and a final decree entered under s. 36 can only mean decrees which are regular in the sense that they have been entered after all the requirements of the Act have been obeyed, and that they are valid not merely in form but in substance. This argument cannot be sustained in view of the very terms of s. 48 (1) which contemplate decrees entered despite omissions or defects of procedure or inadequate proof of title, or non-joinder of parties who had an interest in the land. For the same reason I would hold that registration of an action as a *lis pendens* under the Registration of Documents Ordinance (as required by S. 13 (1)) does not mean registration in accordance with all the provisions of the Ordinance, since due registration is not required by section 13 (1).”

An examination of the above passage makes it clear that the point that arose for decision in that case is widely different from the one under consideration in this case. A defect in the registration of the action as a *lis pendens* will fall within the category of “ an omission or defect of procedure ” which, subject to the provisions of s. 48 (3), does not affect the final and conclusive nature of the decree. The case where a decree is not in conformity with the judgment is, however, not included in the section among the circumstances notwithstanding which the decree will be final and conclusive. A defect so fundamental cannot be regarded as falling within the description of “ any omission or defect of procedure ”.

S. 26 which relates to the entering of an interlocutory decree provides as follows :—

“ At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court shall pronounce judgment in open court, and the judgment shall be dated and signed by the Judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the court shall enter an interlocutory decree *in accordance with the findings in the judgment*, and *such decree shall be signed by the Judge.*”

It will be seen that under this section the Court is directed to enter a decree which is in accordance with the findings in the judgment and it is only "such decree" that shall be signed by the Judge.

There can be no question but that it was the intention of the Legislature that an adjudication made by the court under the Act should, subject to any decision on appeal, be final and conclusive despite any defect in procedure. A decree is "the formal expression of an adjudication"—s. 5 of the Civil Procedure Code. Can it be said that it was the intention of the Legislature that "the formal expression of the adjudication" should be "final and conclusive for all purposes against all persons whomsoever" even though it erroneously sets out the terms of the adjudication? The answer is to be found in s. 26 which, as stated earlier, directs that the decree which "shall be signed by the Judge" shall be "in accordance with the findings in the judgment". A judge is not empowered to sign any other decree.

"*The interlocutory decree entered under s. 26*" referred to in s. 48 (1) should therefore be "such decree" as is required to be signed by the Judge under that section, namely, a decree which is in accordance with the findings in the judgment. I am of opinion, therefore, that a decree purported to be entered under s. 26 which is not in accordance with the findings in the judgment is not an interlocutory decree which has a final and conclusive effect under s. 48 (1).

If the interlocutory decree was not such a decree as the Judge was empowered to sign under s. 26, the final decree for partition entered in pursuance of that decree was also not a valid "final decree under s. 36" which had the final and conclusive effect under s. 48.

It was, however, urged that the Legislature passed the Act in view of the fact that the indefeasibility of the title under a final decree entered under s. 9 of the Partition Ordinance, No. 10 of 1863, "had tended to be eaten away" by reason of the decisions of this Court that the final decree was final and conclusive only when the decree was entered in proceedings which strictly complied with the essential and imperative provisions of that Ordinance and consequently the whole scheme of the new Act was designed to ensure finality to a decree entered thereunder. It was also urged that when a Court caused the interlocutory and final decrees to be registered in terms of s. 51 of the Act as instruments affecting the land, the Court itself held out to the world that the title under the decrees was good and indefeasible and that any interpretation of s. 48 which would affect the conclusiveness of the title would seriously jeopardise land tenure in this country and would cause undue hardship to innocent third parties who may purchase a land relying on the validity of the title as set out in the registered decrees.

I do not consider the above arguments to be sound. The final and conclusive effect given to a decree under s. 48 (1) is not absolute; it is subject to the provisions contained in sub-section (1). Under this sub-section, decrees entered by a court without competent jurisdiction

or in an action which had not been duly registered as a *lis pendens* do not have a final and conclusive effect under s. 48 (1) as against a person who claims on an independent title and who had not been made a party to the action. An innocent purchaser cannot therefore blindly rely on the validity of the title under a registered decree. Although it is unnecessary that he should satisfy himself that all the provisions of the statute had been complied with as in the case of a decree entered under Ordinance No. 10 of 1863, he has still to satisfy himself that the title is not liable to attack by a person to whom s. 48 (3) applies. It cannot, therefore, be a hardship if he has also to satisfy himself that the registered decree is in conformity with the judgment before he can rely on the validity of the title.

In any event, if it was the intention of the Legislature that even erroneous decrees entered under s. 26 of the Act should be final and conclusive for the benefit of innocent purchasers, it should have made express provision to that effect.

The next question that arises for consideration is whether the Court had the power to amend an erroneous decree entered under s. 26 so as to attract the conclusive effect under s. 48. Although there is no specific provision in the Act corresponding to s. 189 of the Civil Procedure Code, it was conceded in the course of the argument that in view of the provisions of s. 79 of the Act, s. 189 of the Civil Procedure Code will be applicable to proceedings under the Act, provided the application of that section will not be inconsistent with the provisions of the Act. In view of the conclusion I have reached that an interlocutory decree which is not in accordance with the findings in the judgment is not an effective decree under s. 26 which has the final and conclusive character under s. 48, I am of opinion that it is not inconsistent with the provisions of the Act for the Court, acting under s. 189 of the Civil Procedure Code, to amend the interlocutory decree to bring it into conformity with the judgment. Since such an amendment will relate back to the date of the judgment, the Court has the power to make the corresponding amendment in the final decree under s. 36 as well. In the instant case, therefore, the amended decrees P6 and P7 are respectively the decrees under s. 26 and s. 36 which are final and conclusive under s. 48.

For the aforesaid reasons I am of opinion that the lands purchased by the 3rd defendant on deed No. 1867 dated 24th June 1960 (3D11) were subject to the mortgage in favour of the plaintiff on bond No. 1372 of 30.11.1954 (P1) and the plaintiff is entitled to a hypothecary decree in this case.

In view of the above conclusion, it is irrelevant to consider whether the 3rd defendant paid the full purchase price mentioned on deed 3D11 to the 2nd defendant or whether she was aware of the mortgage in favour

of the plaintiff at the time of her purchase. I would state, however, that the evidence on record is quite insufficient to support the finding of the trial Judge that the transaction embodied in the deed of purchase 3D11 was fraudulent and collusive.

I dismiss the appeal with costs.

Appeal dismissed.

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[COURT OF CRIMINAL APPEAL]

1965 *Present :* T. S. Fernando, J. (President), Sri Skanda Rajah, J., and Sirimane, J.

S. H. SIRINIYAL, Appellant, and THE QUEEN, Respondent

C. C. A. APPEAL No. 125 OF 1964 (WITH APPLICATION No. 139)

S. C. 46/64—M. C. Balapitiya, 40401

Evidence—Hearsay—Illegal reception—Effect—Criminal Procedure Code, s. 121.

The accused-appellant was charged with committing murder by shooting. The first information of the widow of the deceased as recorded by the police was produced in document form as part of the case for the Crown. The complaint contained, *inter alia*, the following statement:—"He (the accused) has on several occasions threatened to shoot us". The widow had not, in her evidence, referred to any previous threat. The evidence of previous threats by the accused was therefore hearsay and inadmissible. There was no direction to the jury to disregard it.

Held, that, error of law having been established, the burden shifted to the Crown to satisfy the Court that a reasonable jury, had they been properly directed, would without doubt have convicted the accused.

APPEAL against a conviction at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *R. Rajasingham* and *M. Kanakaratnam*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, with *R. Abeysuriya*, Crown Counsel, for the Crown.

February 1, 1965. T. S. FERNANDO, J.—

By a 6 to 1 majority verdict of the jury the appellant was convicted of the offence of murder of a man called Leedin. On the appellant's behalf it was argued (1) that there was non-direction amounting to misdirection of the jury as to the manner in which an inference of guilt may be made in a case depending solely on circumstantial evidence and (2) that there was illegal reception at the trial of hearsay evidence which could well have turned the scale against the appellant.

In regard to the first of these two grounds of appeal, it may be mentioned that the case was one of shooting of the deceased at night by an assailant at a distance of 50 to 60 feet from his victim. The Crown's case in regard to identification of the assailant rested on the testimony of a single witness, Meelin, the widow of the deceased. This woman stated that at about 7.30 p.m. when the deceased was stooping over the edge of the verandah of her house in order to spit on to the compound a shot was heard and the deceased was seen falling as a result of injury caused by that shot. She had an electric torch in her hand and she flashed that torch in the direction from which the shot appeared to come, and she then saw the appellant running with a gun in his hand in the direction of his own house.

The learned trial judge stated more than once to the jury that if they were satisfied that Meelin identified the appellant the latter should be found guilty of the offence of murder. Learned counsel for the appellant argued that identification of the appellant as he was running away was no more than a circumstance which could have tended to incriminate him, and that, as Meelin did not claim to have seen the appellant fire at the deceased, more inferences than one could have been drawn in the case from the fact that the appellant was seen running away. He contended, therefore, that it was incumbent on the learned judge to have directed the jury as to the manner in which circumstantial evidence should be considered before a verdict of guilty can be returned. While it may be correct strictly to label this a case of circumstantial evidence in the technical sense that the fact in issue was dependent on an inference from another fact, we are in agreement with the argument of learned Crown Counsel that in this case the fact in issue could have been decided with as much practical certainty as if it had been observed by Meelin. Therefore, notwithstanding certain infirmities and some improbability in Meelin's evidence to which our attention was drawn, we were unable to take the view that there was a misdirection of the jury. The first ground of appeal failed.

The reception of hearsay evidence took place in the following circumstances. Meelin was the person who carried the first information to the police of the injuries caused to her husband. Her complaint as recorded by the police was produced in document form as part of the case for the Crown, and section 121 of the Criminal Procedure Code, of course, permitted such production. This complaint was read out to the jury and it contained, inter alia, the following statement:—“He (the appellant)

has on several occasions threatened to shoot us". Meelin had not in her evidence (which had been completed before the production of the document which was made only when the Inspector of Police gave evidence) referred to any previous threat either to shoot or injure in any other way. No attempt was made to recall Meelin in an effort to prove the truth of this statement. The evidence of previous threats by the appellant to shoot was therefore hearsay and inadmissible. It was therefore patent that there was error of law in the conduct of the trial.

It was not possible for us to accede to the argument of Crown Counsel that the jurors were hardly likely to have remembered this bit of evidence. A striking example of the powers of jurors to recollect statements made in evidence is to be found in the reported case of *Ivor Stephen Parker*¹. That was also a case where certain inadmissible evidence had been given at the trial. The trial judge had not even heard the evidence in question and, when it was brought to his notice by a juror at the conclusion of his summing-up, he directed the jury not to attach any weight at all to it. In regard to this, Lord Parker, L.C.J., stated in the Court of Criminal Appeal :

"Whether a direction of this sort will in any particular case cure the wrongful admission of evidence must, in the opinion of the court, be one of degree. There may be many cases where the inadmissible evidence is of such little weight or is liable to create so little prejudice that it would be right and proper that the matter should be dealt with by a direction to the jury. On the other hand, there are other cases where the inadmissible evidence is so prejudicial and so likely to influence the jury in arriving at their verdict that the court is reluctantly forced to the conclusion that the matter cannot be left to a direction, but must be dealt with by discharging the jury."

The Court of Criminal Appeal there adopted the test formulated by Lord Normand in the Privy Council in the case of *Teper v. R.*² in these words :— "The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant".

In the case before us there was not even a direction to the jury to disregard the evidence wrongly admitted. Error of law having been established, the burden shifted to the Crown to satisfy us that a reasonable jury, had they been properly directed, would without doubt have convicted the appellant. We were unable to say that the Crown has so satisfied us. Indeed, we were unable also to overlook the probability of the evidence of previous threats by the appellant to shoot having turned the scale against him to the point of the jury getting some confirmation thereby of the evidence of identification given by Meelin. Upholding the second ground of appeal, we allowed the appeal and quashed the conviction of the appellant.

Conviction quashed.

¹ (1960) 45 Cr. A. R. Digitized by Noolaham Foundation.
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² (1952) A. C. 492.

1964 Present : **Abeyesundere, J., and Sirimane, J.**

M. SAMUEL, Appellant, and K. M. P. K. CHETTIAR and another,
Respondents

S. C. 100/61—D. C. (Inty.) Kegalla, 8337

Vendor and purchaser—Sale of different lands in one transaction—Is it a sale of an incertum juris?—Failure of purchaser to obtain possession of some of the lands—Right to recover proportionate share of purchase price—Period of prescription—Prescription Ordinance, ss. 6. 10.

A purchaser of different lands under the same deed of sale is entitled to recover such part of the purchase price paid by him as is proportionate to the value of the lands of which he has been unsuccessful in obtaining vacant possession.

The vendor's obligation to deliver vacant possession to the vendee is in law an implied part of the written contract of sale and therefore the period of prescription should be determined by reference to section 6 of the Prescription Ordinance, which specifies a period of six years.

APPEAL from a judgment of the District Court, Kegalla.

H. W. Jayewardene, Q.C., with L. C. Seneviratne and S. R. de Silva,
 for the Plaintiff-Appellant.

C. R. Gunaratne, for the Defendant-Respondent.

June 26, 1964. **ABEYESUNDERE, J.—**

In this case the defendant has sold to the plaintiff four allotments of land and certain undivided shares in five other lands by deed marked P1, dated 27.8.1946, for the sum of Rs. 2,900/-. The plaintiff, unable to get vacant possession of the properties he had purchased, instituted actions against the persons in possession thereof for declaration of title and for recovery of possession. He did not succeed in the majority of his actions and he sued the defendant in the present action for the recovery of the sum of Rs. 2,650/-, being the consideration paid to the defendant, less the sum representing the value of the land of which possession had been taken by the plaintiff before this action was instituted. In the course of the trial the plaintiff stated that he obtained possession of another land after the institution of this action and that therefore he restricted his claim to the sum of Rs. 2,400/-. He computed this sum on the basis that he could not take possession of seven lands in extent equal to 80 lahas and that the value of a laha was Rs. 30/-. He also stated that when he made his purchase under deed P1 the sum of Rs. 2,900/-, which was the consideration for the purchase, was determined at the rate of Rs. 30/- per laha. This evidence of the plaintiff was not contradicted by the defendant.

The learned District Judge who tried this action dismissed it on the ground that what was sold was an *incertum juris* and that therefore under the Roman-Dutch Law the purchaser was not entitled to recover the purchase price or any part thereof upon his failure to get possession of the property purchased. The plaintiff has appealed from the judgment and decree of the learned District Judge.

The sale of an *incertum juris* is dealt with in Book XXI, Title 2, Section 31 of Voet's Commentary on the Pandects (Gane's Translation, Volume 3, page 686). To determine the nature of the *incertum juris* referred to in the said section 31, reference may be made to Book XVIII, Title 1, Section 13 of the said Commentary, where the things that may be sold are classified and discussed by Voet. In that section Voet makes the following observation :—“.....for it has been held that there can also be a purchase of an expectation, a hazard and the cast of a net, so that the expectation takes the place of the thing.” The *incertum juris* referred to by Voet is what Justinian in the Digest calls the *incertum rei* (Digest XVIII, Title 4, Section 11). In the present case what has been sold and purchased is not an expectation or a hazard as, for instance, the cast of a net, but a thing itself. Voet also discusses the question of the sale of a thing as distinguished from the sale of the uncertainty of a right. In Book XXI, Title 2, Section 31 of his Commentary Voet states as follows :—‘But if when the seller was selling not the uncertainty of his right but simply the thing, he expressly arranged “not to be held liable for eviction”, he is not indeed forced when the thing is evicted to pay damages ; unless in this case also he knowingly sold what was another's. But he is nevertheless fast bound to restore the price received, because a *bonae fidei* contract does not admit of this covenant that the purchaser should lose the thing and the seller should keep the price.’ It is relevant to the matter I am considering now to quote the following views of Voet in regard to the case where a buyer knowingly buys a *res aliena* :—“In this connection it should be broadly noted that he who has knowingly bought a thing which was not the vendor's has indeed no action for damages on eviction, unless he has specially taken care that security for eviction is given him ; but that nevertheless the knowledge in the purchaser that the thing was another's does not prevent his recovering, when eviction has ensued, the price which he gave. It is not fair that the seller should be enriched to the loss of the purchaser.” (Book XXI, Title 2, Section 32)

In accordance with the afore-mentioned views of Voet, this Court has held in the case of *Silva v. Silva*¹ that even where a purchaser knew that the vendor had a disputed title and bought the land on speculation, he is entitled to recover the price actually paid by him to the vendor but is not entitled to recover damages.

I therefore hold that the plaintiff is entitled to recover such part of the purchase price paid by him as is proportionate to the value of the lands of which he has failed to get possession. I accept the evidence of the plaintiff in regard to the value of the lands of which he has been unsuccessful in obtaining possession. I hold that he is entitled to recover the sum of Rs. 2,400/-.

The defendant has filed objections to the decree of the learned District Judge on the ground that the learned District Judge should have answered in favour of the defendant the issue relating to prescription. Mr. C. R. Gunaratne, Advocate, appearing for the defendant, argued that the cause of action for the recovery of part of the purchase price paid by the plaintiff arose on the date of the execution of the deed P1. He contended that the obligation to deliver vacant possession was imposed on the vendor, namely, the defendant, not by the deed P1 but by the common law and that therefore the period of prescription was 3 years as provided in section 10 of the Prescription Ordinance.

I do not agree with this view of Mr. Gunaratne. The vendor's obligation to deliver vacant possession to the vendee is in law an implied part of the written contract of sale and therefore the period of prescription should be determined by reference to section 6 of the Prescription Ordinance. The said section 6 specifies a period of six years. I find support for my view in the decision of this Court in the case of *Dawbarn v. Ryall*¹. That decision is one of the Full Bench. In that case Lascelles, C.J., expresses the following view:—"The circumstance that the obligation on the part of the seller to give quiet possession of the thing sold depends upon a condition which the law considers as inherent in a written contract of sale does not make that obligation any the less dependent on the written contract of sale. Without the written contract of sale this obligation would not exist, and such an obligation, in a case where immovable property is concerned, would not be proved without production of a formal written contract of sale."

The learned District Judge is therefore correct in holding that the action of the plaintiff is not prescribed. Consequently I dismiss the objections of the defendant to the decree entered by the learned District Judge.

I set aside the judgment and decree of the learned District Judge and enter judgment for the plaintiff in a sum of Rs. 2,400/-. The plaintiff is entitled to the costs of the action and also the costs of this appeal.

SIRIMANE, J.—I agree.

Appeal allowed.

1967

Present : Sirimane, J.

W. BALAGALLE, Appellant, and K. SOMARATNE and another,
Respondents

S. C. 232/67—M. C. Matale, 25023

Criminal Procedure Code—Disposal of stolen property—Section 419 (1)—Effect of the words “entitled to the possession thereof”.

Where a person, after discovering that stolen property has been sold to him, surrenders the property to the police, the Magistrate has power under section 419(1) of the Criminal Procedure Code to order the property to be handed over to the true owner and not to the person from whom it was taken by the police.

Punchinona v. Hinniappuhamy (60 N. L. R. 518) not followed.

APEAL from an order of the Magistrate's Court, Matale.

E. R. S. R. Coomaraswamy, with P. Wimalachandra, for the Claimant-Appellant.

C. R. Gunaratne, for the Claimant-1st Respondent.

Ranjith Gunatilleke, Crown Counsel, for the Attorney-General.

May 25, 1967. SIRIMANE, J.—

This appeal arises from an order made by the learned Magistrate under section 419 of the Criminal Procedure Code.

I agree with the submission made by Mr. Guneratne that no appeal lies against an order made under that section, but on the application of Mr. Coomaraswamy I have decided to deal with this matter in revision.

One Somaratne the 1st respondent to this appeal was the owner of car number EN 7734. Admittedly he was the registered owner under the Motor Traffic Act, and the car was in his possession. While in his possession, this car was stolen on 16.12.66 and a complaint was made to the police. On 28.12.66 this car (with the number plates altered to read as EN 5635) had been sold to one Balagalle, the appellant. The position taken up by Balagalle was, that the car was sold to him by some unknown men one of whom posed as “Abeyesundere” the owner of the car. He says that soon after his purchase he realised that he had not been given

the certificate of registration and his suspicions being aroused, he contacted the real Abeyesundere and learnt from him that he had not sold car number EN 5635. He therefore handed over this car (EN 7734) to the police. In short, the appellant himself seems to have realised that possession of the car by him would expose him to the danger of a criminal prosecution for he realised that he had no claim to possess the said car number EN 7734. The police filed no case; they were apparently satisfied that the appellant too had been duped by the thieves. The car was produced in court by the police, and an order in regard to its disposal sought from the learned Magistrate.

It is conceded that section 419, sub-section (1), is the section under which the learned Magistrate was empowered to make an order in these circumstances. That section enacts that the “Magistrate..... shall make such order as he thinks fit respecting the delivery of such property to the person *entitled to the possession thereof*”. To my mind it seems quite clear on the admitted facts in this case that the person “*entitled to the possession*” of the car is Somaratne, the 1st respondent. It was argued for the appellant however that when property is taken from the custody of a person, the Magistrate has no alternative but to order the return of that property to the person from whose possession it was taken. Reliance was placed for this submission on the case of *Punchinona v. Hinniappuhamy*¹. With great respect I regret that I am unable to share the view that a Magistrate has no power to order property to be given to any person other than the person from whose possession the property was obtained. My attention was also drawn to the case of *D. Jayasuriya v. H. Warnakulasuriya*². In the concluding part of that judgment the same learned Judge (H. N. G. Fernando, J.) said “I would hold that section 419 cannot be utilised by a ‘complainant’ in order to obtain an order of possession from the Magistrate of any article seized from the possession of another as being stolen property, *if the other person denies the theft and claims the property as his own*”. In this case there is no denial of the theft but on the contrary the appellant himself had realised that the car sold to him was a stolen one, and that he himself had no right to possess it.

While I agree that a Magistrate’s Court should not be turned into a forum for the settlement of civil disputes, yet, a Magistrate making an order under section 419 must exercise his judicial discretion in ascertaining the person entitled to possession. In doing so the Magistrate, in my opinion, may order that property produced before him be handed over to a person other than the person from whom it was taken. No doubt in

the large majority of cases that come before the Magistrates' Courts the correct order would be to return the property to the person from whose possession it was taken, as the Magistrate's Court does not decide civil rights. But there can be cases, such as this, where there are special circumstances which would render such a course unjustifiable. In the case of *Sugathapala v. J. K. Thambirajah*¹, where the facts were very similar to those in the instant case, this Court made order that the car found in the possession of one Thambirajah should be handed to one Sugathapala. The decision in *William v. Silva*² also supports my view.

In my view the Magistrate was right in making order that the car should be returned to the 1st respondent, Somaratne. The appeal is rejected, and the application in revision refused.

Appeal rejected.
Application refused.



[PRIVY COUNCIL]

1968 *Present : Viscount Dilhorne, Lord Guest, Lord Wilberforce, Lord Pearson, and Sir Alan Taylor*

DERWENT PEIRIS and others, Appellants, and A. M. LAVIRIS APPU, Respondent

PRIVY COUNCIL APPEAL No. 23 OF 1967

S. C. 36 of 1962—D. C. Kurunegala, 403/L

Fideicommissum—Will—Devise by testatrix to her sons—Presence therein of a si sine liberis decesserit clause—Death of a son leaving children—Whether his children are entitled to property alienated by him—Implied or tacit fideicommissum—Conditions necessary for inferring it.

Where a Will leaving property to the testator's sons contains in one of its paragraphs a gift of a clearly fideicommissary character in the event of any of the testator's sons dying without leaving issue, but does not have, in relation to the sons' original shares, a corresponding provision which deals expressly with the event of a son dying but leaving issue, and in particular makes no gift in that event to the son's children, an implied or tacit fideicommissum in favour of the children of the deceased son should not be inferred, unless the dispositions in the Will as a whole and the circumstances in which the testator was placed when he made the Will justify such inference. When there is a reasonable doubt in regard to the actual intentions of the testator the Court will decide against a fideicommissum.

A testatrix who made her Will on 3rd June 1910 and died on 20th December 1918 devised and bequeathed property to her sons in equal shares. A clause of the Will was as follows :—

“ Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my Will.”

Held, that, in the event of a son's death leaving children, the clause did not per se create a tacit fideicommissum over his original share in favour of those children. There were also strong indications elsewhere in the Will against the inference of an implied or tacit fideicommissum. Accordingly, a son who died leaving children took his share absolutely and any alienation of it by him during his life time was valid as against his children.

“ The present law to be applied may be summarised in these propositions :—

1. Where in a Will (and *mutatis mutandis* the same would apply as regards deed of gifts), a bequest is made to a child of a testator, the mere presence of a clause, or condition, “ *si sine liberis decesserit* ” does not *per se* create a tacit *fideicommissum* in favour of that child’s children.

2. Whether, in such a will, a *fideicommissum* is to be implied is a matter of the testator’s intention to be ascertained from the dispositons in the will as a whole and from the circumstances in which the testator was placed when he made it.

3. Such an intention must be clearly established : in case of doubt the presumption is against the implication of a *fideicommissum*.”

APPEAL from a judgment of the Supreme Court reported in (1965) 69 N. L. R. 169.

L. Kadirgamar, with *D. C. Amerasinghe*, for the plaintiffs-appellants.

E. F. N. Gratiaen, Q.C., with *H. W. Jayewardene, Q.C.*, and *R. K. Handoo*, for the defendant-respondent.

Cur. adv. vult.

January 23, 1968. [Delivered by LORD WILBERFORCE]—

The action in which this appeal is brought is a *rei vindicatio* relating to some 200 acres of land in the Kurunegala District known as the Raglan Estate. The appellants claim this land as *fideicommissaries* under the will of their grandmother Adeline Winifred Peiris (“ the testatrix ”). The respondent’s title rests upon a conveyance for value from the father of the appellants Richard Louis Peiris. The appellants’ claim was upheld by the District Judge but his decision was reversed by the Supreme Court on the ground that the appellants failed to establish the existence of a *fideicommissum*.

The main question for determination is whether, under the terms of the will and in accordance with certain rules of Roman Dutch Law, a *fideicommissum* affecting the Raglan Estate in favour of the appellants ought to be implied ; but before consideration is given to this question, it is convenient to state some matters of fact which gave rise to certain issues in the Courts below.

The will of the testatrix was made on 3rd June 1910 before a well-known and experienced notary public A. W. Alwis. It appears that some dispute arose between the testatrix and her husband Richard Steuart Peiris as to the title to various properties, and on 31st May 1917 a Deed of Indenture was entered into between them the occasion for which was the impending marriage of one of their daughters. This Deed,

amongst other provisions, contained an agreement by the testatrix to convey the Moragolla Group of estates (which included the Raglan Estate) by way of gift to her eldest son Richard Louis Peiris (the appellants' father) subject to a *fideicommissary* condition, and further agreements for the gift of other pieces of land to others of her children. Before any steps were taken to implement these provisions, Richard Steuart Peiris died on 23rd October 1918. The testatrix herself died shortly after on 20th December 1918.

Richard Louis Peiris, the eldest son of the testatrix and her husband, was executor of the will of each of them and he initiated two testamentary cases (Nos. 6569 and 6571) in the District Court of Colombo, seeking a decision on certain questions of doubt as to which differences had arisen between the heirs. All matters in dispute, which appear to have included the effect of the Indenture of 31st May 1917, were referred to arbitration, and in due course an Award was made. It is sufficient to state that the arbitrator found that the Indenture of 1917 was binding on the testatrix, her husband and their heirs, and that therefore the two testaments did not deal with the properties dealt with by the Indenture. He also found that the Indenture was binding on the children of the testatrix and her husband.

On 17th December 1925 the Award was made a Rule of Court by the District Court of Colombo.

None of the present appellants was a party to the testamentary cases or to the Award. The eldest of them was in fact not born until 1930.

The title of the respondent arises from a sale of the Raglan Estate in 1951 by Richard Louis Peiris to one U. B. Senanayake, whose title, if any, the respondent acquired on 9th August 1952. Richard Louis Peiris died in December 1954 and the present action was instituted on 18th March 1959.

The relevant portions of the will of the testatrix, of 3rd June 1910, are as follows :—

“ I hereby will and direct that on the marriage of each of my daughters (with the sanction and approval of my said husband) my executor shall set apart and convey to her immovable property of the value of one hundred thousand rupees subject to the conditions following : viz.

That such daughter shall not sell, mortgage or otherwise alienate such property or properties but shall be entitled during the term of her natural life only to take enjoy and receive the rents income and produce thereof. She shall not be at liberty also to lease or demise such property or properties for any term exceeding four years at any one time or to receive in advance the whole of the rents for such period and subject to the further condition that on the death of such daughter

such property or properties so given to her shall go to and devolve on her children in equal shares. Should such daughter die without leaving issue then I will and direct that the properties so given to her shall devolve on her surviving sisters and the issue of such sister as shall then be dead. Such issue taking only amongst themselves the share to which another could have been entitled to or have taken if alive.

So long as my daughters or any of them shall remain unmarried and shall prove dutiful and obedient to my husband my executor shall pay to each of them monthly a sum of two hundred and fifty rupees for her sole absolute use and benefit.

8a. I give devise and bequeath all the rest residue and remainder of my property and estate immovable and movable unto my sons in equal shares subject to the express condition that my said husband Richard Steuart Peiris shall be entitled during the term of his life to take receive enjoy and appropriate to himself for his own absolute use and benefit all rents income produce and profits of all the said property and estate with full liberty to expend for the management cultivation and upkeep thereof all such sums of money as he on his absolute discretion shall think fit and with full power and authority to my said husband should he deem it necessary to mortgage the said properties or any of them for the purpose of raising and borrowing money for any purpose whatsoever and upon such terms and conditions as he shall deem fit and proper and also subject to such conditions and restrictions as my said husband shall according to his absolute discretion and wish think fit to impose when conveying such property or properties to my sons.

8b. Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

8c. If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my will."

The numbering placed before the three paragraphs dealing with the residue does not appear in the original will but has been added for convenience of reference.

It will be seen that while the will contains, in paragraph 8b, a gift, of a clearly *fideicommissary* character, in the event of any of the testatrix's sons dying without leaving issue (in the terminology of Roman Dutch Law a clause "*si sine liberis decesserit*"), there is no corresponding provision, in relation to the sons' original shares, which deals expressly with the event of a son dying but leaving issue, and in particular no gift in that event to the son's children.

The appellants' submission was that a *fideicommissum* in their favour ought to be implied. They advanced the following propositions :—

I. That a "*si sine liberis decesserit*" clause, under Roman Dutch Law automatically gives rise to a *fideicommissum* in favour of the children mentioned in the "*conditio*" if the *de cuius* was a descendant of the testator.

II. That, if I is not correct, only slight indications from surrounding circumstances, or from other provisions in the will are required in order that such a *fideicommissum* should be inferred.

III. That if (contrary to II) very clear indications *aliunde* are needed to support the inference of a *fideicommissum*, indications of this quality are to be found in the present case.

Their Lordships commence their examination of these propositions by reference to the commentators. There is no doubt that support can be found in them for the appellants' submissions. *Grotius* endorses proposition I, though he does so in a negative rather than a positive form : answering the question whether, where the *conditio* exists, the heir is burdened with a *fideicommissum* in favour of his children he says :—

"However, the generally accepted view is that this is not so unless the children were descendants of the testator or unless the last will contained some other indications from which a contrary intention might be inferred." (The Jurisprudence of Holland : Tr. Lee (1926), p. 153.)

Voet discusses the question at greater length. In a section headed "Person burdened by condition may alienate property left unless it appears that those given place under condition were called as heirs" he states that this (alienation) is not permitted "should the children or others who have been given place under condition appear by that very fact to have been summoned by the testator to those properties in respect of which they have been so given place" and continues by stating four sets of circumstances from which such calling may be inferred—as to which "watchfulness is certainly needed . . . for cases are not lacking in

which those who have been given place under a condition ought on account of various circumstances to be deemed to have been summoned under the last will."

The fourth of these is expressed as follows :

" Finally Neostadius is authority for saying that with collaterals indeed who have been given place under a condition, the view of the Roman law demonstrated above (sc. that those who are '*positi in conditione*' are not deemed '*positi in dispositione*') ought to be approved ; but that actual descendants of the testator who have been given place by him under a condition appear by our customs to have been summoned by the last will apart from any combination of reasonable inference such as has been already described." [Voet : Commentary Tr. Gane (1956) Vol. IV, Bk. XXVIII Tit 2 s. 10.]

The cautious statement of this fourth proposition is to be noted : it is placed under the authority of *Neostadius* without direct endorsement by the author. That *Voet* himself considered the point a doubtful one is shown by a footnote to the passage last cited in which he refers to *Grotius* and *Van Leeuwen* on one side and to *Sande's* disagreement on the other. His own view appears to go no further than acceptance of the relevance of "various circumstances". It may also be noted that the learned translator, in an introductory note to the title, says that (*inter alia*) section 10 has been "in modern times a veritable battleground on two most momentous questions" of which he states the present as one.

It is not necessary to refer at length to the writings of *Van Leeuwen*. In his Commentaries on Roman Dutch Law dealing with the special case of descendants of the testator he says "under the testator's children, grandchildren are held to be so included (i.e., called to the inheritance) if from the circumstances it appears that such was the intention" (Commentaries Tr. Kotze (1921) 2nd Ed. Vol. I Bk. III Ch. VIII s. 12 p. 383). To what extent this reference to "the circumstances" introduces an additional requirement, and if it does what the strength of it must be, does not appear. In his earlier work the *Censura Forensis* he appears to approve the opinion expressed "by others" that even children and grandchildren are not to be considered as summoned to the inheritance by virtue of the condition "unless unmistakable and very evident inferences and necessary deductions from the testator's intentions require this, since if the testator wish to summon the latter to the inheritance by means of a *fideicommissum* he ought expressly to say so, since in cases of doubt the presumption is always in favour of the heir and against the *fideicommissum*" (*Censura Forensis* Bk. III Ch. 7 s. 18).

Finally reference may be made to Professor Lee. After stating that the question (sc. whether a *fideicommissum* in favour of the children would be implied from the condition "*si sine liberis decesserit*") was

disputed, he stated positively "if however the testator was an ancestor, not only does the above-mentioned clause create a *fideicommissum* in favour of the children, but even if the clause had been omitted it will be read into the will with the same result." (Lee, Introduction to Roman Dutch Law 5th Ed. (1953) p. 379). For authority he refers to *Voet* and *Huber* and mentions *Galliers v. Rycroft*¹ a case concerned with the question whether the *conditio* ought to be implied.

Thus it can be said that the commentators, while in some passages supporting the implication of a *fideicommissum* in favour of descendants of the testator, are not entirely agreed on the question whether this implication may or should be drawn from the mere existence of the *conditio* or whether additional circumstances indicating the testator's intentions are required or whether, if so, slight, or strong indications are needed. It becomes therefore necessary to enquire to what extent and in what form the views so expressed have been received into the law of Ceylon. The correct approach to a question of this kind is not now in doubt, since this Board has given its approval to the formulation of it by Professor Lee :

"The works of the older writers have a weight comparable to that of the decisions of the Courts, or of the limited number of 'books of authority' in English Law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course, the opinions of these writers are often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is best supported by authority or most consonant with reason ; or, will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life ; or again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience." [Lee op. cit p. 14 approved *Abeywardene v. West*².]

In the present case, it is not only the difference of emphasis of the commentators, which leaves scope for clarification of the law by the courts. There is also the fact that the principles on which testamentary instruments are to be construed must differ widely from those applicable in 17th century Holland. In modern Ceylon, they are or may be made (as in the present case) in the English language, against the background of a mixed legal system, by notaries familiar with that system, for well-educated testators, themselves capable of understanding legal techniques. The courts at the present time are accustomed, rightly, to regard their primary task as being to ascertain the real intention of testators, from a fair consideration of the language of the instrument as a whole, account being taken no doubt of well-known and accepted rules but with liberty to mould them so as to give effect to rather than to defeat that intention. It appears in fact that this is the process which has been adopted in

¹ (1901) *A. C.* 130.

² (1957) *58 N. L. R.* 313, 320 (*J. C.*).

Ceylon. The modern law on the question now under consideration may be said to have its origin not in a Ceylon decision but in a case decided in 1908 by the Supreme Court of Good Hope. This case (*Steenkamp v. Marais and others*¹) was concerned with a joint will by a testator and his wife containing a gift in favour of their son Carel with (as was assumed) a *si sine liberis decesserit* clause in favour of another son. The question was whether Carel had power to mortgage the property subject to the bequest without regard to any interest of his minor children. On behalf of the latter it was claimed that the clause gave rise to an implied or tacit *fideicommissum*. Maasdorp J., after an examination of the relevant passages of the commentators, decided against the implied *fideicommissum*; the decision of the case, he held, depended wholly on the clause in question, there being nothing in any other portion of the will to indicate any other intention. In other words he decided that, even in a case concerned with descendants of the testator, the mere presence of the *conditio*, without other indication, was not sufficient to give rise to the implication.

This decision has been followed in other South African cases. Their effect has recently been stated as follows :

“This question” (i.e. whether children placed in the condition should be deemed to be called to the succession) has frequently been discussed in decided cases (compare *Steenkamp v. Marais* u.s., *Ex parte Richter* 1945 OPD 297, *Ex parte Kops and others* 1947 (1) SA 155 (0)) and the conclusion to which the Courts have come is that such a provision creates no *fideicommissum* in favour of the children. Such an intention can also not be deduced from the wording of the will (*sc. this will*) since in the analysis and interpretation of a will the most important indeed the only object is to establish the intention of the testator and then to give it effect; to this all so-called rules of interpretation are subordinate. All the different indications must be taken into account without laying too much emphasis on them. When there is a reasonable doubt in regard to the actual intentions of the testator the Court will decide against a *fideicommissum* (*Ex parte Swanepoel and others* 1948 (1) SA 1141 at p. 1143 (0). *Engelbrecht v. Engelbrecht en Andere* 1958 (3) SA 571 (0) per Klopper A.J.) [Transl. Honoré].

It remains to consider the extent to which the principle, now so firmly established, in South Africa has been accepted in Ceylon. The first of the modern cases in which the Courts of Ceylon had to consider the effect of a *si sine liberis decesserit* clause, was *Asiathumma v. Alimanchy*². The gift was in favour of the donor’s wife with a gift over, in the event of her dying without issue to the donor’s brother-in-law. It was held that this did not create a *fideicommissum* in favour of any children his wife might have and that she was free to deal with the property. This was

¹ 25 S. C. R. 483.

² (1905) 1 A. C. R. 53.

not a case involving a gift to descendants of the donor and the only relevance of it is that it shows that the Court was prepared to consider the terms of the will and the circumstances of the family before deciding that a *fideicommissum* ought not to be implied.

Learned counsel for the appellants in an argument to which their Lordships are indebted, referred to a number of later Ceylon cases, prior to 1962, which he submitted have not sufficiently been taken into account by the Supreme Court in their recent decisions.

In two of these, an implication has been drawn of a *fideicommissum* from the presence of the condition (*Sandenam v. Iyamperumal*¹, *Deu v. Jayawardene*²), but neither of these cases contains an examination of the authorities and in the latter at least reliance was placed on other expressions found in the will. *Carolis v. Simon*³ requires somewhat fuller mention, for there a *fideicommissum* was implied and the case of *Steenkamp v. Marais* considered. The Supreme Court did not differ from the latter decision : it distinguished it upon the ground that the terms of the will showed that the testators had in contemplation not merely children or grandchildren but remoter descendants : the argument (invoked in *Steenkamp v. Marais*) that the testator's intention might have been, in the event of the birth of issue, to liberate their father from the bond of *fideicommissum* so that he could confer upon them benefits by will or on intestacy was insufficient to meet the case : there was moreover an express prohibition against alienation which would serve no purpose unless to ensure devolution of the property upon the descendants. There was a sufficient manifestation of intention that the property should remain with the testator's descendants. In *Appuhamy v. Halloway*⁴ Wijeyewardene J. said that even where there is an express " *si sine liberis* " clause in a will the better opinion of the jurists appears to be that a *fideicommissum* cannot be implied in favour of the children in the absence of special circumstances.

In *Thinoris de Silva v. Weerasiri et al.*⁵ there was a clear and sufficient indication showing an intention to create a *fideicommissum* but Wijeyewardene J. again referred to the conflicting opinions of learned writers as to the effect of a *si sine liberis* clause taken alone.

These cases can hardly be taken as establishing a line of authority which commits the Courts of Ceylon to a different principle from that established in South Africa, or as preventing them from making a full examination of the relevant law for themselves.

¹ (1916) 3 C. W. R. 58.

³ (1929) 30 N. L. R. 266.

² (1927) 5 T. C. L. R. 107.

⁴ (1943) 44 N. L. R. 276, 280.

⁵ (1949) 51 N. L. R. 467.

This the Supreme Court undertook in *De Silva v. Rangohamy*.¹ It decided in terms that the presence in a will of a *si sine liberis decesserit* clause does not *per se* create a tacit *fideicommissum* in favour of grandchildren of the testator—even though the children referred to in the clause are descendants of the testator. In his judgment H.N.G. Fernando J. mentioned the opinion, to the contrary, expressed by Professor Nadaraja in his work “The Roman Dutch Law of *Fideicommissa*”, and referred to the conflicting views of the text-writers. He said that the view that tacit *fideicommissum* arises by implication from the clause alone was reasonable and might have been accepted by Ceylon and South Africa, but the law in both countries had developed otherwise. So far as the rationale of the presumption was concerned, he was not convinced that a demonstration of *pietas* (*sc.* in favour of descendants) by the clause, raised the necessary inference of an intention to call the descendants to the succession: the testator might have contemplated that they should take their benefits in another way, *e.g.*, by transfer or devise from the ascendant legatee. He accepted, and indeed held, that a *fideicommissum* in favour of descendants might be implied if there was an intention to include them in the succession. This case was followed by the Supreme Court in *Rasammah v. Manar*², a case of a deed of gift. Herat J. referred to the division of opinion among the commentators but reaffirmed the proposition that the trend of decisions in both Ceylon and South Africa was against implication of a *fideicommissum* from the clause alone: the intention to create a *fideicommissum* might be construed out of the language used and from the circumstances of the case. Both of the two latter decisions were followed by the Supreme Court in the present case.

Learned counsel for the appellants submitted that the law in Ceylon has not been settled by the two decisions of 1961–1963 and that it is still an open question whether, the clause, *per se*, in the case of a gift to descendants, gives rise to a tacit *fideicommissum*. If the question is still open, then, it was argued, the weight of opinion among the commentators is in favour of the implication.

Their Lordships cannot accept this argument. In the first place they consider that the decisions of the Courts in Ceylon show a definite trend, following or parallel to those of the Courts of South Africa against the implication of a *fideicommissum* from the clause alone. In cases where the implication has been drawn, this has been upon the basis (perhaps sometimes insufficiently founded) that there was shown to be an intention

¹ (1961) 62 N. L. R. 553. ² (1963) 65 N. L. R. 467. *Digitized by Noolaham Foundation* noolaham.org | avannaham.org

to create a *fideicommissum*. Secondly their Lordships consider that this trend is in accordance with the requirement that effect should be given to the intentions of testators which the Court ascertains from a fair reading of his testamentary dispositions in the light of the circumstances in which he was placed, rather than from the rigid application of rules of law.

As regards the law applicable in 1910 when the will was made, or in 1917 immediately before the testatrix's death, their Lordships are of opinion that, while not so decisively settled as at the present time, the tendency referred to above was sufficiently shown to form the basis of assumption upon which the draftsman would act. The decision in *Steenkamp v. Marais* (U.S.) was given in 1908 and at the least must have stood as a warning that if *fideicommissa* in favour of those mentioned in the condition were to be established, they should be established expressly.

In their Lordships' opinion the present law to be applied may be summarised in these propositions :

1. Where in a will (and *mutatis mutandis* the same would apply as regards deeds of gift), a bequest is made to a child of a testator, the mere presence of a clause, or condition, "*si sine liberis decesserit*" does not *per se* create a tacit *fideicommissum* in favour of that child's children.
2. Whether, in such a will, a *fideicommissum* is to be implied is a matter of the testator's intention to be ascertained from the dispositions in the will as a whole and from the circumstances in which the testator was placed when he made it.
3. Such an intention must be clearly established : in case of doubt the presumption is against the implication of a *fideicommissum*.

Their Lordships now turn to the will. It is first relevant to consider the circumstances in which it was made. The testatrix then had three sons and three daughters, none of the latter being married. She had a considerable estate and was in a position to make generous provision for her children. The scheme of the will was that each daughter should on marriage receive property worth Rs. 100,000, and that the portion of her estate allocated to the daughters should be preserved for the daughters and their issue. The residue, subject to a life interest given to her husband, was to go to the sons. The dispositions of this portion of the estate were to be such as to prevent an intestacy and to exclude collateral relatives from benefit. Consequently there was to be imposed on the share of each son an express *fideicommissum* which, in the event of his dying without leaving issue, would carry the share over to those of his brothers or their children. Provision was to be made for the sons' widows.

In considering, whether, in the event of a son's death leaving children a *fideicommissum* over his original share was to be implied in favour of those children, one is met, at once, by two strong indications pointing to a negative answer :

(1) There is, in relation to the daughters' shares, an express and clearly expressed *fideicommissum* in precisely this event.

(2) No prohibition, or restriction on alienation is imposed as regards the sons' shares, though again an express restriction is imposed as regards the shares of the daughters.

The appellants attempted to explain this distinction by saying that the gifts were different : the daughters, severally, took a fixed sum : the sons on the other hand took the residue jointly. This may be so : but the residuary bequest continues to provide for the devolution of each son's share—by means (in the event of his not leaving issue) of an express *fideicommissum*. The absence of a further express *fideicommissum* (corresponding to that affecting the daughters' bequests), should a son die leaving issue, remains striking.

The argument based on this distinction is a very strong one : in face of it an implication of a *fideicommissum* can only be drawn from some very clear indication indeed. The indication most relied on (indeed the only indication of any weight) is derived from the clause numbered 8c. It is one which requires consideration. It appears to deal with the very case now in question ("if any of my said sons shall die leaving children") and it terminates with the words "the property to which her children would be entitled under this my will". These words it is said show, and show with sufficient clarity, that it is supposed, or contemplated, that a son's children do take an interest under the will : this supposition would be falsified unless a *fideicommissum* were implied in their favour.

This argument has considerable *prima facie* force : it convinced the learned District Judge ; it had some appeal to their Lordships. If no sense or meaning could be given to this clause but one which rests upon the inference of a *fideicommissum* in favour of the son's children, then, even in the face of the contrary indications, such inference might have to be drawn. If on the other hand a meaning can be given to it, which does not rest upon this inference, or require it to be drawn, then such meaning should be attributed ; if it is case of doubt which meaning it bears, that must be resolved against the *fideicommissum*.

Their Lordships consider that the clause can be interpreted in a manner which does not require the inference. For it may be read as an appendix to the clause numbered 8b. That clause may be analysed as follows :

(1) If a son dies (a) unmarried or (b) married but without issue then

(2) his share goes to (a) his surviving brothers or (b) the children of any deceased brother : provided that (as regards case 1 (b)) if there is a widow, she is entitled to one-quarter of the income during her widowhood.

The clause numbered 8c would then deal further with case 2 (b), in the additional event of there being a widow (this gives a meaning to the words "leaving children *and also a widow*"). In other words the clause is dealing with accrued shares and not with original shares : the intention being that as regards original shares a son who dies leaving children takes absolutely and so can make his own provision both for his widow and for his children.

This interpretation of the clause no doubt has its difficulties, both of construction and in its application : it is not the only possible interpretation. But it is a possible interpretation, sufficiently possible to negative the necessity to infer a *fideicommissum* against which such strong indications exist elsewhere in the will.

Their Lordships are therefore of opinion that no *fideicommissum* ought to be inferred and that, in consequence, the appellants' case must fail.

There remains the second issue on which the appellant would also have to succeed if they were to make good their claim against the respondent. They would have to show that the Raglan Estate specifically formed part of the share of their father Richard Louis Peiris in the residuary estate, so as to be affected by the *fideicommissum*. As was pointed out in the Supreme Court this involves their making good the unusual claim that the Indenture and Award took effect so far as to confer upon Richard Louis Peiris a specific interest in the Raglan Estate ; but failed to take effect (as against the appellants) so as to withdraw the Raglan Estate from the will and subject it to the terms of the Award. In making good their contentions the appellants would be in some difficulty from the form of their pleading and from the lack of positive evidence as to what precisely was done, as regards the various properties, following upon the Award. The judgment of H. N. G. Fernando J. in the Supreme Court set out, very fully and fairly, the manner in which the appellants sought to overcome these difficulties : without coming to a conclusion upon them, the Court evidently considered that the appellants' contentions were not without weight. In these circumstances, and because decision upon the first issue determines the appeal, their Lordships do not think it right to express a concluded view on this issue.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

1968

Present : T. S. Fernando, J., and Alles, J.

P. KARUNANAYAKE, Appellant, and C. P. DE SILVA
(Minister of Lands) and another, Respondents

S. C. 99 (Inty.) of 1967—D. C. Matara, 2460/L

Compulsory acquisition of land—Cannot be of an indeterminate corpus—Description of the land must be precise as to location and extent—Land Acquisition Act, as amended by Act No. 28 of 1964, ss. 2, 4, 4A, 5, 38.

In proceedings under the Land Acquisition Act, the notice under section 4, the declaration under section 5 and the Order under section 38 must each set out the particular land to be acquired. The acquisition cannot be of an indeterminate corpus.

The land sought to be acquired from the plaintiff-appellant was described as follows :—“ A portion in extent about 1A. 1R. 16P. out of the land called Hambu Ela Watta and bounded as follows :—North and East by the remaining portion of the same land and V. C. road ; South and West by Polwatta Ganga and the remaining portion of the same land.”

Held, that there was uncertainty as to the precise location of the land. The plaintiff was therefore entitled to an interim injunction restraining the acquisition.

A PPEAL from an order of the District Court, Matara.

E. R. S. R. Coomaraswamy, with *L. W. Athulathmudali*, for the plaintiff-appellant.

Mervyn Fernando, Crown Counsel, with *G. P. S. Silva*, Crown Counsel, for the defendants-respondents.

Cur. adv. vult.

February 22, 1968. T. S. FERNANDO, J.—

The plaintiff-appellant instituted action No. 2460/L in the District Court seeking (1) a declaration *inter alia* that a proposed acquisition of land belonging to him is wrongful and unlawful and (2) a permanent injunction restraining the defendants from taking steps to acquire the said land. He also sought an interim injunction pending the determination of the action restraining the defendant from taking steps as aforesaid. An enjoining order was issued by the District Court on ex-parte application and notice thereof was ordered on the defendants.

After the defendant appeared on notice, an inquiry was held in the District Court, and by an order made on the 27th February 1967 the learned District Judge dismissed the application for the interim injunction and, therefore, discharged the enjoining order.

This appeal canvasses the correctness of the order of the 27th February 1967 above referred to.

The notice required to be given in terms of section 4, the declaration required to be made under section 5 and the Order for taking possession that may be published under the proviso to section 38 of the Land Acquisition Act (Cap. 460) all require that the land proposed to be acquired should be indicated in the respective documents. It is contended on behalf of the appellant that all three documents in respect of this proposed acquisition are so defective in regard to the description of the land as to render them of no force or effect in law.

The proviso to section 38 enables the Minister to take steps on occasions calling for urgent acquisitions provided a notice under section 2 or section 4 has been exhibited. While a notice under section 2 will ordinarily specify only an area and such a notice is sufficient authority for the authorized officer to enter any land situated within that area, nevertheless possession of any such land can be taken only after deciding or determining the particular land of which it is necessary to take possession. There would be no difficulty to demarcate with sufficient precision the land intended to be taken and, it must be noted, the authorized officer is empowered by section 2 (3) to enter and survey the land.

Section 4 relates to a stage after investigations for selecting land have taken place, and that section requires the Minister to direct the acquiring officer to give notice to the owner or owners of the particular land which the Minister considers is needed for a public purpose and has to be acquired. To enable the acquiring officer to give notice to the owner or owners it must follow that he (the acquiring officer) should know the particular land proposed to be acquired. The circumstance that the law contemplates objections to the proposed acquisition involves necessarily that the precise location has to be known not only to the officers of the government charged with the duty of acquiring the land but also to the owner or owners thereof. It is only after the objections have been disposed of as provided in section 4 that the decision to acquire can be taken by the Minister. The written declaration that follows such decision also must relate to that particular land. I am, therefore, of opinion that the notice under section 4, the declaration under section 5 and the Order under section 38 must each set out the particular land to be acquired. The contention of the appellant that the acquisition cannot be of an indeterminate corpus is, in my opinion, sound and has to be upheld.

That the view I have reached as above set out is correct—at any rate in respect of acquisitions after the amendment to the Land Acquisition Act by Act No. 28 of 1964 (which came into force on 12th November 1964)—will be apparent on an examination of the provisions of section 4A of the Act (inserted by section 3 of Act No. 28 of 1964) which has been designed to nullify the disposal of and to prevent damage to land in

respect of which a notice has been issued or exhibited under section 2 or section 4. Sub-section (2) of this section 4A renders null and void any sale or other disposal of land in contravention of sub-section (1), while sub-section (3) declares such a contravention to be a punishable offence. If a person is to be punished for selling or otherwise disposing of certain land, surely he must be informed of the precise location and extent of such protected land. Any interpretation which will involve the result that a person will be prevented from dealing with all his lands in a particular area because he does not know what is the land in that area he cannot sell or dispose of without contravening the Act should be avoided.

When we turn to the three relevant documents in this case, viz. XI of 5th April 1966 (the notice under section 4), X2 of 14th May 1966 (the declaration under section 5), and X3 of 14th May 1966 (the Order under section 38), each of them is found to describe the land in exactly the same terms. That description is set out below :—

“ A portion in extent about 1A. 1R. 16P. out of the land called Hambu Ela Watta and bounded as follows :—

North and East by the remaining portion of the same land and V. C. road ;

South and West by Polwatta Ganga and the remaining portion of the same land.”

In whatever way one may attempt to ascertain where precisely within Hambu Ela Watta this portion of about 1A. 1R. 16P. is to be found one will be met with uncertainty as to its location. Indeed, Crown Counsel had in the end to concede that there is uncertainty in this description and, therefore, that the corpus sought to be acquired as described in the documents was an indeterminate one.

We do not apprehend that there would be any difficulty for Government, with the resources available to it, to have a proper survey plan prepared in the case of each acquisition. Indeed, our own experience is that such plans are usually made and are the basis of the Minister's own decision to acquire land. If so, what difficulty is there to describe that land by reference to such a survey plan and even to make it available to parties affected ? We do not however intend to say that the situation of a land cannot ever be described without reference to a survey or other plan ; but the description adopted in the instant case fails to give effect to the requirements of the Act. As so often happens, action taken hastily in the supposed interests of expedition actually results in a delay greater than that which would have been occasioned by a resort to the procedure which the legislature had in contemplation.

As the Order under section 38 and indeed the other two documents as well are not in conformity with the law, they do not, in our opinion, have that force and effect which the Land Acquisition Act contemplates. For

this reason we set aside the order of the District Court made on the 27th February 1967 which discharged the enjoining order and dismissed the application for an interim injunction. The enjoining order has to be restored and the interim injunction applied for by the plaintiff granted, and we have made order accordingly. The appellant is entitled to the costs of the inquiry in the District Court and of this appeal.

ALLES, J.—I agree.

Order set aside.

1968

Present : Abeyesundere, J.

I. S. S. DEEN, Appellant, and M. A. HALIM, Respondent

S. C. 54/67—C. R. Kandy, 18326/RE

Rent Restriction (Amendment) Act, No. 12 of 1966—Scope of s. 4 of Rent Restriction Act, as amended by Act No. 12 of 1966, s. 12A.

Section 4 of the Rent Restriction (Amendment) Act No. 12 of 1966 must be interpreted as not applying to an action instituted on any of the excepted grounds specified in section 12A of the Rent Restriction Act as amended by Act No. 12 of 1966. Accordingly, it is not applicable to an action seeking to eject a tenant on the ground of his being in arrears of rent for a period of more than three months.

APPEAL from an order of the Court of Requests, Kandy.

M. T. M. Sivardeen, for the plaintiff-appellant.

Nimal Senanayake, for the defendant-respondent.

March 2, 1968. ABEYESUNDERE, J.—

This action was instituted on 8th June 1964 for the recovery of arrears of rent due from the defendant to the plaintiff for a period of more than three months and for the ejectment of the defendant from the premises in suit. The parties agreed that the arrears of rent and damages up to end of October, 1964 were Rs. 174/48, and, with the consent of the parties, judgment was entered for the plaintiff ordering ejectment of the

defendant and granting the plaintiff damages in Rs. 174/48 up to October, 1964, and thereafter Rs. 20/28 per month. But the defendant was allowed to stay in the premises until 31st March, 1966. On 23rd March, 1966 an application was made on behalf of the defendant to extend the date of vacation of the premises by the defendant by another three months. With the consent of the parties the court ordered that writ of ejectment was not to issue till 15th June, 1966.

On 11th June, 1966, the proctor for the defendant, relying on the Rent Restriction (Amendment) Act, No. 12 of 1966, filed a motion praying that no further steps be taken in execution of writ. The proctor for the plaintiff agreed that the motion filed by the proctor for the defendant be inquired into. After inquiry the learned Commissioner of Requests by order dated 13.3.67 held that the plaintiff was precluded by the aforesaid Act from taking execution proceedings in the action.

The reasoning of the learned Commissioner is that, even if an action for the ejectment of a tenant is instituted on any of the grounds specified in Section 12A of the Rent Restriction Act as amended by Act No. 12 of 1966, Section 4 of the amending Act has the effect of declaring such action to be null and void. The said Section 4 provides that, if an action instituted on or after 20th July, 1962, and before 10th May, 1966 (which is the date of commencement of the amending Act), for the ejectment of a tenant from any premises to which the Rent Restriction Act applies, it shall, if such action is pending on 10th May, 1966, be deemed to have been null and void. The action of the plaintiff was instituted within the period specified in Section 4 of the amending Act and was pending on 10th May, 1966. It is correct that actions instituted on any of the grounds specified in Section 12A are not specifically saved by any provision in section 4 of the amending Act. But Section 4 of the amending Act must not be interpreted in such a way as to render ineffective section 12A which by virtue of the provisions of the said Section 4 is deemed to have come into operation on 20th July, 1962. If Section 4 is held to apply even to an action instituted on any of the grounds specified in Section 12A, it will have the effect of deeming that action to be null and void and the effect thereof will be that Section 12A is rendered ineffective. I am therefore of the view that Section 4 of the amending Act must be interpreted as not applying to an action instituted on any of the grounds specified in Section 12A.

For the aforesaid reasons I set aside the order of the learned Commissioner of Requests dated 13.3.67. The plaintiff-appellant is entitled to his costs of the appeal and also to his costs of the inquiry in the Court of Requests.

[COURT OF CRIMINAL APPEAL]

1966 *Present: H. N. G. Fernando, S.P.J. (President), T. S. Fernando, J., and Abeyesundere, J.*

THE QUEEN *v.* P. G. ARASA and another

C. C. A. 76 AND 77 OF 1966, WITH APPLICATIONS 125 AND 126

S. C. 111/65—M. C. Matale, 20491

Evidence—*Trial before Supreme Court—Dock statement of accused—Duty of Judge to refer to it in his summing-up.*

The 1st accused, who was charged with murder, made a dock statement in which he said that before he stabbed the deceased man, the latter had struck him with a club. The cross-examination of the prosecution witnesses and the accused's statement from the dock set up defences either of self-defence or of provocation or both.

Held, that it was the duty of the Judge to have directed the Jury that the dock statement was a matter before the Court which could be taken into consideration.

APPEALS against two convictions at a trial before the Supreme Court.

J. Muthiah (Assigned), for Accused-Appellants.

T. A. de S. Wijesundere, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

November 28, 1966. H. N. G. FERNANDO, S.P.J.—

The two appellants were charged with the murder of one Kalinguwa and the second appellant was charged in addition with the attempted murder of one Kiri Honda.

According to the evidence the two appellants both lived near the house of the deceased but on different sides of that house. On the night in question the two appellants stood on the road opposite the deceased's house, and the first accused abused the deceased. The two men then went towards the first appellant's house and again returned soon afterwards along the road. On this occasion also the first accused abused the deceased man. The latter then went up to the road and asked the first appellant why he was being abused. At this stage, according to the prosecution witnesses, the first accused stabbed the deceased twice on his chest.

It will be seen that there was literally no evidence to justify a conclusion that the second appellant shared an intention to assault the deceased man. He participated neither in the abuse nor the assault. The only circumstance against him was his presence with the first appellant on both occasions. Indeed if the deceased man himself had not left his house and gone up to the first appellant on the second occasion there might have been no stabbing at all. This Court has held on numerous occasions that mere presence is not a sufficient circumstance to justify an inference of common intention. Such an inference would not have been reached in this case but for a reference by the learned trial Judge to the fact that the second appellant "did nothing to prevent the first accused from stabbing". According to the evidence the stabbing took place so suddenly that it was in our opinion quite unreasonable to suggest to the Jury that the second appellant should have tried to interfere.

For these reasons we set aside the conviction of the second appellant on the charge of murder and acquitted him on that charge.

The Police found a club at the scene, lying by the side of the body of the deceased man. The club was found to bear blood stains. When the first appellant was arrested early the following morning Inspector Amerasinghe noticed an injury on his head. When the Inspector first mentioned this injury in his evidence, he said :—

"he had a bleeding injury on the left side of his head. The blood was dried up and there were stains of blood on his sarong."

Thereafter in the course of his evidence he said on numerous occasions that the blood was dried up, and he said this emphatically when questioned by the Court three or four times on the point. Inspector Hettiarachi had also noticed the same injury and said in answer to Court :—

"A. It was dried blood.

Q. Then it is not a bleeding injury ?

A. Yes."

Manifestly then the evidence concerning this injury was that there was dried blood noticed at the site of the injury early in the morning after the night of the incident. But unfortunately the learned Trial Judge despite his own questioning appears to have misunderstood the tenor of the evidence concerning the injury. On this point there was the following passage in the summing up :—

"If Sergeant Amerasinghe saw a bleeding injury at 6 a.m., do you think it likely that the first accused would have received that injury at 10 o'clock on the previous night ? Do you not think that blood on that injury would have dried ? There would have been no bleeding injury after nearly eight hours."

The learned Judge in this passage invited the Jury to take the view that the injury noticed by the Police Officers in the morning was a very

recent one and was probably sustained subsequent to the time of the incident. Having regard to the evidence on the point, this was a very serious misdirection on the facts.

The first appellant made a dock statement in which he said that before he stabbed the deceased man, the latter had struck him with a club. The cross-examination of the prosecution witnesses and this statement from the dock set up defences either of self defence or of provocation or both. In directing the Jury on the case for the defence the trial Judge said :—

“ But gentlemen, please remember, to prove that fact to your satisfaction, it is not sufficient by merely establishing that this stick was found close to the head of the deceased and that an injury was found on the head of the first accused. ”

The direction here substantially was that the evidence available was insufficient to establish the fact that the first appellant had been struck with a club by the deceased and it virtually withdrew from the Jury the right to decide that fact. The Judge failed to direct the Jury that the dock statement was a matter before the Court which could be taken into consideration. But even without that matter, the two circumstances mentioned by the Judge would in our opinion well have justified a finding by the Jury that the first appellant must have been injured with a club in the course of his meeting with the deceased and before the stabbing incident.

In view of these misdirections the verdict of murder could not be allowed to stand. We therefore set aside that verdict and altered the conviction of the first appellant to one of culpable homicide not amounting to murder and imposed on him a period of seven years rigorous imprisonment.

*Verdict against 1st accused altered.
2nd accused acquitted.*

1967

Present : Manicavasagar, J.

M. C. M. HAMEEN, Petitioner, and A. C. M. MALIHA BABY
and another, Respondents

S. C. 791/64—Habeas Corpus Application

Muslim law—Dissolution of marriage—Mother's right to the custody of her child—Forfeiture thereof if she re-marries—Habeas corpus.

In Muslim law (Shafei sect) a woman, whose marriage has been dissolved, forfeits her right to the custody of a male child of that marriage if she marries subsequently a person who is not related to the child, unless special circumstances are shown which require that the child should continue to remain in the mother's custody.

APPLICATION for a writ of *habeas corpus*.

M. T. M. Sivardeen, for the Petitioner.

M. S. M. Nazeem, for the Respondent.

Cur. adv. vult.

May 6, 1967. MANICAVASAGAR, J.—

In these proceedings, the petitioner seeks an order from this Court for the custody of his son Cassim Mohamed Hameen who is at present living with his mother, the former wife, the respondent.

The petitioner and the respondent are Muslims and belong to the Shafei subsect ; they were married in 1951 and their marriage was dissolved in 1957 : Hameen was born in May 1953 and will be 14 years next month ; he has been in the custody of his mother since the dissolution of the marriage.

The learned Magistrate has in a careful analysis of the evidence considered every fact relevant to the issue, and found on the one hand that there is no factual circumstance which militates against the petitioner having the custody of his son, and on the other, that the child has not suffered one whit from being with his mother, who has cared for him and looked after his health and education as any mother is expected to do. But the Magistrate took the view that the law applicable to the parties is such that the father should have the custody of his son.

Under any system of law, a paramount and, indeed, a vital consideration on an issue such as the instant one is the interest of the children, any other consideration being subordinate to it. The law applicable to the Muslims of the Shafei Sect recognises this by granting to the mother her natural right to the custody of her child either on account of tenderness of age or weakness of sex, up to a specified time, which normally is the 7th year in the case of a male child ; at this age the law permits the male child the choice of living with either of his parents until he attains puberty, when on the attainment of this or on reaching 15 years, whichever is earlier, he is personally emancipated from the Patria Potestas (Ameer Ali : Mohammedan Law, Vol II, (5th Edition) page 251, and 50 N. L. R. 102 at 105).

In this case the boy has opted to live with his mother ; it is submitted that his decision is not of his own free will but has been influenced by the fact that he lives with his mother and has been persuaded to say so. This is a submission which needs consideration : as against this the boy has lived with his mother for many years and being well cared for he may have made his choice untrammelled by any extraneous influence. The Magistrate, however, though he ^{does not} say so, explicitly appears to

think that the boy has been unduly influenced. I also lean to the same view because the boy denied knowledge of the petitioner being his father, though he lives in close proximity to his father's home and has spoken to him. I think it most unlikely that he does not know the petitioner to be his father. In any event village gossip would have made him wise on this ; his ignorance does not appear to be true and his choice therefore is of doubtful value and not made in good faith. But there is a more cogent reason ; his mother has contracted another marriage and it is conceded that her husband is not related to the child. Under Muslim law a mother forfeits the right of custody by marriage to one who is not related to the child within the prohibited degrees (Ameer Ali : page 256), unless it is shown that there are special circumstances pertaining to the exclusive interests of the child which require that he should be in his mother's custody ; the evidence does not disclose any such circumstances.

The recommendation by the Magistrate is adopted and is made an order of this Court. The boy will soon reach the age when he would be emancipated ; he is old enough to have access to his mother of his own free will and he should not be restrained from exercising his rights.

Application refused.

1968

Present : Alles, J.

CEYLON TRANSPORT BOARD, Appellant, and
N. M. J. ABDEEN, Respondent

S. C. 106/67—*Labour Tribunal, 10/161*

Labour Tribunal—Misdirection on facts—Right of appeal—“Question of law”—Industrial Disputes Act, s. 31 D (2).

Where the President of a Labour Tribunal misdirects himself on the facts, such misdirection amounts to a question of law within the meaning of section 31D (2) of the Industrial Disputes Act.

APPEAL from an order of a Labour Tribunal.

N. Satyendra, for the Employer-Appellant.

No appearance for the Applicant-Respondent.

January 30, 1968. ALLES, J.—

This was an application by the Ceylon Transport Board to terminate the services of the applicant-respondent who was a conductor employed under them. The allegation against the applicant-respondent was

that he altered figures in tickets issued by him and committed misappropriation of various sums of money. At the domestic inquiry that was held by the employer the applicant pleaded guilty to the fabrication of these documents and the misappropriation of these monies, and the applicant's services were terminated with one month's wages. Thereafter the applicant made an application to the Labour Tribunal against the order made by the Transport Board.

The President ordered the Transport Board to reinstate the applicant with effect from 21st August, 1967, and directed that no back wages should be paid to him. In the course of the inquiry evidence was led of the past record of the applicant. The Depot Operating Assistant, Mr. Wimalasena, gave evidence and it was established through his evidence that up to 1966 the applicant had been guilty of various lapses for which he was punished. This evidence was not considered by the President in the course of his order ; the accused did not give evidence to contradict the evidence of Wimalasena and documents R4 and R6 were placed before the Labour Tribunal to prove that the accused had pleaded guilty to his previous lapses. The President completely failed to consider this evidence. In the course of his order he has in the penultimate paragraph of his order stated : "In my view there is something more to the case than what was told before me. This applicant was *taken as good up to August, 1966*. But suddenly somebody appears to have had a dislike for him and has gone in a voyage as it were to pinpoint the mistakes of this applicant."

It is in pursuance of these observations that the President has taken the view that the punishment meted out to the worker was excessive and that the termination was unreasonable.

The President has clearly misdirected himself on the facts and this misdirection amounts to a question of law. Under Section 31 D (2) of the Industrial Disputes Act this is an order which is properly reviewable by this Court. I therefore set aside the order of the President and I direct that the order made by the Transport Board terminating the services of the applicant was justified.

The appeal is therefore allowed, and the order of the President is set aside.

Appeal allowed.

1968 *Present : H. N. G. Fernando, C.J., T. S. Fernando, J., and Tambiah, J.*

IN RE R. RATNAGOPAL

APN/GEN/2 of 68—In the matter of a Rule under Section 47 of the Courts Ordinance

Commission of Inquiry—Power of Commission to summon any person residing in Ceylon to give evidence—Meaning of expression “residing in Ceylon”—Ignorance of legal meaning—Mistake of law or mistake of fact?—Penal Code, s. 72—Terms of reference—Objection as to their being ultra vires—Scope—Summons to give evidence—Mode of service—Refusal to be sworn and to give evidence—Punishability as offence of contempt against authority of the Commission—Scope—Allegation of bias against Commissioner—Whether it is relevant—Incapacity of Commissioner to compel attendance of a witness—Determination of Commissioner in relation to offence of contempt—Whether it offends against principle of Separation of Powers—Constitution Order in Council, 1946, s. 4 (2)—Courts Ordinance (Cap. 6), ss. 47, 89—Commissions of Inquiry Act (Cap. 393), ss. 2, 7 (c), 10, 12, 16, 21.

(A) The respondent, who was a citizen of Ceylon, went to England in 1949 after selling all his property and assets in Ceylon and was registered in 1959 as a citizen of the United Kingdom and Colonies. He owned properties in England. In 1955 he married a Ceylon citizen, in Ceylon, and both husband and wife lived in London until 1961. His wife lived in Ceylon since November 1961 with her five children, and since 1963 she resided in her own house in Colombo. She made regular visits to London each year, staying there with her husband for about 3 to 5 months during those visits. Since 1964 she was shareholder in a Company which was incorporated in Ceylon, and was the Chairman of that Company since 1961. The respondent himself was not a shareholder or an officer of that Company but was its Overseas Representative. He visited Ceylon twice a year, on transit visas or holiday visas, for the purpose of performing his functions as the Overseas Representative of the Company and for the purpose of discussing the affairs of the Company with his wife and Company officers. His pattern of life was such that, while he had his permanent residence in England and many business activities there, he also regularly came to Ceylon in the ordinary course because of his business connections with the Company and of his family ties ;

Held, that the respondent was a person residing in Ceylon within the meaning of section 7 (c) of the Commissions of Inquiry Act and was, therefore, liable to be summoned, while he was on a visit to Ceylon, to give evidence at a meeting of a Commission appointed under that Act.

Held further, that refusal by the respondent to be sworn or affirmed amounted to an offence of contempt against the Commission under section 12 (1) of the Commissions of Inquiry Act, although the respondent had been advised and had believed in good faith that he was not a person “residing in Ceylon”. Such a mistake is a mistake of law. The provisions, therefore, of section 72 of the Penal Code relating to a mistake of fact could not provide a defence to the respondent.

LXX—18 & 19

1*—H 14397—2,130 (6/68)

(B) A commission was appointed under the Commissions of Inquiry Act for the purpose of inquiring into and reporting whether abuses of the description referred to in the Warrant had occurred in relation to or in connection with "relevant" tenders for Government contracts, and in relation to or in connection with "relevant" Government contracts, during the period commencing on 1st June 1957 and ending on 31st July 1965.

Held, that the terms of reference were not *ultra vires* of the powers conferred by section 2 (1) of the Commissions of Inquiry Act.

(C) A summons may be considered as served within the meaning of section 12 (1) of the Commissions of Inquiry Act when, even though it has not been served and executed by the Fiscal as required by section 21 of that Act, there is voluntary acceptance of it by the person concerned, when it is served or delivered by some one other than the Fiscal.

(D) The respondent who was summoned to give evidence before a Commission of Inquiry refused to be sworn and to give evidence. When he was called upon to show cause why he should not be punished under section 47 of the Courts Ordinance, read with section 10 of the Commissions of Inquiry Act, for the offence of contempt against and in disrespect of the authority of the Commission, it was contended on his behalf that section 12 (1) of the Commissions of Inquiry Act relieved him of the obligation to be sworn if he could show that he had reasonable cause for the refusal. The particular cause which he relied upon was that he had a reasonable apprehension that the Commissioner would be likely to be biased against him in his consideration of evidence given by him.

Held, (i) that a refusal to be sworn, whatever be the purpose of or the reason for the refusal, is within the scope of the first four words "refuses to be sworn" of paragraph (b) of section 12 (1) of the Commissions of Inquiry Act and constitutes the offence of contempt. The second part of paragraph (b) does not permit reasonable cause to be shown for a general refusal to give evidence; it applies only to a refusal to answer particular questions.

(ii) that apprehension of bias on the part of the Commissioner could not in law be relied on by a person for the purpose of showing cause when he is charged with contempt falling under section 12 of the Commissions of Inquiry Act, more especially if that person is only a witness. A commission appointed under that Act is only a fact-finding body and does not exercise judicial or quasi-judicial functions.

(iii) that the provisions of section 12 of the Commissions of Inquiry Act do not conflict with the principle of the Separation of Powers.

(iv) that a Commissioner has no power to compel the attendance of a witness by issuing a warrant or proclamation against him or by causing him to be detained.

RULE under section 47 of the Courts Ordinance, read with section 10 of the Commissions of Inquiry Act.

H. L. de Silva, Crown Counsel, for the Attorney-General, as *amicus curiae*.

E. R. S. R. Coomaraswamy, with *R. R. Nalliah, C. D. S. Siriwardene, Nihal Jayawickrema, Hamavi Haniffa, P. A. D. Samarasekera and C. Chakradaran*, for the Respondent.

Cur. adv. vult.

April 9, 1968. H. N. G. FERNANDO, C.J.—

On October 22, 1965, His Excellency the Governor-General by Warrant under section 2 of the Commissions of Inquiry Act (Chapter 393) appointed Mr. Emil Guy Wikramanayake, Queen's Counsel, to be his Commissioner for the purpose of inquiring into and reporting whether abuses of the description referred to in the Warrant had occurred in relation to or in connection with tenders for Government contracts, and in relation to or in connection with Government contracts, during the period commencing on 1st June 1957 and ending on 31st July, 1965.

On 28th December 1967, the respondent to the present proceedings in this Court received summons issued under the hand of the Secretary to the Commission for the appearance of the respondent to give evidence before the Commission. On 8th January 1968 the respondent attended before the Commission and made the following statement :—

“ I would like to make submissions to Court because of various stories and reports in the Press and other circles where it was discussed. I made it convenient for the Commissioner to read an affidavit I have made already. ”

Thereupon the respondent handed an affidavit to the Commissioner, who having read it made certain observations and directed the respondent to be sworn or affirmed. Thereafter the respondent made certain statements some of which were :—

“ Having heard what the Commissioner said, I think I shall not proceed any further with these proceedings. ”

“ Having heard you, I wish to withdraw from further proceedings, to give evidence. ”

“ Having heard it, I am still convinced I am not prepared to give evidence before this Commission. ”

The Commissioner then made the following observations :—

“ Mr. Ratnagopal refuses to give evidence. I will make a note of the proceedings and make a report to the Supreme Court immediately for contempt. He has had every opportunity of giving evidence, but he refuses to give evidence, on the grounds he sets out. ” “ Mr. Ratnagopal : I am not refusing. I am saying I do not want to participate in the proceedings. ”

On 16th January, 1968, the Commissioner purporting to act under section 12 of the Commissions of Inquiry Act issued a Certificate containing a determination that the respondent has been guilty of contempt against and in disrespect of the authority of the Commission, and the certificate was transmitted to the Registrar of this Court by the Secretary of the Commission. A Rule was thereupon issued on the respondent stating that the Commissioner had certified that the respondent

“ appeared before him on summons on the 8th day of January 1968 but refused to be sworn and to give evidence ” and calling upon the respondent to show cause if any why he should not be punished under section 47 of the Courts Ordinance read with section 10 of the Commissions of Inquiry Act for the offence of contempt committed against and in disrespect of the authority of the said Commission.

Counsel who appeared before us on behalf of the respondent to show cause firstly argued that in terms of section 7 (c) of the Act a Commissioner has power only to summon “ any person residing in Ceylon ” and that the respondent was not a person so residing.

In considering this argument it is necessary first to summarise the facts upon which the argument is based.

According to the affidavit of the respondent dated 7th March 1968 and filed in this Court, the respondent was born in Ceylon in 1924 and was at one time a citizen of Ceylon. This statement as to the respondent’s former Ceylon citizenship is presumably correct, for the respondent presumably acquired the status of citizen of Ceylon by descent upon the passage into law on 15th November 1948 of the Citizenship Act, Cap. 349.

In 1947 the respondent sold all his property and assets in Ceylon, and in 1949 he left Ceylon and did not return here until 1954. He purchased a property in London in 1949, and now owns other properties in England. Ever since 1949 he has been engaged in business activities in London. In 1955 the respondent married a Ceylon citizen, in Ceylon, but she immediately thereafter accompanied the respondent to London and both husband and wife lived in London until 1961, except for a short visit to Ceylon in 1958.

In 1959 the respondent was registered as a citizen of the United Kingdom and Colonies and he has thereafter held a passport granted by the Government of the United Kingdom. The respondent’s wife has been living in Ceylon since November 1961 up to date, and since 1963 the wife has resided in a house in Colombo which she then purchased.

I should add that the respondent’s acquisition of British Citizenship had the effect of depriving him of his Ceylon citizenship, and that his entry into Ceylon is subject to control and restrictions in the same way as is the entry of any alien.

The respondent and his wife have five children :—(1) the eldest son was born in London in 1956 and attended school in Colombo from 1962 until August 1967 and is now being educated at Dulwich College, London ; (2) the second child, a daughter, was born in Ceylon in 1958 and has been attending school in Colombo ; (3) the third child was born in London in 1960 and has been in school at Colombo ; (4) the 4th and 5th children were born in Ceylon in 1964 and live with their mother in Colombo.

The wife has from and after 1963 made regular visits to London each year staying there with her husband for about 3 to 5 months during these visits.

Since 1964 the wife has been the largest shareholder of the Equipment and Construction Company Limited, incorporated in Ceylon, and she has been the Chairman of that Company since 1965. The respondent himself is not a shareholder or an officer of this Company but he is its Overseas Representative. The respondent according to his affidavit visits Ceylon twice a year on transit visas or holiday visas. On these occasions he stays with his wife in her Colombo house ; in order to perform his functions as Overseas Representative of the Company he studies its balance sheets and accounts during these visits, and he also discusses the company's affairs and advises its officers when he is in Ceylon. An affidavit from an Inspector of Police of the Aliens Branch of the Criminal Investigation Department in Ceylon sets out a list of the dates of arrival and of departure in and from Ceylon. According to this affidavit, the particulars in which are now not disputed, the respondent was in Ceylon in 1962, for one period of five months and another of one month ; in 1963, for one period of three months, another of seven weeks, and a third of two weeks ; in 1964, for one period of four weeks, for another of seven months, and a third of nine weeks ; in 1965, for two periods of two or three weeks each ; in 1966, for two periods, one of which was ten weeks ; and in 1967 for three periods of seven weeks, three weeks, and again three weeks, respectively.

On the respondent's own showing, visits by him to Ceylon are necessary for the purpose of performing his functions as the Overseas Representative of the Equipment and Construction Company and for the purpose of discussing the affairs of the Company with his wife and Company officers. There is then the fact that the respondent's wife and his children have been living in Ceylon since 1962, and that the children have had their home and their education here. According to the respondent, the decision for his wife and children to live in Ceylon was made by the wife in the interest of her own health and because of her desire to educate the children in Ceylon. Frequent visits to this country have been made by the respondent, whose relations with his family have been apparently quite normal. It is perfectly natural and reasonable that the respondent's interest in and affection for his wife and children have prompted him to come to Ceylon frequently in order to live for some time with them in their Colombo home. Indeed it seems to me to be a perfectly fair inference that the respondent has hitherto entertained a resolve to visit Ceylon whenever practicable and convenient because of the circumstances which have just been mentioned. I trust that the present proceedings in which the respondent has unfortunately become involved will not serve to alter that natural and reasonable resolve.

Counsel for the respondent has, for his argument that the facts of this case do not establish that the respondent was a person "residing in Ceylon", depended much upon a statement of Viscount Cave in *Levene v. Inland Revenue Commissioners*¹ :—

".... the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." it may be accepted as an accurate indication of the meaning of the word 'reside'."

The matter for consideration in that case was whether a person, whose 'ordinary residence' for a long period had been in the United Kingdom, had ceased to be resident by reason of frequent absence abroad. The decision in the words of Viscount Cave himself was that the expression "ordinary residence" connoted "residence in a place with some degree of continuity and apart from accidental or temporary absences."

I do not find the decision of much assistance in the instant case, because what had there to be decided was not the same question as that which concerns us. In the instant case, there is no doubt whatsoever that the respondent has been permanently resident in England for many years, and the question is whether nevertheless he was also "residing in Ceylon."

Much more akin to the circumstances we have to consider are those which were present in another case, in which the same Bench of the House of Lords which dealt with *Levene's case* delivered judgment on the same day (*Inland Revenue Commissioners v. Lysaght*²). There was no doubt that Lysaght had resided in Ireland for a long period, during which he had no definite place of abode in England. He used to visit England once a month for business purposes, he stayed at a hotel for about a week on each occasion and then returned home. Viscount Cave appears to have taken the view that such visits did not have the character requisite to constitute "residence" in England; but there are many observations in the other judgments in *Lysaght's case* which express the contrary view. Thus Viscount Sumner (page 244) :—

".... although setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master to be "resident" here, it does not follow that keeping up an establishment abroad and none here is incompatible with being "resident here", if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income tax purposes such meanings are misleading."

¹ (1928) A. C. 217.

² (1928) A. C. 234.

Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed.”

“ There is again the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference ? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and if so, how does the discontinuity of the days prevent him from being resident in England when he is here in fact, *if the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion.* If the question had been one of ‘ occasional residence ’ abroad in the language of General Rule 3 these facts would have satisfied the expression, *for residence is still residence, though it is only occasional*, and I see no such fundamental antithesis between ‘ residence ’ and ‘ temporary visits ’ as would prevent Mr. Lysaght’s visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is ‘ ordinary ’ under the circumstances.”

Lord Buckmaster (at page 248) :

“ *A man might well be compelled to reside here completely against his will* ; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside, and if residence be once established, ordinarily resident means in my opinion no more than that *the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.*”

It seems to me, applying the dicta just cited (particularly those which I have italicized), that the circumstances of the present case establish the respondent’s residence in Ceylon more strongly than the facts which were considered sufficient to establish Lysaght’s residence in England. The necessity for the respondent’s visits to Ceylon arose, not only for business reasons flowing from his position as Overseas Representative of the Equipment and Construction Company and as advisor to the Company and to his wife as its Chairman : the necessity also arose because his wife and family had their home in Ceylon, and regular visits were necessary to maintain the family relationship and to overlook family affairs. If I may use the language of Lord Warrington in *Levene’s case*¹, the respondent’s life has been ‘ usually ordered ’ in such a way that there was for him a regular pattern of life according to which, while he had his permanent residence in England and many business activities there, he also regularly came to Ceylon in the ordinary course because of business connections with the Company and of family ties.

¹(1928) *A. C.* at p. 232.

Counsel for the respondent very properly conceded that if the proper test of residence for the purpose of section 7 (c) of the Commissions of Inquiry Act is the same as that applied in *Lysaght's case*, the facts concerning the respondent must then be held to satisfy that test. Counsel however argued that the same test should not here be applied and I will refer to a few of the cases which he cited in this connection.

The decision most favourable to Counsel was that of *Re Adoption Application*¹. A district officer in the Colonial Service and his wife were permanently in Nigeria because of the officer's employment; but both husband and wife spent three months in England, once in every 15 months, during leave periods. They had no home of their own in England, but used to stay during the leave periods with the parents of either the husband or the wife. The application by them to adopt a child under the Adoption Act 1950 was refused on the ground that they did not reside in England for the purpose of section 2 (5) of the Act:—"An adoption order shall not be made in England unless the applicant and the infant reside in England." The Court held that in the Act, "residence" denotes some degree of permanence and that, to be "resident", an applicant must have "his settled headquarters in England".

In coming to this conclusion, Harman J. took account of other provisions of the Act, particularly section 2 (6):—

"An adoption order shall not be made in respect of any infant unless (a) the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and (b) the applicant has, at least three months before the date of the order, notified the welfare authority within whose area he is for the time being resident of his intention to apply for an adoption order in respect of the infant."

Reference was made to section 27 (1) which prohibits an Adoption Society from placing an infant in the care and possession of a person resident abroad. Harman J. noted also that when a 'custodian' changes his residence, s. 32 requires him to give notice of the change to the Welfare authority of the area where he has been residing and of the area to which he is moving.

Having regard to such provisions, Harman J. held that throughout the Act, "resident in England" and "resident abroad" are two things which are the converse one of the other. This meant that the applicant's residence abroad was incompatible with his being resident in England for the purposes of the Act. In all the circumstances, it was "difficult to suppose that under the Adoption Act, unlike the Fiscal Acts, a person can be resident in two places". There were thus many features in the Adoption Act which compelled the Court to the conclusion that an adoption order could not be made in favour of a person who was not permanently resident in England. I am unable to hold, in the absence

¹ (1951) 2 A. E. R. 931.

of any special features in our Commissions of Inquiry Act, that the test imposed by the English Adoption Act should be applied in considering the meaning of the expression "residing in Ceylon" occurring in section 7 of our Act.

Counsel also relied on English decisions upon the question whether the Courts have jurisdiction in matrimonial causes on the ground that a wife "has been ordinarily resident in England for a period of 3 years preceding the commencement of the proceedings".

In *Hopkins v. Hopkins*¹, the parties had married in England in 1943, at a time when the husband had a commission in the Fleet Air Arm. They lived in England until 1949 and had 2 children, both apparently born in England. In April 1949, the parties went to Canada, where the husband found employment in May that year. On 1st September, they moved into a house in Canada which the husband had taken on a yearly tenancy. At this period, the parties had no home in England. The wife left Canada on September 20th and returned to England in October.

The Court held that the husband had at the material time acquired a domicil of choice in Canada. The question was whether the wife had, during the 3 years preceding October 1949, been ordinarily resident in England, despite her stay in Canada for 5 months of that period. It was held that "it would be impossible to say that during these 5 months she was resident anywhere other than in Canada". The judgment in this case does not explain, by reference to the particular facts, how "ordinary residence" in Canada was thereby established. But a comparison with the facts of a later case readily furnishes the explanation.

In *Lewis v. Lewis*² the wife had a flat in London, in which she lived with her husband and her parents from 1942 to 1951. In 1951, the husband went to Australia in the course of his ordinary employment, and his wife and child accompanied him. But she retained the London flat in which her parents continued to reside. In November 1951 she returned to England and resumed occupation of the Flat. The Court accepted the position that the stay in Australia was intended to be temporary, and that both parties had, when they left for Australia, intended to return to England. It was held on these facts that the wife had been ordinarily resident in England, despite her stay with her husband in Australia, for a period of 3 years immediately preceding October 5, 1954.

I agree with Counsel's submission that the decision of these cases turned on the intention with which the wife in each case left England, which had previously been her place of ordinary residence. If there was at that stage no intention to return to England, but instead an intention to stay abroad indefinitely, then England ceased at that stage to be the place of ordinary residence. In the *Hopkins* case, the facts showed such an intention because the wife had no home in England and her only home was that which her husband provided in Australia. If therefore, the

¹ (1950) 2 A. E. R. 1035.

² (1956) 1 A. E. R. 375.

question were to arise whether the respondent in the instant case had been ordinarily resident in England during the 3 years preceding December 1967 (when he last visited Ceylon), the answer must probably be in the affirmative, because he had during that period left England with no idea of living elsewhere permanently or indefinitely. On the contrary, he was "ordinarily resident" in England during that period, despite his occasional, though regular, visits to Ceylon.

In the *Hopkins* case, as well as in a later case of *Stransky v. Stransky*¹, reference was made to the tax cases of *Levene* and *Lysaght*, and to observations made by the learned Law Lords in those cases. Pilcher J. in the *Hopkins* case cited a reference by Lord Warrington to the possibility that a person can reside in more than one place within the meaning of the provisions of the Tax laws. Nevertheless it seems to me that the question whether a wife can be held to be ordinarily resident in England for a 3-year period, despite her being "resident" elsewhere for parts of that period, did not call for consideration upon the facts of the cases of *Hopkins*, *Stransky* and *Lewis*. In each of these cases the ground of objection to the jurisdiction of the English Courts was only that a period of ordinary residence in England had either been terminated or else interrupted by a stay abroad; and the decisions were to the effect that such a termination or interruption can result only by a departure from England with an intention to live elsewhere permanently or indefinitely.

In my opinion therefore the cases concerning matrimonial causes must be distinguished from a case such as *Lysaght*, which decided that a person can in certain circumstances be 'resident' in England for the purposes of the revenue laws, notwithstanding that his permanent home is in another country. It is at least very doubtful whether, for the purposes of a matrimonial action, *Lysaght*'s connection with England would have sufficed to establish that he had been ordinarily resident in England for a period of 3 years; if the test applied in the matrimonial actions, namely whether a person left England with the intention of living elsewhere whether permanently or indefinitely, had been applied in *Lysaght's* case, *Lysaght* could probably not have been held to be ordinarily resident in England during a period of 3 years.

I note also that the Matrimonial Causes Act 1950 confers jurisdiction on the English Courts, firstly on the ground that the husband is domiciled in England, and that the ground of the wife's ordinary residence in England for a period of 3 years is the second alternative ground of jurisdiction. That being so, it is only reasonable that the alternative ground is established only if the wife's intention regarding her place of residence is in some degree comparable to the intention requisite to establish domicile.

In the revenue cases however, there is nothing in the relevant statutes which might indicate that residence cannot be established except when there is an intention to continue such residence permanently or

¹ (1954) 2 A. E. R. 536.

indefinitely. Nor is there in our Commissions of Inquiry Act any indication that such an intention to remain in Ceylon is necessary in order to constitute residence in Ceylon. I think therefore the expression any person "residing in Ceylon" in section 7 of our Act must be construed in the same manner as the provisions regarding residence in the English revenue laws have been construed in England. I have already indicated that the facts of the present case establish that the respondent "resides in Ceylon", even more strongly than the facts of a case such as that of Lysaght.

Counsel's second argument was that the appointment of the Commission was *ultra vires* the powers conferred by the Commissions of Inquiry Act. In considering this argument it is necessary to set out here the relevant part of the warrant appointing the Commission :—

" WHEREAS it appears to me to be necessary to appoint a Commission of Inquiry for the purposes hereafter mentioned :—

Now, therefore, I, William Gopallawa, Governor-General, reposing great trust and confidence in your prudence, ability and fidelity, do, in pursuance of the provisions of section 2 of the Commissions of Inquiry Act (Chapter 393), by these presents appoint you, the said Emil Guy Wikramanayake, to be my Commissioner for the purpose of—

(1) *inquiring into, and reporting on, whether, during the period commencing on the first day of June, 1957, and ending on the thirty-first day of July, 1965, all or any of the following acts or things, hereafter referred to as "abuses" occurred, directly or indirectly, in relation to, or in connection with, all such tenders (including quotations or other offers by whatsoever name or description called) made by persons or bodies of persons (other than any local authority or Government department), hereafter referred to as "contractors", for the performance of contracts for the construction of buildings or any other works (including contracts for the supply of services or equipment in connection with such first-mentioned contracts), by whatsoever name or designation called, for or on behalf of any Government department, and all such contracts of the description hereinbefore referred to given to contractors, whether in consequence of the making of tenders or otherwise, as you the said Commissioner may in your absolute discretion deem to be, by reason of their implications, financial or otherwise, to or on the Government, of sufficient importance in the public welfare to warrant such inquiry and report (hereafter referred to as "relevant tenders" and "relevant contracts", respectively) :—*

There immediately follows a long list of matters, each of which is an "abuse" concerning the occurrence of which there is to be inquiry and report by the Commission. I have italicized the sentences or clauses which have to be read together for the consideration of Counsel's argument.

Section 2 (1) of the Commissions of Inquiry Act provides as follows :—

“ Whenever it appears to the Governor-General to be necessary that an inquiry should be held and information obtained as to—

- (a) the administration of any department of Government or of any public or local authority or institution ; or
- (b) the conduct of any member of the public service ; or
- (c) any matter in respect of which an inquiry will, in his opinion, be in the interests of the public safety or welfare,

the Governor-General may, by warrant under the Public Seal of the Island, appoint a Commission of Inquiry consisting of one or more members to inquire into and report upon such administration, conduct or matter.”

The objection of *ultra vires* was based on certain propositions formulated on the following lines :—

- (1) The subject of the inquiry which the Governor-General required in this case is not of the nature specified in paragraph (a) or paragraph (b) of s. 2 (1) of the Act, because there is no specification in the terms of reference, either particularly or generally, of any department or departments or of any member or members of the public service, the administration of which or the conduct of whom is to be investigated.
- (2) Accordingly, an inquiry into the present subject matter could be lawfully required by the Governor-General only if it is within the scope of paragraph (c) of s. 2 (1).
- (3) A matter is within the scope of paragraph (c) only if the Governor-General is of opinion that an inquiry into the matter will be in the interests of the public welfare.
- (4) In this case, the Governor-General commits to the Commissioner the function of determining, in his absolute discretion, particular tenders and contracts which are of sufficient importance in the Commissioner’s opinion to warrant inquiry and report in the interest of the public welfare.
- (5) Hence the actual subject-matter of the inquiry, namely whether abuses occurred in connection with “relevant tenders” and “relevant contracts”, was not within the contemplation of the Governor-General, and was not a matter “in respect of which an inquiry will, in his opinion, be in the interests of the public welfare”.

This objection, which Counsel for the respondent formulated in consequence of certain observations which fell from me during the hearing appeared to me at first to be substantial. But learned Crown Counsel,

appearing as *amicus curiae*, subjected s. 2 of the Act and the terms of reference to a careful examination, which satisfied me that the objection must be rejected.

The maxim *omnia praesumuntur rite esse acta* justifies an assumption that the Governor-General will not appoint a Commission of Inquiry unless he has in mind *some* subject of inquiry ; and such an assumption is justified also on grounds of common sense. The terms of reference in this case do specify generally an ascertainable subject for inquiry, namely whether abuses of a specified description (they are specified in the list numbered (a) to (n) in the warrant) occurred in connection with tenders for Government contracts, and such contracts themselves, during a specified period.

If the scope of the inquiry as set out in the terms of reference had been thus generally stated without any qualification, the objection would not have been tenable that the Governor-General had not formed the requisite opinion under paragraph (c) as to the need for the inquiry. Moreover, I agree with learned Crown counsel that the list of " abuses " mentioned in the terms of reference involves or can involve inquiry into matters referred to in paragraphs (a) and (b) of s. 2 (1) of the Act, that is to say, into the administration of any Government Department which may be concerned with tenders and Government contracts and into the conduct of public officers who may be so concerned.

The questions which further arise are—

- (i) whether the limitation of the subject of the inquiry to abuses in connection with " relevant " tenders and " relevant " contracts contradicts the reasonable assumption that the Governor-General was of opinion that an inquiry was necessary into the subject generally mentioned in the terms of reference ;
- (ii) whether it was unlawful for the Governor-General to commit to the Commissioner the function of deciding or selecting which tenders and contracts he would investigate for the purpose of ascertaining whether abuses of the nature contemplated by the Governor-General had occurred in connection with them.

I find it convenient to consider these questions by supposing that the terms of reference in this case had been drafted in a different form thus :—

" Whereas I am of opinion that an inquiry should be held and information obtained as to whether abuses occurred in connection with tenders for Government contracts and with Government contracts during the period . . . : I hereby appoint to be my Commissioner for the purpose of inquiring into all such tenders called for, and all such contracts negotiated, during the aforesaid period, and of reporting whether abuses of the nature referred to in the Schedule hereto occurred in connection with any or some or all such tenders and contracts."

Let me suppose that upon such a Commission, the Commissioner ultimately submits a report—

- (a) that the number of tenders and contracts during the relevant period was so numerous that he had not been able to inquire into all of them ;
- (b) that he had inquired into all important tenders and contracts, namely those which related to works involving expenditure by the Government of sums exceeding Rs. 500,000 in each case ;
- (c) that he had also inquired into 20 other contracts which involved the utilisation of foreign aid, because in his opinion an inquiry into such contracts was of public importance ;
- (d) that according to his findings, “ abuses ” specified in the report had occurred in connection with some of the contracts actually investigated.

Upon receipt of such a report, it *may be* open to the Governor-General to require the same Commissioner to investigate all the previously uninvestigated tenders and contracts, and no doubt it *will be* open to appoint another Commissioner to make such an investigation. But the failure of the Commissioner to inquire into all the tenders and contracts in the contemplation of the Governor-General would not taint with illegality or invalidity the inquiry into, and the report of the findings concerning, the tenders and contracts into which an **actual** investigation took place. In other words, there can be no substance in such circumstances in the contention that the inquiries actually conducted by the Commissioner were not authorised by the Commissions of Inquiry Act.

If then an inquiry and the findings based thereon would not be unlawful or unauthorised on the ground that the Commissioner decides of his own motion to limit the scope of his investigations to some only, but not all, of the contemplated tenders and contracts, it must follow *a fortiori* that such a limitation would be even more innocuous if, as in the instant case, it is imposed in pursuance of special authority conferred by the warrant of appointment.

Since the objection of *ultra vires* has to be rejected for the reasons above stated, it is not necessary to state my reasons for agreeing with certain other answers to the objection which Crown Counsel also submitted. One such answer was that the purpose of the Commission, which is merely to inquire and report on certain matters, does not involve the exercise of judicial or quasi-judicial functions, or even of executive power ; that being so, any failure of the Commission to duly carry out its purpose is a subject for complaint to the Governor-General and not to the Courts.

The offence of contempt which the respondent is alleged to have committed, namely the refusal to be sworn, is one specified in s. 12 (1) (b) of the Act, and several arguments of law were adduced in support of the plea that the respondent did not commit that offence.

One such argument was that a refusal to be sworn is an offence only if the person so refusing is (in terms of the opening words of s. 12 (1)) a person “on whom a summons is served under this Act”, and that a summons under the Act was not served on the respondent. Counsel invoked s. 21 of the Act, which provides that “every process issued under this Act shall be served and executed by the Fiscal”, and claimed that there was no compliance with s. 21 in this case. There was undoubtedly no such compliance, for the summons which the respondent received was not served or executed by the Fiscal. What actually occurred was that the summons was issued to a police officer for service, and that, being unable to serve it personally, the police officer affixed a copy of the summons on the respondent’s wife’s house in Colombo, at which the respondent was admittedly staying at the time. Thereafter, the respondent himself telephoned an appropriate police official, who at the respondent’s request, delivered the summons to him. (These facts do not appear on the record, but they were stated to us by Counsel for respondent on instructions from his client.) The argument on this point then is simply that, although the respondent did receive the summons issued by the Commission, it was not *duly* served because he did not receive it from the hand of the Fiscal.

This argument depends on the proposition that the provisions of s. 21 are mandatory and imperative, and not merely directory, and that service of a summons otherwise than by the Fiscal is a nullity.

Having regard to the purpose of the service of a summons on a proposed witness, there can be no doubt that the purpose was achieved in this case, namely that the proposed witness in fact became aware that he was required to give evidence before a Commission which had duly issued a summons for him to appear under statutory power so to do. In fact the summons was delivered to him personally, because of a request which he himself made. The situation is thus not different from what it would have been if the respondent happened to attend before the Commission as a mere spectator, and had then agreed to accept a summons delivered to him by the Commissioner or the Secretary of the Commission. It seems to me that in both situations, when there is voluntary acceptance of a summons served or delivered by some one other than the official specified in that behalf in the statute, the purpose intended by the statutory provision for a mode of service is in fact achieved. Once a summons has been duly issued by a competent authority and has been in fact received and accepted by the proper person, any subsequent objection that there was not a due service is purely technical. Indeed, the respondent did not, when he attended before this Commission, raise the objection which his Counsel formulated only at a late stage of a lengthy argument. I hold that there was a mere irregularity in the mode of service of the summons and that the irregularity was of such a nature as would, in criminal proceedings, have been covered by the saving provisions of s. 425 of the Criminal Procedure Code. I hold also that the respondent by his conduct waived his right that the

summons should be served on him by the Fiscal. It follows that the respondent is a person on whom summons was served under the Act, and to whom the provisions of s. 12 become applicable.

Another argument, for the contention that the respondent committed no offence when he refused to be sworn or affirmed, invoked section 72 of the Penal Code, which declares that “ nothing is an offence which is done by a person who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it.”

The argument here was that the respondent had been advised and had believed in good faith, that he was not a person “ residing in Ceylon ” ; and even if that belief was incorrect, it was a mistake of fact and not a mistake of law which induced that belief and the consequent refusal to be sworn or affirmed. It seems to me however, that the mistake, if any, made by the respondent was not a mistake of fact. The mistake concerned the proper meaning, intended by the Legislature, of the expression “ any person residing in Ceylon ”. The well-known case of *Weerakoon v. Ranhamy*¹ is relevant in this connection.

In that case, a person was charged with an offence under the Forest Ordinance alleged to have been committed by reason of certain acts done by him on land alleged to have been ‘ chena land ’ at the relevant time. One defence in the case depended on section 72 of the Penal Code, the accused claiming that he had believed, on the faith of certain deeds and other matters, that he had a title to the land, and that it was therefore not “ chena land ”. In rejecting this defence Schneider J. observed :—

“ The title relied upon by the appellant does not come within the above description, and is one therefore which the law would not recognise. The only mistake he made was in being ignorant that this was the law. He was not ignorant as to the facts relating to his title, nor as to the fact that the land was a chena within the Kandyan provinces. He must be presumed to have known the law whether he was actually acquainted with it or not. It seems to me therefore that the mistake which the appellant could plead is a mistake of law and not of fact, and that section 72 therefore does not exculpate him. The word ‘ mistake ’ in section 72 must be taken to include ignorance. Sections 69 and 72 are a paraphrase of the English Common law maxim in its application to criminal law : *Ignorantia facti excusat ; ignorantia juris non excusat.* ”

De Sampayo J. discussed the matter as follows :—

“ Ordinarily there is no difficulty about the expression “ mistake of fact ”. It is a misconception as to the existence of something which in reality does not exist. What, then, is a ‘ fact ’ in this connection ? I should say that it was something external to oneself. It cannot I

¹ (1921) 23 N. L. R. 33.
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think include a state of mind. It is, indeed, the supposed fact which produces the state of mind. The difference between "objective" and "subjective" well known in mental science is not an inappropriate distinction for the present purpose. Mr. Jayewardene's argument, as I understand it, is that the accused's belief on the strength of his deeds and possession that he had good title is "the fact" about which he was mistaken. I cannot accede to this argument. The mistaken belief is the result of a process of reasoning, whereby he gives legal effect to his deeds and acts of possession. This surely is a mistake of law and not of fact."

In the present case also, the respondent, if he believed that he was not "residing" in Ceylon, had that belief through ignorance of the legal meaning of "residing" or because of a mistake in his process of reasoning. I hold therefore that the provisions of section 72 of the Penal Code do not provide a defence to the respondent.

Counsel for the respondent argued also for a construction of s. 12 (1) of the Act which would relieve him of the obligation to be sworn or affirmed if he could show that he had reasonable cause for the refusal. The particular cause which the respondent had, it is said, is that there was a reasonable apprehension that the Commissioner would be likely to be biased against the respondent in his consideration of evidence given by the respondent, and in his investigation of contracts in which the Equipment and Construction Company had been concerned.

The construction contended for is that, while a refusal *simpliciter* to be sworn is covered by the first four words "refuses to be sworn" in s. 12 (1) (b) of the Act, such a refusal, if it involves and is due to a desire not to give evidence, is in substance a refusal to give evidence. Such a refusal, it was argued, is within the scope, not of the first four words in paragraph (b) of s. 12 (1), but of the second part of the paragraph, *i.e.* "having been duly sworn, refuses or fails without cause, which in the opinion of the Commission is reasonable, to answer any question put to him touching the matters directed to be inquired into by the Commission".

There is first a simple but perhaps "technical" answer to this argument, namely that the second part of paragraph (b) is not applicable except in the case of a person who has first been duly sworn. But there are other more acceptable and convincing answers to this argument.

The second part of paragraph (b) pre-supposes in my opinion that a question must first be put to a witness before there can arise in his mind a reason why he should decline to answer it. For example, a witness will claim that a communication made to him was privileged, only if some question put to him will involve an answer which would disclose some such communication. The language of paragraph (b) indicates that reasonable cause for refusing to answer a question is some cause related to the question which is asked and/or to the answer which is sought, and is not some general cause inducing a general refusal to answer any questions whatsoever.

I think also that, while the second part of paragraph (b) applies to a refusal to answer a particular question, the first four words of the paragraph were intended to apply to a general refusal to give evidence. Let me take a case in which a person is summoned to give evidence, but the Commission does not require him to be sworn or affirmed. If the person then states that he does not wish to give evidence, the matter might end there if the Commission accedes to that wish. But it will be open to the Commission at that stage to require him to be sworn ; and if he then refuses to be sworn, his refusal would be clearly attributable to his intention not to give evidence. In other words, the requirement that he be sworn will then be the means of compelling him to testify. Indeed, this is the sole means by which any person can be compelled to give evidence before a Commission appointed under the Act.

The oath or affirmation which a witness takes in proceedings in our Courts is that “ the evidence I will give in this case will be the truth ”. A witness thus makes a twofold undertaking, that he will give evidence, and that his evidence will be true. If then the first part of paragraph (b) can be construed to mean that a person who is sworn may nevertheless refuse to testify, the construction would have the absurd consequence that the law permits the person to remain mute and thus evade outright his undertaking to give true evidence.

I hold for these reasons, firstly, that a refusal to be sworn, whatever be the purpose of or the reason for the refusal, is within the scope of the first four words of paragraph (b) of s. 12 (1) and constitutes the offence of contempt ; and secondly, that the second part of paragraph (b) does not permit reasonable cause to be shown for a general refusal to give evidence.

In view of the conclusion just stated, it suffices for me to add that there appears to be much substance in two arguments of Crown Counsel. One was that the ground of bias is not available even to a person whose conduct is the subject of inquiry by a Commission, if its proceedings are neither judicial nor quasi-judicial, and if its findings do not determine or affect the rights of such person. The other argument was that the ground of bias on the part of a tribunal is not available to a witness who refuses to testify, even though the proceedings of the tribunal be judicial. I note in this connection that at the present stage of the inquiry by this Commission, the conduct of the respondent is not “ a subject of inquiry by the Commission ” as contemplated in s. 16 of the Act.

During this hearing, we invited the attention of learned Crown Counsel to a possible challenge of certain provisions of s. 12 of the Commissions of Inquiry Act on the ground that they infringe the principle of the Separation of Powers. If in circumstances referable to paragraph (a) or paragraph (c) of s. 12 (1), or to the second part of paragraph (b), a person pleads some cause as a ground for failure to appear, or to produce a document, or to answer a question, as the case may be, then the section requires the Commissioner to form the opinion whether or not the pleaded

cause is reasonable. In any such circumstances, the Commissioner's determination under sub-section (2) of s. 12 that the person has committed an offence of contempt, the determination will be based on the Commissioner's opinion that the cause shown is not reasonable. The question can then arise whether, in subsequent proceedings in the Supreme Court for the alleged offence of contempt, a relevant ingredient of the offence consists of the fact that the Commissioner has formed the opinion to which reference is here made. If that opinion is a relevant ingredient, then the Court would be bound by the Commissioner's opinion on a question of fact, and to that extent a conviction by this Court would be dependent on a finding of fact reached by a tribunal not competent to exercise judicial power.

I am in agreement with Crown Counsel's submission that the above is not the only construction which may be given to s. 12, and that the Section can and should be construed in such a manner that its provisions do not conflict with the principle of the Separation of Powers. The alternative construction is that the Commissioner's opinion is relevant only for the purpose of the determination made by him under sub-section (2); but once the matter is before the Supreme Court, and when the Court decides in its discretion to take cognisance of an alleged offence of contempt, it is for the Court to decide for itself whether or not a person had reasonable cause for any of the failures or omissions now under discussion.

It will be evident that my brother Fernando, in reaching the conclusion that the respondent in this case had no reasonable apprehension of the likelihood of bias on the part of the Commissioner, has considered all the relevant circumstances quite independently of, and without reference to, the opinion entertained by the Commissioner concerning this matter.

The judgment prepared by my brother Fernando relieves me of the task of discussing two further questions which arise for decision. Whether an apprehension of bias on the part of the Commissioner can in law constitute a cause for the respondent's refusal to be sworn or give evidence, and whether the matters specified in the respondent's affidavit filed in this court concerning the Commissioner's business interests, and the Commissioner's actions and remarks affecting the respondent and his wife, sufficed to create a reasonable apprehension that the Commissioner is likely to be biased against the respondent in the course of the Commissioner's further proceedings. I adopt the reasons stated by my brother for rejecting the contentions urged on behalf of the respondent in relation to both these questions, and I hold accordingly that answers in the negative must be given to both the questions.

I hold that the respondent is guilty of an offence of contempt committed against or in disrespect of the authority of the Commission, and I impose on him for that offence a fine of one thousand rupees, or in default a sentence of simple imprisonment for a term of one month.

T. S. FERNANDO, J.—

I agree, for the reasons set out by my Lord, the Chief Justice, with the findings he has reached and to the making on this matter of the order proposed by him. I wish to deal, at his suggestion, only with the questions of law and fact relating to bias which have not been explored by him in his judgment.

In the course of the protracted argument before us which, I would like to state, was conducted with ability and with acceptance by learned counsel for the respondent and by Crown Counsel, much time was devoted to the question whether bias on the part of the Commissioner would constitute reasonable cause if established by a person charged with contempt falling within section 12 of the Act. Crown Counsel argued that bias would not be relevant in such a situation and that this Court should not, therefore, examine the allegations contained in the affidavit of the respondent. A Commission appointed by the Governor-General under the Commissions of Inquiry Act is only a fact-finding body and, indeed, its report is not required by law to be published. It was held quite recently, in the case of *Dias v. Abeywardene*¹, where a writ of prohibition had been applied for on the ground of a Commissioner's alleged bias, that a Commissioner under the Act does not exercise judicial or quasi-judicial functions. It is now well recognised that the remedies of *prohibition* and *certiorari* are available to disqualify persons or bodies exercising functions of a judicial or quasi-judicial nature if bias in the sense of pecuniary personal or official bias is established. In the case of judges, section 86 of the Courts Ordinance itself provides for a disqualification of a judge who is personally interested in any cause or suit. Crown Counsel brought to our notice a decision of an Indian High Court—*Allan Berry and Co. v. Vivian Bose*²—where a petition under Articles 226 and 227 of the Indian Constitution had been directed, *inter alia*, towards seeking a disqualification of the Solicitor and the Secretary attached to a Commission appointed under the Commissions of Inquiry Act, 1952, on the ground that they are incapable of giving impartial assistance and should not be allowed to be attached to the Commission. The Court there held that, as the proceedings of the Commission are not of a judicial or quasi-judicial nature, it was not possible for it to hold that bias, even if established, disqualified the officers concerned from being associated with the Commission.

Counsel for the respondent attempted to distinguish this and other cases cited by Crown Counsel by pointing out that what he was seeking to do in this Court was, not to establish that bias which would disqualify the Commissioner from performing his functions under the Act, but to point to facts indicating bias as constituting reasonable cause for his client's refusal to testify before this particular Commissioner. I do, however, think that there is much force in Crown Counsel's rejoinder that to permit the respondent, who is not even in a position analogous to that of a party in a judicial or quasi-judicial proceeding but only a witness, to

¹ (1966) 68 N. L. R. 409.

² A. I. R., 1960, Punjab, 86.

refuse to testify on the ground alleged is to grant him a right denied even to a party in a proceeding before a court. A witness in a judicial proceeding who attacks the judge on the ground of his bias would be held to be committing the offence of contempt by scandalising the court. Moreover, if bias can constitute reasonable cause for the respondent refusing to be sworn or refusing to testify, the same or similar considerations can be put forward by others, and a logical consequence may ensure a virtual disqualification of the Commissioner. It is not, in my opinion, competent for this court to so disqualify a Commissioner appointed by the Governor-General. It is undeniable that the Governor-General's powers and functions under the Commissions of Inquiry Act are exercised in accordance with the usual constitutional conventions—see section 4 (2) of the Constitution Order in Council, 1946—and he would receive the advice of the appropriate Minister. The proper forum for seeking a disqualification of a Commissioner would appear, therefore, to be Parliament and not the Courts of Law. By upholding the point raised by the respondent we would be attempting to do indirectly what we cannot do directly. Any question that would result in a disqualification or a virtual disqualification of the Commissioner should be left by the court to the proper authority, and I would in this connection adopt with respect the observation of Frankfurter J. in the American case of *Colegrove v. Green*¹, made in the context of the Separation of Powers, that “to sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket”. For the reasons I have indicated, I would uphold the argument advanced by Crown Counsel that bias cannot be relied on for the purpose of showing reasonable cause when charged with commission of a contempt and that it is, accordingly, irrelevant.

The opinion that I have reached that bias on the part of a Commissioner is irrelevant in these proceedings would, in ordinary circumstances, have rendered it unnecessary for me to examine the averments or allegations contained in the respondent's affidavit of 7th March, 1968 presented to this court in support of the ground of bias. Respondent's Counsel, however, urged that, as this is not a proceeding whereby it is sought to disqualify the Commissioner, and as all that the respondent is doing by presenting his affidavit is to establish reasonable cause for refusal generally to give evidence, the court will examine the allegations of bias to the extent necessary to decide whether they would constitute such reasonable cause. As we permitted the matter to be argued, and as we think it expedient to record a finding of fact on this matter in the event of our conclusion that reasonable cause cannot be permitted to be shown where there has been a general refusal to give evidence being wrong, I will shortly state my reasons for holding that the respondent has failed also to establish bias.

In regard to the affidavit of the respondent, his counsel was content to confine himself to the matters set out in paragraphs 6 and 7 thereof, with the further qualification that the averments in sub-paragraph (o)

¹ 328 U. S. S. C. Rep. 556 (90 Lawyers' Ed., p. 1436).

of paragraph 6 may be disregarded by us as that sub-paragraph was included at a stage when the respondent did not have access to certain documents. It was stated that the documents have since been seen and that it is not proposed to pursue the particular matter concerning the offer by Steel Products Ltd. to purchase the estate specified in that sub-paragraph.

It became apparent to us in the course of the argument that no examination of the averments of the respondent's affidavit could be effective without an opportunity being afforded to the Commissioner to submit any material he wished in answer to that affidavit. Section 12 (4) of the Commissions of Inquiry Act does not enable this Court to summon or examine the Commissioner except with his own consent. He is not a party to these proceedings although they commenced on his certificate. Crown Counsel's appearance before us was in the capacity of an *amicus curiae* in response to the notice we had caused to be given to the Attorney-General to assist us at the hearing. In the circumstances we indicated to Crown Counsel that we would be willing to receive any affidavit evidence that the Commissioner may be advised to submit. After that indication was given, we have had submitted to us an affidavit sworn by the Commissioner on March 23, 1968 in which, to put it shortly, he denies all the material allegations in paragraph 6 of the respondent's affidavit. We should add that an affidavit containing substantially the same allegations contained in the respondent's affidavit filed in this court had been submitted by the respondent to the Commissioner on January 8, 1968, before the certificate to this court was signed by the Commissioner. We have had the advantage of examining the record of the proceedings of that day before the Commission, and I observe that the Commissioner appears generally to have thought then that there was not sufficient reason for him not to proceed to examine the respondent as a witness.

Quite apart from the fact that the material allegations, as I have noted above, have been denied by the Commissioner, we have to take account of the fact that the allegations in paragraph 6 are of too general a nature and no specific instances, except those to which I shall refer later, have been mentioned :—vide sub-paragraphs (g) and (h) thereof. Had specific instances been given, if there were any, the Commissioner would have had an opportunity of considering the allegations and replying thereto, if he was so advised. Moreover, it is indisputable that to be any real assistance in the discussion of the question of bias the allegations would require to be specific ones. One or more of the few specific transactions mentioned in the affidavit—vide sub-paragraph (k) of paragraph 6—relate to contracts entered into at a time falling outside the period covered by the terms of reference of the Commission. The matter referred to in sub-paragraph (r), viz., that a Mr. de Silva who is a friend of the Commissioner and who has resigned from the Board of Directors of a company of which the respondent's wife is Chairman and who is alleged by respondent to be taking an undue interest in the investigations being

made by the Commission, is of too remote a nature to form a ground capable of contributing towards the establishing of bias on the part of the Commissioner. There is next the allegation in sub-paragraph (p) that, as the Commissioner had some years ago acted as counsel for Messrs Socoman in certain arbitration proceedings between the latter and the Government and as the company (Equipment and Construction Co. Ltd.) of which the respondent is the overseas representative is a collaborator with and a sub-contractor of Socomans, the Commissioner may not be able to resist drawing inferences from knowledge gathered by him in his professional and, therefore, confidential capacity as counsel for Socomans. It would appear that Equipment and Construction Co. Ltd. was a sub-contractor of Socomans in respect of the contract entered into between the latter and Government over the Kandy Town Water Supply Scheme which is one of the contracts being investigated into by the Commissioner. The fear which the respondent appears to be entertaining in this regard of a denial to him of what he calls natural justice is, in my opinion, too far fetched to be taken into account when one is considering the existence of bias. Taken altogether, the matters relied on in paragraph 6 of the affidavit as allegations establishing bias in the Commissioner are of so vague, flimsy and general a nature that it is altogether impossible to regard them as constituting reasonable cause for a refusal to give evidence.

There remains only an examination of the matters specified in paragraph 7 of the respondent's affidavit with a view to considering whether the existence of the facts alleged therein and proved would in their cumulative effect add up to such bias or antipathy towards the respondent, and indeed towards his wife as well, as would constitute reasonable cause contemplated in section 12 (1) (b) of the Act. These have been examined at some length by us and we even permitted the respondent to lead evidence in proof of such of them as he cared to pursue before us. We had the record of the proceedings of the Commission in so far as they relate to the relevant dates put before us, and we permitted respondent's counsel access thereto so that the facts may be placed before us as accurately as circumstances permitted.

It may be useful now to examine the facts alleged to be proved. For convenience, they may be detailed, in chronological order, under the following five heads :—

- (i) An attempt to have summons on the respondent served illegally abroad ;
- (ii) An uncalled for suspension of the passport (a Ceylon passport) of the respondent's wife secured on December 8, 1967 on a request made by the Commissioner on December 5, 1967 ;
- (iii) A threat uttered on December 13, 1967 to issue a " commission " to a medical officer to examine the respondent's wife in hospital, despite the submission by her of a medical certificate to the effect that she had entered hospital ;

- (iv) The Airport incident of December 26, 1967 ;
- (v) An illegal order of December 28, 1967 restraining the respondent, a British subject, in possession of a valid British passport, from leaving Ceylon.

In respect of item (i) above, a reference to the record kept by the Commission on September 2, 1967 shows that the Commissioner “directed summons be sent (to the respondent) by registered post to his address in London, and that a copy (of the summons) be sent to the High Commission to have it served (on the respondent)”. Crown Counsel conceded that the High Commissioner would have had no legal authority to serve summons or have summons served outside Ceylon. The Fiscal to whom directions can be given under the Act to effect service of summons cannot do so overseas. He conceded also that the summons directed in these circumstances would have lacked legal efficacy. Even where a person has voluntarily accepted summons reaching him outside Ceylon there would be no legal obligation on him to attend in obedience thereto. The Commissioner appears, however, to have entertained the belief, erroneous as it now turns out to be, that not only had he the power to order service of summons outside Ceylon, but that he had the power even to issue a warrant of arrest and, indeed, to proclaim the respondent. It was proved by the record that on December 27, 1967 (the day after the respondent had arrived in Ceylon) the Commissioner had stated to the respondent’s wife who had appeared before him that day as a witness that while he cannot compel her to take the summons on her husband he “can take other steps equally drastic”. This reference to “drastic steps”, I have no doubt, was to the issue of warrant and proclamation, because on the very next day he stated to a proctor who appeared before him on the respondent’s behalf that if he failed to secure the attendance of the respondent by effecting substituted service which he was directing that day he would “proceed to take the other steps I am empowered to take to secure the attendance of a witness, such, for instance, as the issue of a warrant, or a proclamation if that also fails”. The Commissioner very probably had in his mind the procedure available to a civil court in terms of section 131 of the Civil Procedure Code, but, as Crown Counsel suggested, overlooked the circumstance that those powers of a court are not vested in a Commission appointed under the Commissions of Inquiry Act.

Turning to item (ii), it was not disputed by Crown Counsel that at the request of the Commissioner made on December 5, 1967, the prescribed authority under the Immigrants and Emigrants Act had on December 8, 1967 ordered the suspension of the passport of the respondent’s wife who is a citizen of Ceylon, and that suspension was being continued by another order similarly secured on January 28, 1968. It has been suggested by Crown Counsel that suspension of a passport is a matter which is in the absolute discretion of the prescribed authority. It does not become necessary on this occasion to examine the validity of

the proposition so suggested, and I therefore expressly refrain from doing so here. Speaking for myself, I think it appropriate to add that the right to freedom of movement is an important right of a citizen, and our courts may not be found unwilling on a proper occasion and in appropriate proceedings to consider whether executive discretion can be equated to executive whim or caprice. In the present instance, having regard to the facts that (a) the respondent's wife had, in obedience to the summons issued by the Commission, attended and given evidence, and (b) the Commissioner himself felt that she was not in a position to give any useful evidence, doubts do arise about the necessity of restricting her movements in the way ensured by the Commissioner.

The next item (iii) also concerns the wife of the respondent. It was pointed out to us that, on December 5, 1967, when a medical certificate was submitted by Counsel appearing for the respondent's wife to account for her inability to attend, the Commissioner inquired whether there was any likelihood of her leaving Ceylon and received Counsel's assurance that there was none. When a second medical certificate was submitted on the lady's behalf on December 13, 1967, the Commissioner remarked that he could issue a "commission" to the Judicial Medical Officer or a gynaecologist to examine the lady, presumably because he entertained some doubt about the bona fides of the reason for non-attendance. The acceptance of an excuse for non-attendance on the ground of illness may be made conditional on the person summoned agreeing to submit himself for medical examination. But there is, in my opinion, no power even in a court for the issue of "commissions" of this kind to compel persons to submit themselves to medical examination. Certainly Crown Counsel did not point to any provision of law enabling this to be done or suggest that it could legally be done. In these circumstances, the respondent's counsel submitted to us that this was another instance of a threat held out by the Commission to do something without legal authority therefor. That such orders for "commissions" have been or are often being made by courts is no good reason for a Commission appointed under the Commissions of Inquiry Act also to resort to them. It was also urged on behalf of the respondent that on December 13 the Commissioner asked of the proctor for the respondent's wife what assurance there is that she will not join her husband abroad. It was suggested that the question was a cynical one considering that some days earlier the Commissioner had ensured she would not be able to leave the country, and I have myself experienced difficulty in appreciating the necessity for it. It appears to have

been in a similar strain that the Commissioner that very day in postponing the taking of the evidence of the respondent's wife for December 27 remarked that he wanted "to see to it that she makes no attempt to go away. I can take sufficient steps to prevent it".

Let me now turn to item (iv) which concerns the detention of the respondent at the Katunayake airport on the afternoon of December 26, 1967, when he disembarked at Colombo on a transit visa. The Commissioner had been informed by the proctor who had appeared for the respondent's wife on some earlier day that the respondent was expected in Colombo about Christmas time. The Commissioner had not been successful in having summons served in England on the respondent, and obviously (and I must add not unnaturally) the Commissioner desired to have service effected no sooner the respondent arrived in Ceylon. To that end the Commissioner had enlisted the services of the police to provide information as to the correct address of the respondent during his visit to Ceylon. The police officer on duty at the airport to whom fell the duty of obtaining this information was required to make communication with his superior officers at Colombo should the respondent disembark at Colombo. It transpired in evidence before us that this police officer kept with him the respondent's passport until he was able to complete a telephone call to his said superior officers. As a consequence, the respondent would appear to have been detained for about 15 minutes at the airport. While one must appreciate that the respondent, probably tired after a long journey and anxious to get away to his wife's house, was irritated by what he may well have considered uncalled for delay or detention, the entire incident is, in my opinion, trivial, and the connection of the Commissioner therewith is but remote. It appears to me to be a case of "much ado about nothing".

The final item (v) is of a more substantial nature than the others. There is now no dispute over the fact that, as a result of a request made by the Commissioner, the Police had issued instructions on December 28, 1967—vide document X4—that the respondent should not be allowed to leave Ceylon. He could have been prevented from so leaving only by restraining him, and the circumstances attending that restraint would have rendered the person responsible guilty at least of the offence of wrongful restraint. The respondent had been made aware of this order. Crown Counsel agreed that the order and the request that had prompted it were both quite illegal. The respondent is a British subject who arrived in Ceylon on a British passport, and he was free to leave Ceylon at any time he desired provided he had not by some act or conduct of his rendered himself liable to be arrested or otherwise restrained. It is a matter for no little regret that orders of this nature are issued

apparently without adequate consideration either of their legality or their propriety. It is customary to include in a warrant issued by the Governor-General under the Commissions of Inquiry Act a direction to all police officers and other persons to render such assistance as may be applied for by the Commissioners. But the warrant itself specifies that the assistance that may be rendered is only such "as may be properly rendered". The police officers and other persons must therefore advise themselves as to the propriety and legality of the assistance that they can grant. It must follow that the Commissioners themselves owe a duty to the police officers and other persons to whom they address requests for assistance or information to confine such requests to proper and lawful ones.

Counsel for the respondent argued that, on the facts I have attempted to outline shortly above, his client was reasonably justified in feeling apprehensive about further illegalities being committed or threatened if he appeared before the Commission to give evidence. He contended that the question of justification must be looked at in the background of the business rivalry alleged between companies in which the respondent was interested and the companies of which the Commissioner is a director. Looked at in this way, he argued, the facts caused the respondent to entertain the belief that the Commissioner was biased, and this belief in a bias constituted reasonable cause for the respondent to refuse to give evidence. We were invited by counsel to apply on this question of the existence of reasonable cause a subjective test, but we felt quite unable to agree that such a test would be the proper one.

If the case had been one of a court or of a person acting in a quasi-judicial capacity, only "a real likelihood of bias", i.e., "a real likelihood of operative prejudice, whether conscious or unconscious" would have disqualified the court or such other person;—see *R. v. Camborne Justices, ex parte Pearce*¹. In that case the Court did not feel itself justified in going so far as Lord Esher, M. R. did in *Eckersley v. Mersey Docks and Harbour Board*² when he said "not only must they not be biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed".

The proper test to be applied is, in my opinion, an objective one, and I would formulate it somewhat on the following lines: Would a reasonable man, in all the circumstances of the case, believe that there

¹ (1954) *A. E. R.* 850.

² (1894) *2 Q. B.* 670.

was a real likelihood of the Commissioner being biased against him? I agree with the respondent's counsel that the burden on a person seeking to show reasonable cause is to satisfy this objective test on a balance of probability. We were invited to have regard to the maxim that everyone is presumed to know the law. Certainly such a presumption is particularly valid in the case of a person like the Commissioner with whom we are concerned on this proceeding. Counsel therefore argued that the acts amounting to illegalities and threats of illegalities complained of by the respondent could be presumed to have been committed with actual knowledge of their illegal nature.

In applying the objective and not the subjective test, the reasonable man would be required to balance such inferences as could be drawn from the proved facts as would go to show that the Commissioner had justification to believe that the respondent was merely placing obstacles in the way of having his evidence recorded with the inferences that would go towards indicating the existence in the Commissioner of a bias or prejudice against the respondent. The record of the proceedings kept by the Commissioner from September 2, 1967 to January 8, 1968 (vide copy produced before us) has been submitted to a very minute examination before us by counsel for the respondent. I think it evidences that the Commissioner's fear that the respondent was endeavouring to avoid giving evidence was intrinsically justified. Therefore, even approaching the question of the illegalities referred to above, on the assumption that the Commissioner acted with a knowledge of their illegality, I do not think that, when the proceedings are considered as a whole, we would be justified in reaching a conclusion that the objective test we are required to apply here is satisfied.

The ordering of service of summons abroad, the suspension of the passport of the respondent's wife, the threat to issue "commissions" for her examination in the hospital by a doctor, the threat to issue a warrant for the apprehension of the respondent and to "proclaim" him, and the observations made by the Commissioner on more than one occasion suggestive of a belief by him that the respondent is not desirous of giving evidence are, all consistent, more with an anxiety on the part of the Commissioner to get on with the work entrusted to him and investigate quickly any alleged "abuses" connected with Government contracts than with the existence of any real bias towards the respondent. It may be that in his enthusiasm for the performance of the task entrusted to him he may well have felt irritated by what appears to have struck him as obstruction on the part of the respondent.

I am not unmindful of the fact stressed by counsel for the respondent that the record shows that lawyers appearing for the respondent as well as for his wife had indicated right up to the time of the respondent's arrival in Ceylon on December 26 that he was willing to give evidence. Nevertheless, all the matters complained of except the order to prevent the respondent leaving Ceylon are consistent more with the anxiety I have referred to above on the part of the Commissioner than to any real likelihood of bias, and no reasonable man could have thought otherwise. In these circumstances, could the illegal order (item v) have sufficed to tilt the balance in favour of the probability of the reasonable man reaching the contrary conclusion. This question, I am free to state, is not devoid of difficulty ; but, always bearing in mind that the burden of establishing reasonable cause is on the respondent, I do not consider it could because, in the context of the relevant proceedings, this illegal order was itself but the outcome of a continuing and pressing desire to secure the evidence of the respondent, if need be, at any cost. In that view it must follow that the respondent has failed in establishing reasonable cause even on the basis of such of the allegations in paragraph 7 of the affidavit as have been proved.

Before concluding this judgment it is right to add one word more. With a view to avoiding recurrences of illegalities and irregularities of the kind that these contempt proceedings have brought to light, we hope that the Government will in the future ensure to Commissioners appointed under the Commissions of Inquiry Act legal advice in regard to the several steps that may require to be taken from time to time by Commissions in the discharge of their duties. Neglect to ensure this could expose police officers and other persons to prosecutions and civil suits at the instance of parties affected.

TAMBIAH, J.—

I had the benefit of reading the judgments of my Lord the Chief Justice and my brother T. S. Fernando, J. I am in agreement with their findings and the views expressed by them. However, I wish to add my own observations on a few matters.

There is overwhelming evidence to show that, despite the fact that the respondent abandoned Ceylon citizenship, and acquired British citizenship and resided in England, he has a residence in Ceylon where his wife and children are living. In deciding the question of residence the fact of residence as well as the intention to reside are factors which should be taken into account. It is possible for a citizen of the United Kingdom

to have residence in another country for a particular period either for purposes of holiday or business. The facts proved in this case show that the respondent's wife and children had a permanent residence in Ceylon and the respondent himself, whenever he came to Ceylon, resided here with his wife.

Counsel for the respondent urged that the visits of the respondent to Ceylon were in the nature of sojourns, but the evidence clearly establishes that he came and resided with his wife for a particular period of time each year ever since he abandoned Ceylon citizenship. Further there is evidence that for business purposes it was necessary for him to have a residence in Ceylon. Therefore I hold that he was a person resident in Ceylon within the meaning of section 7(c) of the Commissions of Inquiry Act (Cap. 393).

My brother T. S. Fernando J. has fully dealt with the facts relating to the alleged bias referred to by Counsel for the respondent in the course of his submissions. Although some of the acts of the Commissioner are illegal and cannot be justified, yet after very careful consideration, it is difficult for me to take the view that he had a bias against the respondent. It is not in evidence that the respondent was known to him before. Some of the steps taken by the Commissioner, although not justified in law, were perhaps taken by him as he was apprehensive. The respondent who was a citizen of the United Kingdom and whose visits to this country are unpredictable, could not be got at in order to be examined by him. It is regrettable that the Commissioner should have adopted some stringent methods which are against the rule of law and which are illegal. But the important question is whether the Commissioner has formed a bias to disbelieve any answer which would be given by the respondent to questions put by him.

I fully agree with the findings of my brother T. S. Fernando J. that in an inquiry of this nature the Commissioner does not act judicially or quasi-judicially (vide *Dias v. Abeywardena*¹). Proceedings of this nature are inquisitorial (vide article on "Reports of Committees" by A. E. W. Park, *Modern Law Review*, Vol. 30 (July 1967), p. 426 at 428). Even an adverse finding against the respondent could not in any way alter the legal rights of the respondent. The Commission is a fact-finding Commission and has no legal consequences. (Vide *Allen Berry & Co. v.*

¹ (1966) 68 N. L. R. 409.

*Vivian Bose*¹; *The King v. Macfarlane*.²) Therefore the question of bias is not a factor that any reasonable man should take into account in refusing to give evidence.

Further an analysis of section 12 (1) (b) of the Commissions of Inquiry Act (Cap. 393) read with section 12 of the same Act shows that this court will take cognizance of contempt of court only where a person refuses to give an answer to a question put by a Commissioner, which is reasonable or when he refuses to be sworn. The questions put by a Commissioner may be unreasonable if they did not touch on the matters directed to be inquired into by the Commission.

In this case it is too premature for us to find out the nature of the questions which may be asked by the Commission. The evidence given by the respondent's wife shows that, although she is the Chairman of the company known as the Equipment and Construction Company Limited, she was unable to say where the books were or give any details about this business. The Commissioner appears to have been at pains to get at the books of this Company. In these circumstances, the Commissioner rightly thought that the respondent, who was perhaps the brains behind this business, would have been in a better position to give information regarding the books. If the Commissioner had asked the question as to where the books of the Company were, could it be said that it was an unreasonable question and that a reasonable man in the position of the respondent could have possibly objected to give an answer? We are now in the realm of speculation as to what questions the Commissioner would have asked from the respondent. Therefore it was not reasonable for the respondent to refuse to give evidence before the Commission. In these circumstances, it cannot be said that he had reasonable cause in refusing to give evidence. In my view therefore, the respondent has committed the offence of contempt as envisaged in section 12 (1) of the Commissions of Inquiry Act (Cap. 393) and this court should take cognizance of such contempt under the provisions of section 12 (3) of the Commissions of Inquiry Act (Cap. 393). For these reasons I convict the respondent of the offence of contempt of which he is charged and sentence him to pay a fine of Rs. 1000/-; in default of fine he will serve a term of one month's simple imprisonment.

Rule made absolute.

¹ (1960) *A. I. R.*, *Punjab*, 86.

² (1923) *32 Commonwealth Law Reports* 518

1967

Present : Tambiah, J., and Alles, J.

THE ATTORNEY-GENERAL, Appellant, and O. M.
DE LIVERA, Respondent

S. C. 559/65—D. C. Colombo, 95/T

Estate Duty Ordinance (Cap. 241)—Proviso 3 of s. 6 (d)—“Gift made in consideration of marriage”—Requisites necessary for such gift.

A father donated to his daughter, seven years after her marriage, certain immovable property. He purported to make the gift in pursuance of an earlier oral “agreement”, prior to the time of the marriage, to convey the premises to the daughter at her marriage by way of dowry.

Held, that the gift was not a “gift made in consideration of marriage” within the meaning of that expression in proviso (iii) of section 6 (d) of the Estate Duty Ordinance. A requisite necessary for the gift contemplated in that proviso is that it must be made on the occasion of the marriage and contingent on the marriage taking place.

APPEAL from a judgment of the District Court, Colombo.

P. Naguleswaran, Crown Counsel, for the appellant.

H. W. Jayewardene, Q.C., with *S. Ambalavanar, Sinha Basnayake* and *B. Eliyatamby*, for the respondent.

Cur. adv. vult.

November 27, 1967. **TAMBIAH, J.**—

The matter raised in this appeal is an important one and involves the construction of proviso 3 of section 6 of the Estate Duty Ordinance (Cap. 241). The short point for decision is whether the gift of property No. 7, Police Park Avenue, Colombo, described more fully in the schedule to the plaint filed in this case, which was donated on deed P1 to the respondent, is a transaction which falls under the proviso to section 6 (d) of the Estate Duty Ordinance (Cap. 241).

The respondent married on 23.3.1950. It appears from the evidence that it was not one of the traditional marriages arranged by parents but was a love match. Although the respondent’s father Mr. Amerasekera did not consent to this union, later he gave his blessings. Before the wedding there was a conference between the respondent’s parents, relatives and others at which the father consented to give this property to her. The respondent stated in the course of her evidence that her father consented to give this property saying that he was giving this in consideration of marriage. The Prevention of Frauds and Perjuries Ordinance (Cap. 70) specifically enacts that no promise or agreement

to transfer an immovable property is valid unless it is notarially executed. In view of this stringent provision of the Prevention of Frauds and Perjuries Ordinance, how far the oral evidence of the respondent is admissible has not been investigated. Be that as it may, her evidence was admitted.

The respondent stated that in pursuance of this agreement, her father executed the deed P1 of 2.8.57 in which he has stated as follows :—

“And Whereas I agreed with my daughter Evangilane Maud Olga Amerasekera to convey to her at her marriage the said premises by way of dowry.”

“Now Know Ye and These Presents witness that I the said Samuel Robert Amerasekera (hereinafter referred to as the “said donor”) in pursuance of the said agreement and in consideration of the love and affection which I have and bear unto my daughter the said Evangilane Maud Olga de Livera nee Amerasekera of No. 7, Police Park Avenue, Havelock Town, Bambalapitiya in Colombo (hereinafter referred to as the “said Donee”) and for diverse other good causes and considerations me hereunto specially moving do hereby grant convey assign and transfer by way of dowry unto the said Donee, her heirs, executors, administrators and assigns as a gift irrevocable the said premises all that allotment of land together with the buildings thereon bearing Assessment No. 7, Police Park Avenue, Havelock Town, Colombo, and fully described in the Schedule A hereto.”

The respondent also added in the course of her evidence that her father had unequivocally stated that he had given this property as dowry to her and her husband. Mr. Amerasekera had rented out this house to the Caltex Company and had written two letters P2 and P3 of 1954 requesting the company to give possession of the property for the reason that he had given this property as dowry to his daughter. In one of the letters he states that his daughter is pressing him to give her the possession of the property. Caltex Company vacated the property and in September 1954 the respondent and her husband went into occupation and have been living there ever since.

Mr. Amerasekera also left a last will dated 13.4.55, marked R1, in which he has devised the same property to the respondent and in paragraph 10 of R1 he has specifically stated that the estate duty payable on this property should be paid by the respondent. The respondent admitted having seen and read R1. R1 should have been properly proved by the production of the probate but of consent it was admitted.

The learned Crown Counsel who appeared for the appellant urged that the deed P1 was not given in consideration of marriage since on the date it was given it was not given either to promote the marriage or to induce it.

It must be noted that whatever intention Mr. Amerasekera might have had before the marriage of the respondent, he waited for nearly seven years, during the course of which he changed his mind by the execution of the will R1, and bequeathed the property by way of testamentary disposition. Even in the deed of transfer P1 he has stated that it was transferred not only in consideration of marriage but for the love and affection he had towards his daughter. The learned Crown Counsel submitted that exactly similar words are found in the English Finance (1909–10) Act [10 Edwards 7, chapter 8, section 59 (2)] as in the proviso to Section 69 of the Estate Duty Ordinance and wherever the words of our statutes are similar to the statutes in England, our Courts should be guided by the decisions of some of the highest tribunals of the United Kingdom. He contended that the corresponding section of the English statute is identical with proviso 3 to section 6 of the Estate Duty Ordinance and has exactly the same words, namely—"Nothing herein contained shall apply to gifts made in consideration of marriage".

It has been held by the highest authority that where words in our statutes are identical with English statutes, the construction placed by the English courts should be adopted by us (vide *Meideen v. Banda*¹, following *Trimble v. Hill*²). Although this rule was laid down during the colonial regime, yet there is no reason for us to depart from this rule (vide *Meideen v. Banda* (supra); *Nadarajan Chettiar v. Tennekoon*³).

In *Inland Revenue Commissioners v. Lord Rennell et al.*⁴, the learned Law Lords who decided it adopted the three tests which were suggested by Counsel in the course of the argument in order to determine whether a transfer is a gift in consideration of marriage within the meaning of the similar provision in the English Finance Act (1909–1910). The three tests suggested were : It should be made on the occasion of the marriage ; secondly, it must be conditional to take effect only if the marriage takes place ; and thirdly, it must be made by a person with the purpose of or with a view to encouraging or facilitating the marriage.

In *Inland Revenue Commissioners v. Lord Rennel et al.* (supra) the question that came up for decision was whether a gift provided by settlement made on the occasion of marriage is a gift made in consideration of marriage within section 59 (2) of the Finance Act (1909 to 1910), notwithstanding that the beneficiaries under the settlement were not confined to persons who in law were within the marriage consideration. The majority view was that despite the fact that the settlement was not confined to persons, who in law were within the marriage consideration, yet, if the gift was made in consideration of marriage to a daughter, although others might have been benefited by it, yet it came within the purview of that section.

¹ (1895) 1 N. L. R. 51.

³ (1950) 51 N. L. R. 491.

² 5 L. R. A. C. 342.

⁴ (1963) 1 A. E. R. 803 at 817.

Although on this point there has been difference of opinion, all the judges who took part in the case have adopted the three tests suggested earlier. Viscount Radcliffe in the course of his speech said ((1963) 1 A. E. R. at p. 807) :

“What then is the meaning of the phrase ‘gift which is made in consideration of marriage’ as used in the Finance (1909–10) Act, 1910? First, the word ‘gift’ can hardly have been used in the sense usually attributed to it in ordinary speech, for in that sense it would signify no more than a present made without return of any kind. Yet it was determined by several decisions, previous to 1910, that there could be a gift for the purposes of account or estate duty and property taxed as such, even though the transfer of it had been made on the terms of some substantial benefit, even a monetary benefit, accruing in return to the transferor.”

He continued (at page 808) :

“First then, there is ‘Consideration’ as a necessary element of the English contract, consideration as the thing done or foreborne or promise given by the promisee in return for the undertaking of the promisor. Consideration in this sense belongs to the law of contract : a gift, which is a transfer, belongs to the law of property, and the contract sense of consideration is inappropriate to the context in which the word here appears. Of course, marriage, the act of marrying, of entering into the married state, can be consideration for an enforceable promise.”

He added (at page 809) :

“In my opinion, one must turn from consideration in relation to promises to consideration as that word has been understood by equity lawyers and conveyancers in relation to transfers or proposed transfers of property. It was they who analysed and developed the ideas of “valuable”, “good” and “meritorious” consideration ; and at any rate by the sixteenth century it had become a matter of the first importance to equity to determine what consideration was to be sufficient to raise a use or, to put it in another way, what circumstances were to be regarded as sufficient to prevent a transferee of property, ostensibly unfettered, from holding it free from obligation to the transferor or third parties. Consideration in this sense is said by Sir William Holdsworth (see his History of English Law, Vol. 8, pp. 42 *et seq.*) to have been a *causa* recognised by civil lawyers. I should hesitate to try to offer any definition of what is meant by “causa” but it was certainly not the *quid pro quo* idea that was developed into our conception of contractual consideration. It was rather a set of circumstances, sometimes the essential nature of the transaction, which was categorised by the equity law as justifying its intention and the employment of its procedures of enforcement.”

“My understanding of the matter is, therefore, that a *gift made in consideration of marriage is a transfer made on the occasion of marriage*, contingently on the marriage taking place, and containing such limitations, if made by way of settlement, as amount to the customary provision for the spouses and the issues of the marriage.”

Lord Cohen said (at page 813) :

“In the result I am content to accept counsel for the respondents’ three requisites for a gift to be made in consideration of marriage within the meaning of the subsection, (1) it must be made on the occasion of the marriage ; (2) it must be conditioned only to take effect on the marriage taking place ; (3) it must be made by a person for the purpose of or with a view to encouraging or facilitating the marriage.”

Lord Guest was of the same view (vide 1963 1 A.E.R. at 817).

Applying any of these tests, the gift which is evidenced by P1 is not a gift in consideration of marriage. In the first place it was not made on the occasion of the marriage since the marriage took place seven years earlier. Secondly, it was not conditioned only to take effect on marriage because, as stated earlier, the evidence disclosed that it was a love match and this property was not given as a condition for the marriage to take place. Thirdly, the evidence shows that it was not made for the purpose of or with a view to encouraging or facilitating the marriage. Indeed it was made many years later. Even if there was an earlier promise, it is unenforceable since it was not a notarially executed document. The evidence shows that Mr. Amerasekera had changed his mind as would be found from the contents of the will R1, and his intention in executing P1 was to give it as a gift.

Mr. Jayewardene who appeared for the respondent relied on the case of *Kandappa v. Charles Appu*¹ and also the case of *Murugesu v. Subramaniam*². Dealing with the different species of property known to Kandyan law and Thesawalamai, different considerations arise. The case of *Kandappa v. Charles Appu* (supra) merely decided that under the Kandyan law a dowry could be given before or at the time of marriage or even after marriage, if it was in pursuance of a promise made before marriage.

In the case of *Murugesu v. Subramaniam* (supra) I have held that a dowry could be given before marriage. But these considerations have no application in construing the relevant provisions of the Estate Duty Ordinance. It may well be that a deed may be executed as a dowry both under the Kandyan Law and the Thesawalamai, but yet it may not come under section 6 of the Estate Duty Ordinance to escape the payment of the Estate Duty. Further the parties to this action are not governed by the Kandyan Law.

¹ (1926) 27 N. L. R. 433.

² (1967) 69 N. L. R. 532.

Mr. Jayewardene ventured to submit that a deed of gift executed even many years after marriage comes within the ambit of the proviso to section 6 of the Estate Duty Ordinance, if it was the intention of the donor to implement a promise to give a dowry before marriage. If his contention is accepted it will open the door to the perpetration of colossal frauds against the Crown. Every parent can escape the payment of estate duty by disguising a simple gift by stating in the deed that it was given in consideration of marriage. This was not the intention of the Legislature in enacting the proviso to section 6 of the Estate Duty Ordinance.

For these reasons we set aside the order of the learned District Judge and hold that the gift which is the subject matter of the deed P1 does not fall under proviso 3 of section 6 of the Estate Duty Ordinance and is therefore liable to payment of death duty.

The appellant is entitled to costs in both courts.

ALLES, J.—

I agree that this appeal should be allowed. On the facts disclosed at the trial, it was not possible for the trial Judge to have held that a disposition of property made seven years after the marriage was a gift made in consideration of marriage. The trial Judge appears to have been influenced by some oral statements made by the deceased at the time of the marriage in 1950—statements which are clearly inadmissible in law—which he has utilised as evidence of the donor's intention to devise the property to his daughter as dowry, and which intention according to him, was implemented at the time of the execution of the deed P1 in 1957.

According to Lord Cohen and Lord Guest in *Rennell v. Inland Revenue Commissioners*¹, the three requisites necessary for a gift to be made in consideration of marriage are :

- (1) It must be made on the occasion of the marriage ;
- (2) It must be conditioned to take effect only on the marriage taking place ; and
- (3) It must be made by a person for the purpose of or with a view to encouraging or facilitating the marriage.

The third requisite suggests that the settlor's intention at the time of the devise is a matter that is relevant in deciding whether the gift was made in consideration of marriage or not. Viscount Radcliffe however seemed to take the view that the settlor's intention was not material to this issue. Said Viscount Radcliffe at p. 752 :

“I do not myself think that the question whether this divesting of assets was a gift made in consideration of marriage depends upon what was contemplated or intended by the settlor at the time of the divesting

¹ (1967) 2 W. L. R. 745 at 761 and 767.

..... To try each case by a post-obit inquiry into the supposed contemplations or intentions of the deceased is to apply a criterion that is at once improbable and unsatisfactory.”

Again in the concluding portion of his judgment, he says :

“ There is no more reason why the description (gifts made in consideration of marriage) should be said to include the idea that the gift must be made ‘ for the purpose of or with a view to encouraging or facilitating the marriage ’ than that it should include the idea that the gift should unequivocally secure provision for the spouses and their issue.”

The difference of opinion between Viscount Radcliffe and the majority of the Law Lords was on the issue whether the particular marriage settlement in *Rennell's case* was a gift made in consideration of marriage. Viscount Radcliffe was of the view that it was not, because it purported to benefit not only the spouses and their issue but also to secure provision for an unascertained class of beneficiaries. He however made it clear that “ a gift made in consideration of marriage is a transfer made *on the occasion of marriage, contingently on the marriage taking place*, and containing such limitations, if made by way of settlement, as amount to the customary provision of the spouses and the issue of the marriage.” According to Viscount Radcliffe, the declared intentions of the settlor made at the time of the divesting had no relevance to the construction of the words “ gifts made in consideration of marriage ”.

It would appear that in his view the conditions that must be satisfied to maintain that the gift was made in consideration of marriage are as follows :—

- (a) There must be a “ gift ” to which he gave the unusual meaning “ abstraction of assets ” from the estate ;
- (b) The gift must be made on the occasion of the marriage and contingent on the marriage taking place ; and
- (c) The gift must be limited to the spouses and their issue only and not to include unascertained beneficiaries within the marriage settlement.

I would, with respect, prefer to adopt the tests laid down by Viscount Radcliffe to that which found favour with Lord Cohen and Lord Guest who were two of the members of the Court who were in the majority in *Rennell's case*. Applying these tests to the facts of the instant case, the transfer of property made in 1957 was not made on the occasion of the marriage or contingent on the marriage that had already taken place in 1950. I agree with the order proposed by my brother Tambiah, J.

Appeal allowed.

1967

Present : T. S. Fernando, A.C.J., and Sirimane, J.

THE ATTORNEY-GENERAL, Appellant, and
J. L. D. PEIRIS, Respondent

S. C. 278/1965—D. C. Colombo, 55283/M

Prescription—Action for recovery of money paid under a mistake of fact or a mistake of law—Maintainability—Requirement of demand before institution of action—Effect of omission to make such demand—Effect of demand on a time-barred debt—Profits tax—Payment of it by executor when it was not legally due—Claim by executor for repayment—Plea of prescription raised by Crown—Permissibility—Profits Tax Act (Cap. 243), s. 14—Profits Tax (Special Provisions) Act, No. 36 of 1964, s. 2—Income Tax Ordinance (Cap. 242), s. 28—Prescription Ordinance (Cap. 68), s. 10—Trusts Ordinance (Cap. 87), s. 91.

In an action to recover money due, prescription starts to run as from the date when the cause of action arose. The fact that the plaintiff was not aware that he had a cause of action does not affect the question at all. "An obligation (such as the one in this case) remains alive only for a particular period of time and the demand for its fulfilment must be made *within that time*. But it is not the demand itself which gives rise to the cause of action. If the plaintiff came into Court without making a demand he may have been deprived of his costs or mulcted in costs, if the defendant brought the money to Court ; for, the summons in the case would itself constitute the demand. But an obligation, which is no longer alive, cannot be revived by making a demand and eliciting a refusal, long after an action to enforce the obligation is time-barred."

Plaintiff, who was one of the executors of a deceased person's estate, sought to recover from the defendant certain sums of money paid by him on behalf of the estate as Profits Tax in respect of the years 1948 to 1951, at a time when there was no provision in law under which Profits Tax could be levied by the Commissioner of Income Tax. The payments were made between the years 1952 and 1955. The present action was instituted on 3rd May 1962 after a demand for the return of the money was made by the plaintiff in 1959 (when he discovered his mistake) and was refused by the Commissioner of Income Tax on 29th November 1961. It was conceded that a claim in such a case would be prescribed under section 10 of the Prescription Ordinance three years after the accrual of the cause of action. Further, the trial Judge found that the payment was made by the executor under a mistake of fact and without any "undue influence" on the part of the Tax Department.

Held, (i) that the plaintiff's claim was time-barred. As soon as the Commissioner of Income Tax recovered money from the plaintiff without legal authority, he was under an obligation to return it ; and the plaintiff's right to demand a return of the money accrued to him the moment he made the payment. Accordingly, the plaintiff's causes of action arose on the dates he made the payments, the last of which was on 6th April 1955. The argument that the plaintiff was not aware of his mistake, and having discovered it in 1959 made a demand, the refusal of which on 29th November 1961 gave rise to the "cause of action" was quite untenable.

(ii) that, as the action was instituted on 3rd May 1962 and decree was entered in favour of the plaintiff on 29th April 1964, the provisions of section 2 of the Profits Tax (Special Provisions) Act, No. 36 of 1964, were not applicable in the absence of any express reference therein to pending actions.

(iii) that, as it could not be said that the money was paid as the result of "undue influence" or that a fiduciary relationship had come into being between the Tax Department and the plaintiff, section 91 of the Trusts Ordinance was not applicable.

Quaere, whether the money was paid by the plaintiff under a mistake of law and, if so, whether he was entitled in law to recover what he paid.

Observations on the question whether it is proper for the Crown to resist a citizen's claim, which is otherwise than fraudulent, by resorting to a plea based on the provisions of the Prescription Ordinance.

APPEAL from a judgment of the District Court of Colombo.

H. Deheragoda, Senior Crown Counsel, with *D. S. Wijesinghe*, Crown Counsel, for the defendant-appellant.

H. W. Jayewardene, Q.C., with *S. J. Kadirgamar*, Q.C., and *B. Eliyatamby*, for the plaintiff-respondent.

Cur. adv. vult.

December 2, 1967. T. S. FERNANDO, A.C.J.—

I have had the advantage of seeing the judgment prepared by my brother Sirimane, and I agree to the making on this appeal of the order proposed by him. I wish only to add the following observations.

The effect of section 10 of the Prescription Ordinance could have been avoided in this case by the plaintiff only if he could have brought himself within the benefit of the provisions of section 91 of the Trusts Ordinance. The relevant issue was answered by the learned trial judge against the plaintiff, and nothing we have heard from counsel on his behalf was cogent enough to lead us to a reversal of the finding thereon.

As I am in agreement with my brother that the issue as to prescription has to be answered in favour of the Crown, I do not wish to express any opinion on the question whether the trial judge was right or wrong in answering in the plaintiff's favour the issue as to whether the payment of the profits tax by the plaintiff was made under a mistake of law or under a mistake of fact. Even if the trial judge was correct, the cause of action was barred by section 10 of the Prescription Ordinance.

It is very unusual to find the Crown resisting a citizen's claim, which is otherwise than fraudulent, by resorting to a plea based on the provisions of the Prescription Ordinance. Remembering always that the Crown is declared not bound by that Ordinance, great circumspection must be exercised by the law officers of the Crown before defeating a

citizen's honest claim by raising the plea of prescription. The Department of Inland Revenue has consistently to deal with the general tax-paying public, and its smooth and proper working can be rendered possible only when it gains the confidence of that public by creating the impression that they can expect fair dealing from the Department. In recent years the Department has so often announced its readiness to assist and guide the tax-paying public and invited them to bring their problems to it that I think it would be of some advantage to citizen and Department alike to read the following observations of an experienced Chancery Judge in a fairly recent case. Vaisey J., in *Sebel Products Ltd. v. Commissioners of Customs and Excise*¹, dealing with a case, not where the Statute of Limitations was relied on by the Crown, but where the Commissioners of Customs and Excise had refused to refund money paid to them by a plaintiff voluntarily under a mistake of law, stated :—

“ At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants, being an emanation of the Crown, which is the source and fountain of justice, are, in my opinion, bound to maintain the highest standards of probity and fair dealing comparable with those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control : see *Re Tyler* (1907) 1 K. B. 865. Secondly, because the taxpayer, who is too often tempted to evade his liability and to keep in his own pocket money which he ought to have paid to the revenue, will find too ready an excuse in the plea that the revenue authorities will, if they can, keep in their coffers, if they can get it there, money which the taxpayer was under no obligation to pay to them and they had no right to demand. Although such an excuse would have no validity in either a court of law or in the forum of the taxpayers' own conscience, I think that, in the public interest, grounds for proferring it should, so far as possible, be avoided. ”

SIRIMANE, J.—

The plaintiff is the son of the late Mrs. Nancy Charlotte Peiris and also one of the executors of her estate. Mrs. Peiris died on 20.3.51.

After her death, the Commissioner of Income Tax served on the plaintiff four notices of assessment claiming various sums of money as Profits Tax which the deceased was liable to pay during the years 1948, 1949, 1950 and 1951, aggregating to a sum of Rs. 271,533/40. In consequence of these notices, the plaintiff made certain payments, and in this action alleged (*inter alia*) that the Commissioner of Income Tax was not entitled to recover any sum as Profits Tax due from the deceased, from him, and sued the Attorney-General as representing the Crown to recover the amounts he had paid.

¹ (1949) 1 A. E. R. at p. 731.

It was admitted at the trial that the plaintiff had made various payments as follows :

	Rs. c.
1. On 27. 6.52	.. 287 40
2. On 27.11.52	.. 32,356 40
3. On 27.11.52	.. 115,576 80
4. On 27.11.52	.. 28,802 94
5. On 7. 3.55	.. 18,593 92
6. On 7. 3.55	.. 8,804 48
7. On 6. 4.55	.. 1,370 40
	<hr/>
	205,792 34
	<hr/>

and he restricted his claim to that sum.

Items 5 and 6 set out above were sums due to the plaintiff by way of reduction of income tax, if he paid all the Profits Tax due.

The learned District Judge gave him judgment in a sum of Rs. 178,393·94 which figure had been reached by disallowing items 5 and 6.

The Attorney-General has appealed against this judgment, and the plaintiff has filed a cross-appeal claiming a further sum of Rs. 27,398·40 (which is the total of items 5 and 6).

The Profits Tax Act, Chapter 243, came into force in 1948. By section 14 of that Act, the charging and recovery of Profits Tax was to be effected in the same manner as in the case of Income Tax and for that purpose certain sections in the Income Tax Ordinance were made applicable to Profits Tax.

Under section 28 of the Income Tax Ordinance (Chapter 242) an executor of a deceased person is chargeable with tax for periods prior to such person's death. But this section 28 was not one of the sections made applicable to Profits Tax by section 14 of the Profits Tax Act as it stood at the time these payments were demanded and paid. It was only on the 20th of October, 1957 (by Act 53 of 1957) that section 28 referred to above was made applicable to the Profits Tax Act, and it was conceded at the argument, therefore, that at the time the Commissioner of Income Tax demanded payments totalling to Rs. 271,533·40, there was no provision in law under which he could levy or receive that sum.

The learned Crown Counsel urged this appeal on three grounds which (though not in the order they were advanced) were :

- (1) that the plaintiff's claim was prescribed,
- (2) that the plaintiff made these payments under a mistake of law and was not, therefore, entitled to claim them now, and
- (3) that section 2 of Act No. 36 of 1964 which validated the recoveries of Profits Tax from an executor between 1948 and 20th March 1957 (to which I shall refer later) precluded the plaintiff from making a claim such as this against the Crown.

In regard to prescription, it was conceded that section 10 of the Prescription Ordinance (Chapter 68) applies to the plaintiff's claim, and that his claim was, therefore, prescribed three years after his cause of action arose.

Section 5 of the Civil Procedure Code (Chapter 101) defines "cause of action" as—

"The wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury."

This action was filed on 3.5.62.

When did the plaintiff's cause of action arise ?

In my view, *as soon as* the Commissioner of Income Tax received a payment to which he was not legally entitled, he was under an obligation to return it ; and the plaintiff's right to demand a return of the money he paid (assuming that he paid it under a mistake of fact) accrued to him the moment he made the payment. In other words, as soon as the Commissioner recovered money from the plaintiff without legal authority, there was a wrong for the redress of which the plaintiff could have brought an action immediately, so that the plaintiff's causes of action arose on the dates he made the payments, the last of which was on 6.4.55. Once a cause of action has arisen, prescription starts to run *as from that date*. The fact that the plaintiff was not aware that he had a cause of action does not affect the question at all. The only instances where the running of prescription is delayed or suspended, are those where, at the time the cause of action arose the plaintiff was suffering from some disability such as minority, unsoundness of mind, or absence beyond the seas as enumerated in section 13 of the Prescription Ordinance. One may also add to these, a case where there has been a fraudulent concealment of the cause of action by the opposing party. None of these considerations arise in this case.

The argument that the plaintiff was not aware of his mistake, and having discovered it in 1959 made a demand, the refusal of which on 29.11.61 gave rise to the "cause of action" is, in my opinion, quite untenable. An obligation (such as the one in this case) remains alive only for a particular period of time, and the demand for its fulfilment must be made *within that time*. But it is not the demand itself which gives rise to the cause of action. If the plaintiff came into Court without making a demand he may have been deprived of his costs, or mulcted in costs, if the defendant brought the money to Court; for, the summons in the case would itself constitute the demand. But an obligation, which is no longer alive, cannot be revived by making a demand and eliciting a refusal, long after an action to enforce the obligation is time-barred.

A simple example will make this position clear. Under section 7 of the Prescription Ordinance an action to recover rent is barred three years after the cause of action has arisen. Suppose a tenant mistakenly pays more rent than he is legally liable to pay, and the landlord also mistakenly receives it. Can a tenant, who discovers his mistake 10 or 20 years after the payments have been made, demand from the landlord a return of the excess rent and sue for it within three years of the date of refusal? The answer must obviously be in the negative.

Our attention was drawn to section 26 of the English Limitations Act (as amended) of 1939 which enacts that where the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake, or could with reasonable diligence have discovered it. We do not have a similar provision in the Prescription Ordinance. If there was, we would have had to address our minds as to when the plaintiff could *reasonably* have discovered his mistake. He had the right of appeal, which if exercised would undoubtedly have brought the error to light; or, at least, after Act 53 of 1957 was passed, the mistake could reasonably have been discovered. But we are not called upon to construe a section similar to section 26 of the English Act.

Wessels (Law of Contract in South Africa, Second Edition, Volume II), says at page 754 (section 2789):

"Where money has been paid by mistake, the *condictio indebiti* action runs from the moment payment has been made and not from the date of demand, for in this respect it resembles a loan."

It was pointed out by learned Counsel for the respondent that the passage in Voet referred to by the learned author has no relevance to this question, but the cases referred to (in particular, *Baker v. Courage & Company*) are directly in point, and I think, with respect, that the learned

author correctly sets out the law in the passage quoted above. *Baker v. Courage & Company*¹ was decided before the amendment to the English Act of Limitations. Though the term "cause of action" has a somewhat different meaning in English law, the reasoning in the judgment is entirely applicable to the facts of the present case. It was held there, that where money has been paid under a mistake of fact common to both parties the Statute of Limitations runs against the right to recover the money from the date of payment and not from the date of the discovery of the mistake.

Hamilton J. in the course of his judgment as reported in 101 Law Times, page 854, said (at page 857) :

" It was contended upon the authority of *Kelly v. Solari* (9 N. M. W. 54) that the fact that the defendants had the means of knowing the truth if they had only read their own books is quite immaterial, and that the only point to be considered is, when did they know the fact ? If this were right, it would take away the protection of the Statute of Limitations which has always been understood to be a statute passed for the protection and benefit of persons upon whom claims are made, so as to prevent them from being called on to account in respect of transactions long gone by. It would convert that statute into a snare wherever, as so constantly happens in business, a mistake of fact has occurred ; and supposing that, instead of being the case of the plaintiff it had been the case of a corporation, which would not die, I see no particular reason why this mistake of fact might not have been proved from the documents at the end of 50 or even 100 years, and then notice given and a demand made and the point urged by Mr. Danckwerts would have arisen equally then as now if it arises at all."

One views with distaste a plea of prescription raised by the Crown against a subject who is unable to raise a similar plea against the Crown. But the Crown has thought it fit to take the plea in this case, and it must succeed.

The next point urged for the Crown was that the learned District Judge was wrong when he held that the plaintiff had not made these payments under a mistake of law because, to quote the Judge's words, " at the stage he made his payments there was no such law in existence."

Why did the plaintiff make these payments ? I think the answer to that question is, that he did so because he believed, that according to the provisions of the Profits Tax Act, he was *under a legal liability to pay*. The evidence shows that he had the assistance of accountants and legal advisers. Had he acquainted himself with the provisions of section 14 of the Profits Tax Act as it stood, at the time he was called upon to pay, he would have known that the law did not require him to do so.

He made his payments, therefore, under a mistake of law.

¹ (1910) 1 K. B. 56.

As a rule payments made under a mistake of law are not recoverable (see *Attorney-General v. Arumugam*¹, *Bogaars v. Van Buuren*²), and as far as I am aware this rule has always been followed in our Courts. In *Attorney-General v. Arumugam* (supra), L. B. de Silva, J., followed the law as set out in Voet, Book XII, title 6, section 7 (Gane's Translation, Volume II, page 839).

“*Condictio indebiti* lies only for ignorance of fact, not of law. Then again it is not every ignorance of a payer which is enough for the action for the return of what was not due, but only that which is ignorance of fact, and does not appear to be slack or studied. If the payment of what was not due happened through ignorance of law, the truer view is that a claim was denied by the civil law.”

But there have been certain modifications of this rule in exceptional circumstances, and much reliance was placed by Counsel for the plaintiff on *Kiriri Cotton Company Limited v. Dewani*³. It was held in that case that where the person who mistakenly makes payment, is not “*in pari delicto*” with the person who receives it, then the former is entitled to recover what he mistakenly paid. In the course of his judgment, Lord Denning said :

“It is not correct to say that every one is presumed to know the law. The true position is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat*. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers v. Ingham*. If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not *in pari delicto* and the money can be recovered back.”

At one stage of the argument I was inclined to think that these dicta were applicable to the case before us. But a closer examination of the facts here and those in *Kiriri Cotton Company Limited v. Dewani* has led me to a different conclusion. In that case a tenant paid a premium to a landlord in order to obtain a sub-lease. Under the Uganda Rent Restriction Ordinance (the case was from that country) a landlord who received such a premium was guilty of an offence and liable to a fine. The tenant who made the payment, however, was not made liable in any way. In these circumstances, it was held that the duty of observing the law

¹ (1963) 66 N. L. R. 403.

² (1882) 2 S. A. R. 259.

³ (1960) 1 A. E. R. 177.

being placed by the statute on the landlord for the protection of the tenant the parties were not *in pari delicto* and the tenant was entitled at common law to recover the premium. In the case before us, it is true that it was the Tax Department which made the initial mistake. But one can go no further than that. The law does not prohibit the department from receiving money mistakenly paid to it by a tax payer when both the receiver and the payer are mistaken. There is no law which the department has to observe for the protection of the tax payer. In this instance, the tax payer could have found out without much difficulty, that the department was mistaken and so refused to pay. Neither party were really "in delicto", and the payment was made by the plaintiff purely under a mistake of law. He is, therefore, not entitled in law to recover what he has paid. I have expressed this view, as a good deal of argument was addressed to us on this matter, though it is unnecessary to decide this point in view of the conclusion I have reached on the question of prescription.

The last point urged by Counsel for the Crown might also be dealt with. He submitted that the plaintiff's action must *now* be dismissed, in view of the provisions of section 2 of Act No. 36 of 1964. That section reads as follows :—

"2. Where any profits tax under the Profits Tax Act with which a deceased person, if he were alive, would have been chargeable at any time after the date of commencement of that Act and before the 20th day of December, 1957, had been assessed upon, paid by or recovered from the executor of such deceased person, such assessment, payment or recovery shall be deemed to have been, and to be, valid as it would have been if the provisions of section 28 of the Income Tax Ordinance had *mutatis mutandis* applied in relation to such assessment, payment or recovery ; and accordingly such executor or any heir of the deceased person shall not be entitled to the refund of any sum so paid by, or recovered from, such executor as profits tax or to institute any action in any court of law, for the recovery of any sum so paid."

The effect of the first part of this section is to validate retrospectively all profits tax levied from executors during the period in which the provisions of section 28 of the Income Tax Ordinance were not applicable to the Profits Tax Act. The second part of the section provides that *accordingly* an executor who had paid taxes, which were now validated, could not sue to recover those payments. It is quite clear, I think that the disability to sue commences only after the Ordinance came into force, i.e., from 12th November, 1964. This action was filed on 3.5.62, and decree entered in favour of the plaintiff on 29.4.64. The appeal was filed on 11.5.64. It is settled law now that legislation will not affect pending actions unless the enactment is expressly made applicable to such actions. This argument advanced on behalf of the Crown is, therefore, rejected.

Counsel for the plaintiff then sought to support the findings in his favour by contending that the learned District Judge was wrong when he rejected the plaintiff's plea that the Commissioner of Income Tax held this money in trust for the plaintiff. It was argued that if prescription was to run at all it would only begin to run from the date of the repudiation of the trust which (it was submitted) was 29.11.61. This argument was based on the provisions of section 91 of the Trusts Ordinance (Chapter 87), which lays down that when an advantage is gained by the exercise of undue influence, the person gaining the advantage must hold it for the benefit of the person who has been prejudiced. It was contended that a statement in the assessment notice, to the effect that if the tax demanded is not paid, a further sum not exceeding 20 per cent. of the tax would be added, amounted to duress, or the use of undue influence.

I am quite unable to accept this argument. The assessment notices sent to the plaintiff are those sent out by the department to every tax payer. The words complained of are no more than a formal intimation to the tax payer that he may be liable to pay more in the event of delay or default. His right to protest, or appeal against the assessment, is in no way affected—in fact, the notices themselves inform him of the right of appeal. The plaintiff was the executor of a very large estate and in matters pertaining to the payment of taxes (these sums were paid out of a bank account relating to the estate) had at least the assistance of a firm of Chartered Accountants. In fact, most of his correspondence with the Tax Department was through these Accountants. It cannot be said that the money was paid as the result of "undue influence" or that a fiduciary relationship had come into being between the Tax Department and the plaintiff. I think the learned District Judge was right in answering the issue relating to a trust against the plaintiff.

The appeal must succeed, and the cross-appeal must, therefore, fail. But the appeal succeeds on the plea of prescription and on the plea that payment was made under a mistake of law—a mistake which the Tax Department itself had made. In the circumstances, I am not disposed to make an order for costs in favour of the defendant.

The appeal is allowed and the plaintiff's action dismissed. The cross-appeal is also dismissed, but there will be no costs either here or below.

Appeal allowed.

1967

Present : H. N. G. Fernando, C.J., and Alles, J.

L. DE S. A. GUNASEKARA, Appellant, and THE QUEEN, Respondent

S. C. 6/67—D. C. Colombo, 21/Bribery

Bribery Act (Cap. 26)—Sections 14 and 20—“*In his capacity as a Member of Parliament*”—“*Procuring any grant or benefit for another person*”—Meaning of words “*procure*”, “*grant*” and “*benefit*”.

The accused-appellant was charged on three counts. On the first count he was charged under s. 14 of the Bribery Act with having accepted, in his capacity as a Member of Parliament, a gratification of Rs. 3,000 as an inducement or reward for doing a certain act, namely, procuring for one Dharmasena a licence for the sale of liquor. Count No. 2 charged the appellant under s. 20 of the Bribery Act with having accepted the said sum as an inducement or reward for procuring for Dharmasena a grant from the Government, namely, a grant of a licence for the sale of liquor. The third count was an alternative to count 2, that he accepted the gratification as an inducement or reward for procuring for Dharmasena a benefit from the Government, namely, a licence for the sale of liquor, in breach of s. 20 of the Bribery Act.

The evidence established the fact that the accused solicited a gratification of Rs. 3,000 from Dharmasena on a promise that he would get the licence issued to Dharmasena, and on the pretext that the money was to be given as a bribe to the Minister for Home Affairs for the issuing of the licence. The Minister, whose evidence was believed *in toto* by the trial Judge, testified that the accused, as a Member of Parliament of the Government Party, had direct access to him and often saw him in his office on various matters. He said also that Members of Parliament often mention to him such matters as applications for liquor licences, but that such matters would not be matters of record. He stated that the only reason urged by the accused in connection with the application of a man from Eheliyagoda for a liquor licence was that the man had been a strong supporter of the accused at his election. That reason had nothing to do with the accused’s constituency or with the interests of good Government. Further, the Minister denied that he had requested or taken any money from the accused in connection with the matter of an application for a liquor licence.

Held, (i) that the evidence failed to establish one element required by s. 14 of the Bribery Act, viz., that the gratification was accepted as an inducement for the accused doing an act *in his capacity as a Member of Parliament*. The undertaking that the accused would get a liquor licence for Dharmasena was not an undertaking to do any act in his capacity as a Member of Parliament.

(ii) that the word “*procure*” in s. 20 of the Bribery Act means obtaining for another person by one’s care or efforts.

(iii) that s. 20 (1) (a) (vi) of the Bribery Act does not refer only to a grant of some proprietary right or interest enjoyed by the Crown. The expression “*grant or benefit*” in this context must be widely construed. Further, the operative word is the word “*benefit*”, the ordinary wide meaning of which is not narrowed by its association with the words “*grant*” or “*lease*” which precede it.

APPEAL from a judgment of the District Court, Colombo.

G. E. Chitty, Q.C., with *P. Nagendran, V. E. Selvarajah* and *Gamini Dissanayake*, for Accused-Appellant.

Vincent T. Thamotheram, Deputy Solicitor-General, with *Ranjith Goonetillake*, Crown Counsel, for the Respondent.

Cur. adv. vult.

November 20, 1967. H. N. G. FERNANDO, C.J.—

The appellant in this case, who at the relevant time was a Member of Parliament, was charged on three counts : first that he did accept from one Dharmasena a gratification of Rs. 3,000 as an inducement or reward for doing an act in his capacity as a Member of Parliament, to wit, procuring for Dharmasena a licence for the sale of liquor and that he thereby committed an offence punishable under section 14 of the Bribery Act. The second count charged the appellant with accepting the said sum from Dharmasena as an inducement or reward for his procuring for Dharmasena a grant from the Government, to wit, a grant of a licence for the sale of liquor and that he thereby committed an offence punishable under section 20 of the Bribery Act. The third count was an alternative to count 2, that he accepted the gratification as an inducement or reward for procuring for Dharmasena a benefit from the Government, to wit, a licence for the sale of liquor and he thereby committed an offence punishable under section 20 of the Bribery Act.

In order to examine the arguments of Counsel at the appeal, it is necessary to refer to some of the relevant evidence much of which consists of Dharmasena's testimony. Dharmasena desired to obtain a licence for the sale of liquor at a hotel run by him at Eheliyagoda and he made an application to the Government Agent, Ratnapura. His application was not successful, and he apparently was told that he could get a liquor licence if he made contact with a Government Member of Parliament for that purpose. Presumably because Dharmasena did not know an M.P., he requested the help of one Rajapakse, who introduced him to his brother-in-law Harischandra, said to be a friend of this Accused, who was then the M.P. for Kalawana. Dharmasena, Rajapakse and Harischandra visited the Accused—at his house in Ratnapura and spoke to him there. According to Dharmasena he asked the Accused to obtain a licence for him, and the Accused said that he would first speak to the Commissioner of Excise about the matter. The next week the same three people again met the Accused at his house, and Dharmasena was then told to come on a subsequent occasion to Sravasti, the hostel in Colombo for Members of Parliament. He took a written application in

the name of his brother to Sravasti and he met the Accused. Thereafter the Accused accompanied him to the office of the Commissioner of Excise. After going into the office, the Accused returned and stated that he had handed the application to the Commissioner, that it would be sent to the Minister, and that, after the Minister signed, Dharmasena would get the licence. On the same occasion the party went to the Home Ministry after the Accused had telephoned the Minister, and the Accused was in the Ministry for half an hour. On his return the Accused stated that he spoke to the Minister and that Dharmasena will get the licence.

Subsequently, Dharmasena apparently offered to pay Rs. 10,000 or Rs. 5,000 to the Accused when he got the licence, but the Accused said that he did not want any money. Thereafter, however, at another meeting the Accused said "that money had to be given before the work is done and the Minister will not do it without accepting the money". The Accused wanted the money to be given to him for him to pay it to the Minister. At this stage Dharmasena agreed to pay Rs. 3,000 and to pay a further sum of Rs. 2,000 after obtaining the licence. The Accused had said that the Minister had wanted Rs. 5,000 down and Rs. 5,000 sometime later.

Dharmasena made arrangements to raise the money by sale of his land to one Suwanda for Rs. 6,000. Suwanda himself had to withdraw the money from the General Post Office. On the 24th of October 1962 Dharmasena, Rajapakse and Suwanda met the Accused at Sravasti with the appropriate form for the withdrawal of Rs. 6,000 from the Post Office Savings Bank. The Accused had, according to an officer of the Postal Department, identified Suwanda and requested that officer to expedite the withdrawal and this was accordingly done.

The party thereafter went to the Home Ministry and outside the office Dharmasena handed Rs. 3,000 in cash to the accused. The Accused entered the Ministry and on his return said that Dharmasena will get the licence very soon.

The evidence thus far recited is corroborated in ample respects by Rajapakse and Suwanda, particularly in regard to the fact that the accused asked for the money outside the Home Ministry and then went into the Ministry. The prosecution produced at the trial the conveyance of Dharmasena's land to Suwanda, and it was established that when this deed was signed on 25th October 1962 the vendor acknowledged that a part consideration of Rs. 3,000 had already been paid.

Dharmasena did not get his liquor licence despite frequent calls on the Accused, and ultimately the Accused delivered to him at Sravasti on 10th April 1963 a cheque for Rs. 3,000 bearing the same date. On that occasion the Accused told Dharmasena not to credit his cheque because he had no money in the Bank, that he gave the cheque only because Dharmasena did not trust him, and that somehow or other he will get the

licence for Dharmasena. That the cheque was given as a sort of security is confirmed by the fact that the cheque was not presented until very much later.

There was no explanation from the defence of the fact that a cheque for Rs. 3,000 drawn by the Accused to bearer had been presented by Dharmasena for payment through his bank. There was nothing in the evidence to indicate any business transaction between the two men and nothing to contradict the version that the cheque was given either for the purpose of repaying the Rs. 3,000 given to the Accused on 25th April 1962, or as a sort of security for the keeping of the Accused's promise to obtain a liquor licence for Dharmasena.

The then Minister of Home Affairs gave evidence at the trial. According to him, the Accused saw him sometime in 1962 and requested him to issue a licence to run a liquor bar to a person said to be from Eheliyagoda who was a supporter of the Accused. The Minister in reply said that no liquor licences were being issued pending a Cabinet decision and that the application could be made after that decision.

It is relevant to note certain other evidence given by the former Minister. As a Member of Parliament of the Government Party, the Accused had direct access to the Minister and often saw him in his office on various matters. He said also that other Members of Parliament often mention to him such matters as applications for liquor licences, but that such matters would not be matters of record. Further, the Minister denied that he had requested or taken any money from the Accused in connection with the matter of an application for a liquor licence. The trial Judge accepted *in toto* the evidence of the Minister.

Counsel has complained, perhaps rightly, that the judgment of the learned District Judge contains a mere narrative of the evidence, and little or no statement of reasons. But it is clear to me that it would have been unreasonable to reject the substantial allegations in the evidence of Dharmasena, which were corroborated in important respects by other witnesses and in one respect by the Minister. The absence of any explanation for the payment into Dharmasena's account of a cheque for Rs. 3,000 drawn by the Accused fortifies Dharmasena's testimony. The Defence could make no reasonable suggestion as to why Dharmasena, Suwanda and Rajapakse should have implicated the accused falsely in an offence of an unusually grave nature. The evidence established the fact that the Accused solicited a gratification of Rs. 3,000 from Dharmasena on a promise that he would get the licence issued to Dharmasena, and on the pretext that the money was to be given as a bribe to the Minister for the issuing of the licence.

Counsel for the Accused in appeal has argued that the facts of this case do not establish one element required by s. 14 of the Bribery act, viz. that the gratification was accepted as an inducement for the Accused doing an act *in his capacity as a Member of Parliament*. In considering

this argument, I have derived valuable and sufficient assistance from the judgment of Viscount Radcliffe in the case of *Attorney-General v. de Livera*¹ and it is useful to cite freely from that judgment :—

“.....It would be misleading therefore to confine the idea of a member’s capacity entirely within the limit of those activities which the written Constitution specifically notices as falling within his constitutional function, in effect the sole activity of voting upon motions or resolutions of his Chamber. The Standing Orders themselves envisage a wider range of action as appropriate to an individual member, as, for instance, the presentation of petitions to the Chamber, the institution of motions and the putting of questions for answer by the Prime Minister, Minister or Parliamentary Secretary. All these specific activities are certainly tied to what takes place in proceedings on the floor of the House : but Their Lordships are satisfied that in determining what a member does in his “capacity as such” within the meaning of those words in the Bribery Act the answer must be found in what can be learnt of the constitutional conventions and practices of the day rather than by exclusive reference to the wording of the Constitution or the Standing Orders of the House or any similar document.”

* * * *

“..... They recognise that there are many things which a member may be invited to do because he is a member and enjoys as such a status and prestige which supply the motive of the invitation but in doing which he would not be acting in his capacity as a member. But, with this recognition made, they are of opinion that the circumstances of any particular case may show that in the light of prevailing practices or conventions observed by members of the House some act for which an inducement has been offered is sufficiently closely bound up with and analogous to a proceeding in the House as to be properly described as done by a member in his capacity as such.”

In *Livera’s case* an offer of a bribe was made to the then Member of Parliament for Chilaw in the following circumstances. The M. P. had strongly recommended in writing the acquisition of an estate for alienation to persons of certain villages in his constituency who had been displaced from their homes as a result of floods. The Minister thereupon directed the Land Commissioner that the M. P. had asked for the estate for alienation and that acquisition proceedings should be taken immediately. When Livera, the owner of the estate, interviewed the Government Agent with the object of stopping the acquisition, the Government Agent referred Livera to the M. P. There was evidence from the Land Commissioner that it was the practice to consult the M. P. of the area before acquiring land for alienation. In these circumstances it is perfectly clear that when Livera approached the M. P. with

his request for the cancellation of the acquisition, he approached a person who according to the prevailing practice could well have secured the cancellation by a request made in that behalf in his capacity as the M. P. for Chilaw. On these proved facts their Lordships were able to hold thus :

“ Where the facts show clearly, as they do here, that a Member of Parliament has come into or been brought into a matter of Government action that affects his constituency, that his intervention is attributable to his membership and that it is the recognised and prevailing practice that the Government Department concerned should consult the local M. P. and invite his views, Their Lordships think that the action that he takes in approaching the Minister or his Department is taken by him ‘ in his capacity as such Member ’ within the meaning of Section 14 (a) of the Bribery Act.”

Having regard to the earlier statement in the judgment of Viscount Radcliffe that “ the circumstances of any particular case may show that some act for which an inducement has been offered is sufficiently closely bound up with and analogous to a proceeding in the House as to be properly described as done by a member in his capacity as such ”, Their Lordships in fact decided that the function of the M. P. for Chilaw in such a matter as the acquisition of land in his constituency for alienation was analogous to a proceeding in the House. Although Their Lordships did not explain precisely where the analogy lay, it is safe to assume that in their opinion the part played by the Member of Parliament in connection with such a decision was merely an alternative to raising by way of question or motion in Parliament a matter of general importance to his constituency. Their Lordships were however careful to emphasize the distinction between something done by a member of Parliament merely because he is a member, and something done by him in his capacity as a member. This matter is referred to in the following passage :—

“ It is plain from this account that Mr. Munasinghe played a dominating part in the proposal to acquire the Vincent Estate for the accommodation of the flood victims in the Chilaw District. It was he who initiated the proposal by his letter to the Minister of Lands and Land Development dated 28th October 1958. He might indeed have taken this step from more than one standpoint of his personal position as a prominent local man, as an active politician, general secretary of the Sri Lanka Freedom Party, even perhaps as Chief Government Whip. In fact, however, it is to be noted that his letter was headed ‘ House of Representatives ’ and his signature at the foot had added to it the words ‘ M. P. Chilaw ’.”

I can see no resemblance between the facts established in *Livera's case*, and those proved in the instant case. There is no question that in *Livera's case* the Minister ordered the acquisition only because he approved

a request for acquisition formally made by the Member of Parliament for Chilaw who signed as such. The member must according to the practice be consulted before the acquisition ; that being so, his direct request for the acquisition was at least equivalent to and in fact more effective than his being consulted by the Land Commissioner on a proposal mooted by someone else. Their Lordships were confidently able to reject the alternative possibilities that the Member of Parliament in that case was merely acting by virtue of his personal prominence or influence. For present purposes it is sufficient to note that they were thus able to reject the alternative that the member was merely attempting to exploit his influence as a member of the Government Party. That alternative I am quite unable to reject in the case of this accused. According to the evidence of the Minister, the only reason urged by this Accused in connection with the application of a man from Eheliyagoda for a liquor licence, was that the man had been a strong supporter of the Accused at his election. That reason had nothing to do with the Accused's constituency or with the interests of good Government. Dharmasena himself must have realized that no such interests were involved in the matter of his application for a liquor licence.

In the concluding paragraphs of the judgment in *Livera's case*, Their Lordships referred to three distinct matters which established that the member in that case was acting in his capacity as such member : firstly, that the member is brought into a matter of Government action that affects his constituency ; secondly, that his intervention is attributable to his membership ; and thirdly, that it is the recognised and prevailing practice that the department concerned should consult the local M. P. on the matter involved. The evidence in the instant case fails to establish to any extent whatsoever any of these characteristics which serve to bring a member's action within the scope of s. 14 of the Act.

The learned trial Judge does not appear to have realized the importance of this particular element of s. 14 which I have thus far discussed. There is therefore nothing in the judgment which needs to be considered in this connection. I would hold that the undertaking that the accused would get a liquor licence for Dharmasena was not an undertaking to do any act in his capacity as a Member of Parliament. The conviction and sentence on the first count of the indictment is therefore quashed and the accused is acquitted of the charge stated in that count.

The arguments relating to the second and third counts were threefold. Mr. Chitty's first contention was that the prosecution had not proved that the accused accepted a gratification for his "procuring any grant or any benefit from the Government" for Dharmasena. One ground of this argument was that in s. 20, the word "procure" does not mean merely getting or obtaining, but involves an element of control or authority in the matter of getting or obtaining a grant or relief. In other words, merely making a request that something be granted is not "procuring", unless the person making the request has because of some special capacity or

interest a function to perform in connection with the decision whether or not the request is to be granted. Mr. Chitty was unable to refer to any actual instances where, under the law or practice now prevailing in regard to the transaction of Government business, a person might have such a function to perform. Instead he thought that perhaps the Legislature when referring in several paragraphs of s. 20 to "procuring" or "preventing" various matters was merely legislating in anticipation of the establishment in the future of certain somewhat unusual Government procedures.

I am unable to agree that any such special connotation attaches to the word "procure" when used in s. 20, or that the word has any meaning different from its ordinary Dictionary meaning "to bring about by care or pains" or "to obtain by care or effort".

In the present case, the evidence as accepted by the trial Judge is that in the first instance, the accused, after interviewing or pretending to interview the Excise Commissioner and the Minister, told Dharmasena "I will get you the licence". This was a simple assurance to Dharmasena that the licence would be granted because the accused made a request in that behalf to the two officials concerned. Had the licence then been issued, undoubtedly it would have been correct to say that the licence was obtained for Dharmasena by the care or effort of the Accused.

At a later stage, the accused informed Dharmasena that a further effort was necessary, viz., that a sum of Rs. 5,000 must be paid to the Minister, and that thereupon the Minister would issue a licence. Even in April 1963 when the Accused gave his cheque to Dharmasena he still maintained "somehow or other I will get you the licence". Mr. Chitty argued that the fact that the money was given by Dharmasena to satisfy the Minister showed that what the Accused at this stage undertook to do was only to act as a sort of messenger in delivering the money to the Minister; further that since the Minister might fail to grant the licence in his discretion there was no undertaking by the Accused to procure such a licence.

It is in my opinion misleading to take too much account of the accused's false statement that he was going to bribe the Minister. In fact he took the money for himself and the learned trial Judge found with much justification that Dharmasena knew this all the time. That being so, Dharmasena was relying, not on a decision of the Minister which might or might not be favourable to him, but instead on the Accused's frequent protestations that he will get the licence for Dharmasena.

Let me suppose that the Accused had nothing to do with Dharmasena, and that Dharmasena himself had made his application, interviewed the Excise Commissioner and the Minister, and had even (I say this for the sake of argument only) paid some money to the Minister or someone of the Ministry, and had then been granted his licence. In those circumstances surely it would be correct to say that Dharmasena "procured the licence

for himself". When in fact the Accused undertook to make all these necessary efforts, he was agreeing to procure the licence, and if having made the efforts, the licence was in fact granted, it would have been a perfectly correct statement of fact to say that the accused had procured the licence for Dharmasena.

In my opinion the expression "procuring a grant or relief for another person" in s. 20 means obtaining it for another person by one's care or efforts.

Mr. Chitty urged that the accused only undertook to assist Dharmasena to obtain the licence, and that therefore the correct charge if any should have been one of accepting the gratification as an inducement "for furthering the procuring of a grant or benefit". He argued that when the taker of the gratification has no power or control in the matter of the giving the contemplated grant or benefit, he does no more than "further the procuring". My reasons have already been stated for the conclusion that, according to the evidence in this case, the Accused undertook to do much more than to assist Dharmasena; the language in which the undertaking was expressed (vide the summary in the early part of this judgment) definitely establishes that Dharmasena was assured that the accused would get the licence for him.

Moreover I do not agree that the distinction between an undertaking *to procure* something, and an undertaking *to further the procuring* of something, depends on the question whether or not the undertaker has a control over the matter of the conferment of the thing. A person will properly be said to "further a procuring" if what he undertakes to do is something short of actually obtaining the grant or benefit. A charge of "furthering" would have been appropriate if for instance the Accused had only said that he would speak to the Minister or that he would deliver Dharmasena's application to the Commissioner of Excise. Similarly it would be a case of only furthering the procurement of employment if a person merely agrees to recommend another for employment without an assurance that the employment would actually be obtained. No doubt the conduct of the accused in this case rendered him guilty of accepting an inducement for furthering the procuring of a licence for Dharmasena. But since he in fact undertook "to get the licence" he also committed the offence of accepting a gratification as an inducement for procuring the licence.

Mr. Chitty's second objection to counts 2 and 3 was that a liquor licence is not a grant or a benefit contemplated in paragraph (vi) of section 20 of the Act. He relied in this connection on the English Case of *Heap v. Hartley*¹ in which a distinction was drawn between a grant and a licence. That case was not one which called for consideration of a statutory provision like s. 20 (1) (a) (vi) of the Bribery Act, which refers to the procuring of "any grant or benefit from the Government". Even

¹ 42 Chancery Division, p. 461.

if it be correct that in English Property Law, the word "grant" ordinarily connotes the surrender or transfer by the grant or of something previously owned or enjoyed by the grantor, I am unable to agree that the word was intended in our Bribery Act to have that same special connotation. The word "grant" with its grammatical variations, occurs in our Statute Law in the Excise Ordinance itself in connection with the issue of liquor licences, in the Citizenship Act in connection with the conferment of the status of citizenship, and in the Royal Letters Patent in reference to the Prerogative of Pardon. There are I am sure other provisions of our Statute Law in which the word is issued in contexts in which there is not involved any question of the surrender or transfer by the Crown or the Government of any right to property or any right having a direct financial value.

The contention that the Legislature intended, in s. 20 (1) (a) (vi), to refer only to a grant of some proprietary right or interest enjoyed by the Crown, is with respect contrary to common sense. The contention is based on the supposition that the Legislature was, in enacting paragraph (vi) of s. 20, concerned only to prevent and punish corruption in the matter of the surrender or transfer of property or of rights enjoyed by the Crown or the Government. Any such supposition is negatived when account is taken of the purpose of the Legislature as evidenced in the Bribery Act. Sections 14 to 19 of the Act, speaking generally, are designed against the taking or offering of gratifications by or to "officials", in connection with acts which are either official acts or done or to be done in an official capacity. The benefits or favours or advantages in consideration of the obtaining or giving of which bribery is penalised by those sections are varied and even multitudinous. Those sections are followed by s. 20, which is not restricted to and does not even refer to, the offering or taking of gratifications to or by public officers; *any person* who accepts a gratification as an inducement for procuring employment under the Government or a public Corporation, or for procuring a grant or benefit from the Government or such a Corporation is guilty of bribery. In this way s. 20 is designed to punish those who use the advantage of personal or family position for the actual or pretended purpose of influencing the commission by "officials" of offences under other sections of the Act. It is obvious that if ordinary citizens are deterred from using their position in that way, there is less likelihood that "officials" can be bribed. Again, although it may be very difficult to prove a direct act of bribery by or to an "official", it may be well easy to prove the taking of a gratification by a person who is only an actual or pretended intermediary. I am satisfied that the Legislature intended as far as possible to prevent or punish even ordinary citizens who accept gratifications as inducements to influence public officials with a view to acting or not acting in a particular way in the discharge of the official functions. Common sense therefore requires that in paragraph (vi) of s. 20 the expression "grant or benefit" must be widely construed.

Mr. Chitty rightly pointed out that since counts 2 and 3 were in the alternative, the accused should not have been convicted on both those counts. I have stated my reasons for the opinion that the term "grant" in paragraph (vi) does not bear the special meaning contended for by Mr. Chitty. But even if the correctness of that opinion be doubtful, the issue of a licence is quite clearly a benefit referred to in that paragraph. I accept the submission of the learned Deputy Solicitor-General that the operative word in paragraph (vi) is the word "benefit", and that its ordinary wide meaning is not narrowed by its association with the words "grant" or "lease" which precede it. Since therefore the counts were framed in the alternative, I would set aside the conviction and sentence on count 2, and affirm the conviction on count 3, and impose on the Accused on that count a sentence of 3 years rigorous imprisonment.

ALLES, J.—I agree.

*Convictions on counts 1 and 2 set aside.
Conviction on count 3 affirmed.*

1962 *Present : T. S. Fernando, J., and Tambiah, J.*

K. RAMANATHAN, Appellant, and L. H. PERERA and 2 others,
Respondents

S. C. 45/59—D. C. Colombo, 760/ZL

Civil Procedure Code—Section 218 (k)—"Contingent right"—Trust—Interest of a beneficiary—Liability to be sold in execution of a money decree against him.

Where, in a trust created by will, the legal title to the property which is the subject matter of the trust is vested in the trustees during the continuance of the trust and the beneficial interest is vested in the beneficiaries, but the enjoyment of the beneficial interest is postponed till the death of the last of the trustees, the interest of any of the beneficiaries is an assured and vested interest and is liable, during the life time of a trustee, to be seized and sold in satisfaction of a decree entered against him for payment of money. In such a case the interest of the beneficiary is not a merely contingent right within the meaning of section 218 (k) of the Civil Procedure Code.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with M. S. M. Nazeem and M. T. M. Sivardeen,
for the plaintiff-appellant.

C. Ranganathan, with S. C. Crossette-Thambiah, for the defendants-respondents.

Cur. adv. vult.

January 16, 1962. TAMBIAH, J.—

The defendants in this case filed case No. 14,719/S in the District Court of Colombo against one Rajendram and, having obtained decree, they seized the land described in the schedule to the plaint. The present plaintiff, who purports to be one of the trustees under a last will left by the grandfather of the said Rajendram, made a claim before the District Court but his claim was dismissed by that court. The plaintiff thereupon filed the present action under section 247 of the Civil Procedure Code in which he asked for a declaration that the property, which has been the subject-matter of seizure, is not a seizable interest as it is exempted by the provisions of section 218 (k) of the Civil Procedure Code.

Section 218 (k) of the Civil Procedure Code (Cap. 101) of the Revised Legislative Enactments (1956 Edn.) gives the right to the judgment creditor to seize and sell or realise in money by the hands of the Fiscal “all saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which the judgment debtor has a disposing power, which he may exercise for his own benefit, and whether the same be held by or in the name of the judgment debtor or by another person in trust for him or on his behalf”. The proviso to this section exempts certain classes of property from seizure or sale. One of the exempted classes of property is “an expectancy of succession by survivorship or other merely *contingent* or possible right of interest” (vide section 218 (k) of the Civil Procedure Code). The learned District Judge has held that the property in question does not fall within the ambit of section 218 (k) of the Civil Procedure Code and, therefore, is liable for seizure or sale. The plaintiff has appealed from this order.

The question for determination is whether the interest, which Rajendram has in the property in question, is a contingent or a vested right within the meaning of section 218 (k) of the Civil Procedure Code. The Indian Civil Procedure Code contains a provision similar to section 218 and it is therefore relevant to consider the distinction drawn between a contingent interest and a vested interest by their Lordships of the Privy Council in construing the corresponding section of the Indian Civil Procedure Code. In *Babui Rajeshwari Kuer v. Babui Kuhkhna Kuer and another*¹ a testator, who had no male issue, provided in his will that after his death, his wife should become proprietor having life interest only of all his properties. The will then proceeded as follows : “(4) On the death of my wife the whole of my estate being treated as 16 annas right, 3 as. and odd out of it shall pass into the possession of the daughter-in-law but she shall not have the right to transfer the same, 12 annas share shall pass into the possession of the two daughters born of the womb of my daughter *who are still living* in equal shares, i.e., each will get 6 annas share and 1 anna share shall pass into the possession of the sister-in-law as absolute proprietors having the right to alienate, etc. the property”. The will also had other provisions which are not relevant to this case. The

¹ (1943) *A. I. R.*, P. C. 121.

question arose as to whether the grand-daughters, to each of whom half the property had been left by will, had a contingent or a vested interest within the meaning of section 61 of the Indian Civil Procedure Code. The contention of the appellant that, on a proper construction of the will, the interest of the grand-daughters was contingent on the survival of the widow was based on the clause " who was still living ". It was argued that these words are equivalent to " who shall be still living " and therefore, the grand-daughters only succeeded if they happened to survive the wife of the testator. Their Lordships of the Privy Council rejected this contention and held that the interest of the grand-daughters was a vested one and not a contingent one. Clause (6) of the will provided that " if for any reason God forbid, any portion of the said estate is not taken possession of by my daughter's daughters and the sister-in-law and they do not get the opportunity of entering upon possession and occupation of it, the entire estate will remain in my daughter-in-law's possession without the right of transfer and on her death the entire estate shall be treated as my estate with the District Magistrate and Collector of Saran as its manager and trustee ". Referring to this clause, their Lordships observed that the most that can be said is that this clause is intended, in certain events, to divest the interest which before those events have already become vested.

The term ' contingent ' right in section 218 (k) of the Civil Procedure Code means a right which is conditional as contrasted with a vested right which is a certain or assured right. When the word ' vested ' is used in this sense, Austin (*Jurisprudence* vol. 2, lect. 53) points out that in reality a right of one class is not being distinguished from a right of another class but that *a right is being distinguished from a chance or possibility of a right*, but it is convenient to use the well-known expressions vested right and conditional or contingent right (vide also *Jewish Colonial Trust Ltd. v. Est Nathan*¹, per Watermeyer J. A.).

Our Courts have also considered the meaning of the terms " contingent " and " vested " in dealing with properties which are burdened with a fideicommissum. In *Mohammed Bhoy et al. v. Lebbe Maricar*² it was held that the interests of a fideicommissarius cannot be sold in execution during the lifetime of the fiduciarius as it is a contingent interest within the meaning of section 216 (k) of the Civil Procedure Code where such an interest was created by will and contained the condition that, on the death of the fiduciarius, the property should pass to the fideicommissarius. The interest of the fideicommissarius, in this case, was "*expectant on his surviving his father*". In *Silva v. Silva*³ a deed of gift created a fideicommissum in which the fideicommissary succeeded to the property after the death of the fiduciary. It was held that the former acquired " an assured and certain interest " which was liable to be seized and sold under section 218 (k) of the Civil Procedure Code. Under the Roman-Dutch law, there is a distinction between a fideicommissum

¹ (1940) A. D. 163 at 176.

² (1912) 15 N. L. R. 466.

³ (1927) 29 N. L. R. 373.

created by deed and a fideicommissum created by will. Where a fideicommissum is created by deed, the fideicommissary has an assured interest which he could alienate even if he happens to die before the fiduciary.

In *Gunatilleke v. Fernando*¹ Lord Phillimore, delivering the opinion of the Privy Council, equated contingent interest to "spes". He said (vide 22 N.L.R. at page 393) : "But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to their Lordships' notice. No doubt the *spes* which such a remainder-man can alienate is a very shadowy one, for if he predeceases the fiduciary, his heirs take nothing, and therefore the alienee could take nothing".

In the instant case, the question is whether, on a true construction of Last Will No. 147, executed by Sathappa Chetty Kalimuttu Chetty, Rajendram, who is one of his grandsons, had a vested interest or merely a contingent interest. It was contended on behalf of the appellant that Rajendram's interest only vested if he happened to survive the last of the trustees. It was also contended that the trust operated during the subsistence of the will and that Rajendram had no right to the property or to the income thereof, and consequently he had only a contingent interest.

The counsel for the respondent, on the other hand, submitted that Rajendram had a vested interest but the beneficial enjoyment of his share of the property was postponed till the last of the trustees died. He also contended that during the pendency of the trust, the trustees were empowered to perform certain functions and duties which did not militate against the vesting of the rights of Rajendram.

Sathappa Kalimuttu Chettiar, after executing last will No. 147 of 20th August 1938, executed two other codicils. The terms of the codicils are irrelevant in determining the question at issue in the instant case. The testator, who executed this will, was possessed not only of this land but also of several other properties and he had eight children by two marriages. By the first bed, he had Sellatchi, Vettivel, Muttukaruppan and Periya Ponnatchi, and by the second bed, he had Sinna Ponnatchi, Thevagnanasekeram, Ramanathan and Nagendra. Of these eight children, seven of them had married and had children of their own. Nagendra was a minor and was unmarried at the time Kalimuttu Chettiar wrote his last will. Rajendram, one of the judgment-debtors in the case mentioned, was one of three children of Kalimuttu's son, Vettivel, by the first marriage.

The recital to the last will states that the testator is desirous of dividing his property among the grandchildren in the proportions : $\frac{1}{2}$ share to the children of Muttukaruppan, Periya Ponnatchi, Thevagnanasekeram and Ramanathan respectively and $\frac{1}{8}$ share to his son, Nagendra. The last

¹ (1921) 22 N. L. R. 385 at 393.

will states that the devisees will be called as donees or beneficiaries in the proportions set out in the last will and, subject to the conditions and restrictions and reservations, the child or children of any of the above take by representation the share his or her parent would be entitled to. The will also states that *the children of Vettivel, Rajendram, Somasunderam and Sandanam are entitled to an undivided $\frac{1}{8}$ share of the capital and income of all the immovable and movable property in Schedules A and B.*

The testator devises and bequeaths the properties contained in the schedule to the will to his trustees upon trust subject to the conditions, restrictions and reservations and for the purposes set out in the will. The will further states that, for these purposes, the trustees shall be vested with title to the said property immediately after his death and shall stand seized and possessed of the same for the purposes of executing and carrying out all the purposes of the trust. Among the conditions set out are that *the donees should not mortgage, sell or alienate their shares* but that, after their death, the same shall devolve on their lawful heirs, subject to the proviso that *should the necessity arise they could sell, alienate or mortgage their shares among themselves*. The will also provides that the donees are not entitled to receive the income arising from their shares until the trust ceases as provided by the will. The donees are also prohibited from selling, mortgaging or alienating their rights to the said income and any such act on their part is to make the share of such donees liable for forfeiture at the sole and absolute discretion of the trustee or trustees. The forfeited share should then devolve on the brothers and sisters of the said donees and, failing them, it should devolve on the other donees. The trust should terminate with the death, incapacity or refusal to act, of the last surviving of the original trustees. The trustees are given the power of management of the testator's business and the properties. They are also given power of investment, power to make advances and certain other powers.

On a reading of this last will, it is clear that the legal title to the property, which is the subject-matter of this action, vested in the trustees during the continuance of the trust and the beneficial interest is vested in the beneficiaries, of whom Rajendram is one, but the enjoyment of the beneficial interest is postponed till the death of the last of the trustees. In view of the clear words in the last will vesting defined shares in the donees and the prohibition of alienation to outsiders, it cannot be said that the interest of Rajendram is only a contingent one and not an assured and vested interest.

The counsel for the appellant further contended that the clause which provides that the child or children of any of the donees take by representation the share of his or her parents, shows that the interest of the donee was only a contingent one. We are unable to agree. This clause, in our view, only provides for the substitution of the children to the interest which has already vested in the donees in the event of the death of the donees.

For these reasons, we hold that the judgment of the learned District Judge should be affirmed and we dismiss the appeal with costs. Application No. 323 of 1960 presented by the plaintiff seeking a revision of the same judgment of the District Judge is also dismissed.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.

1967 *Present : Abeyesundere, J., and Manicavasagar, J.*

D. THENABANDU, Petitioner, and R. SAMARASEKERA
(Registrar-General), Respondent

S. C. 303/67—Application for a Mandate in the nature of a Writ of Certiorari on the Registrar-General

*Registrar of Births, Marriages and Deaths—Appointment and dismissal—No right to be heard before dismissal—Marriage Registration Ordinance, s. 6—Births and Deaths Registration Ordinance—Interpretation Ordinance (Cap. 2), ss. 12, 14 (f)—Scope of principle *audi alteram partem*—Certiorari—Constitutional law.*

A person who has been appointed by the Registrar-General to be a Registrar of Births and Deaths under the Births and Deaths Registration Ordinance, and a Registrar of Marriages under section 6 of the Marriage Registration Ordinance, holds office at the pleasure of the appointing authority. He may therefore be dismissed from both offices by the Registrar-General without being given an opportunity to appear and lead evidence to vindicate his innocence.

The Births and Deaths Registration Ordinance does not contain any provision specifying the appointing authority in the case of an appointment to the office of Registrar of Births and Deaths. Therefore section 12 of the Interpretation Ordinance applies and the appointment may be made by the Minister or an officer authorised in that behalf by the Minister.

By virtue of section 14 (f) of the Interpretation Ordinance the Registrar-General, as the authority empowered to appoint a Registrar of Births and Deaths, has the unfettered power to dismiss such a Registrar appointed by him.

The principle *audi alteram partem* does not apply in the case of dismissal from an office where the grounds of dismissal are not specified or where there is no procedure prescribed which should be followed before dismissal.

A PPLICATION for a writ of *certiorari* on the Registrar-General.

Colvin R. de Silva, with F. R. Dias Bandaranaike, P. D. W. de Silva, Bala Nadarajah and N. Dias, for the Petitioner.

H. L. de Silva, Crown Counsel, for the Respondent.

November 26, 1967. ABEYESUNDERE, J.—

The Petitioner in this case who had been appointed by the Registrar-General to be a Registrar of Births and Deaths and a Registrar of Marriages was informed by letter dated 30th May, 1967 that he was dismissed from both offices by the Registrar-General with effect from 27th May, 1967. Prior to his dismissal he had been asked to show cause why he should not be dismissed on the two charges specified in paragraph 8 of the petition relating to the registration of the marriage of a minor girl without the consent of her parents. The petitioner had asked for an inquiry and an opportunity to appear and lead evidence to vindicate his innocence. Such an opportunity was not given to the Petitioner. He prays for a writ of certiorari to quash the order of dismissal.

The petitioner had been appointed a Registrar of Marriages under Section 6 of the Marriage Registration Ordinance. That section empowers the appointing authority to remove a Registrar at pleasure. As the petitioner held the office of Registrar of Marriages at the pleasure of the appointing authority, he had no right in law to be heard before he was dismissed. No writ of certiorari therefore lies in respect of the petitioner's dismissal from the office of Registrar of Marriages.

The Births and Deaths Registration Ordinance does not contain provision specifying the appointing authority in the case of appointments to the office of Registrar of Births and Deaths. Therefore Section 12 of the Interpretation Ordinance applies and under that Section the appointment of a Registrar of Births and Deaths may be made by the Minister or an officer authorised in that behalf by the Minister. It was not disputed in this case that the Registrar-General who had appointed the Petitioner as a Registrar of Births and Deaths had received the authorisation referred to in Section 12 of the Interpretation Ordinance. By virtue of Section 14 (f) of the Interpretation Ordinance the Registrar-General, as the authority empowered to appoint a Registrar of Births and Deaths, has the unfettered power to dismiss such a Registrar appointed by him. There is no statutory provision in the Births and Deaths Registration Ordinance or any other statute specifying the grounds of dismissal of a Registrar of Births and Deaths nor is there any statutory procedure laid down which is to be observed before the dismissal of such a Registrar. The decision of this Court in the case of *Kulatunga v. The Board of Directors of the Co-operative Wholesale Establishment*¹ states, relying on the decision of the House of Lords in the case of *Ridge v. Baldwin*², that the principle of *audi alteram partem* does not apply in the case of dismissal

¹ (1963) 66 N. L. R. 169.

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² (1963) 2 A. E. R. 66.

from an office where the grounds of dismissal are not specified or where there is no procedure prescribed which should be followed before dismissal. Therefore the fact that the Petitioner was not given an opportunity to attend an inquiry and lead evidence does not vitiate the order of dismissal. Consequently no writ of certiorari lies in regard to the order dismissing the petitioner from the office of Registrar of Births and Deaths.

The Petition is dismissed with costs payable by the Petitioner to the 1st Respondent. We fix the costs at Rs. 262·50.

MANICAVASAGAR, J.—I agree.

Application dismissed.

1967

Present : Tennekoon, J.

F. E. WIJEYESINGHE (Food and Price Control Inspector), and
P. O. S. A. FAROUK, Respondent

S. C. 846/67—M. C. Colombo South, 67024/A

Control of Prices Act—Food Price Order—Meaning of word “ mutton ”.

The word “ mutton ” in Food Price Order No. C 283 includes frozen mutton.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

V. S. A. Pullenayegum, Crown Counsel, with **Faisz Mustapha**, Crown Counsel, for the Complainant-Appellant.

No appearance for the Accused-Respondent.

November 4, 1967. **TENNEKOON, J.**—

This is a case in which the accused has been convicted of having sold mutton at a price above that fixed by Food Price Order No. C283. There was evidence that the mutton that was sold on this occasion was frozen mutton.

The learned Magistrate, holding that the word “ mutton ” as used in the Food Price Order did not include frozen mutton, acquitted the accused. The learned Magistrate appears to have thought that the use of the words “ mutton without bones, mutton with bones, and mutton dead weight ” in the Food Price Order was an indication that if it was intended to control the price of frozen mutton there would have been reference to frozen mutton in the descriptions of mutton which were subject to the price order. I do not think this follows at all.

The word "mutton" must be given its ordinary meaning and mutton even when frozen still remains mutton. The words "mutton without bones, mutton with bones and mutton dead weight" could also apply to frozen mutton without bones, frozen mutton with bones and frozen mutton dead weight. No inference can therefore be drawn from the presence of those expressions that there was an intention to exclude frozen mutton. I am accordingly of the view that the Magistrate misdirected himself in acquitting the accused. The verdict of acquittal is set aside and the accused is convicted of the charge. The record will go back to the Magistrate for sentencing.

Acquittal set aside.

1968

Present : Abeyesundere, J.

H. L. PIYADASA, Appellant, and L. H. P. YAPATILEKE (Food and Price Control Inspector), Respondent

S. C. 1132/67—M. C. Matale, 699

Control of Prices Act—Price control order relating to sale of Milk Maid Condensed Milk—Charge of selling a tin of 14 ozs. of such milk at excessive price—Burden of proof relating to quantity of milk.

In a prosecution for selling a tin of 14 ozs. of Milk Maid Condensed Milk in excess of the maximum retail price fixed by a price control order in force under the Control of Prices Act, it is incumbent on the complainant to lead evidence that the quantity of milk sold by the accused was 14 ozs. The statement on the label of the tin is hearsay and does not constitute evidence to prove the contents of the tin.

APPEAL from a judgment of the Magistrate's Court, Matale.

Nihal Jayawickrame, for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Lalith Rodrigo*, Crown Counsel, for the Attorney-General.

March 31, 1968. ABEYESUNDERE, J.—

In this case the accused was charged with selling one tin of 14 ozs. of Milk Maid condensed milk above the maximum retail price fixed by a price control order in force under the Control of Prices Act. After trial he was convicted of the offence with which he was charged and sentenced to pay a fine of Rs. 1,500 and to 1 month's rigorous imprisonment and, in default of the payment of the fine, to a further 6 weeks' rigorous imprisonment. The accused has appealed from the conviction and sentence.

Counsel appearing for the appellant submits that the prosecution has failed to prove that the tin of condensed milk sold by the accused contained 14 ozs of condensed milk of the variety known as Milk Maid condensed milk. The evidence led for the prosecution has established that the tin sold contains embossed on its metal surface the figure of a milk maid and that such figure and the label appearing on the tin indicate that the tin of milk contains the Trade Mark of a milk maid. The evidence of the witness Mutukaruppan Ramiah is that when he asked from the accused for a tin of milk he was given the tin which has been produced in this case. That evidence was relied on by the prosecution to establish that the accused acknowledged that the tin contained condensed milk. But there is no evidence, apart from the label on the tin which the prosecution submitted as evidence of the contents of the tin, that the tin contained 14 ozs. of condensed milk. I agree with the submission of counsel for the appellant and it is also conceded by Crown Counsel appearing for the Attorney-General that the statements on the label constitute hearsay evidence which cannot be relied on to prove the quantity of condensed milk in the tin. It was submitted by Crown Counsel that the controlled article should not be determined by reference to the weight of the contents of the tin. But I note from a perusal of the price control order relevant to this case that the controlled article is a tin of 14 ozs of condensed milk of the kind known as Milk Maid condensed milk. I am of the view that in this case it was incumbent on the prosecution to prove that the quantity of Milk Maid condensed milk sold by the accused was 14 ozs. As the label does not constitute evidence to prove the contents of the tin, I hold that there is no evidence to prove that a tin of 14 ozs. of Milk Maid condensed milk was sold by the accused. I therefore set aside the conviction and sentence and acquit the accused.

Appeal allowed.

1968

Present : H. N. G. Fernando, C.J.

**M. M. JALALDEEN, Appellant, and P. A. S. JAYAWARDANE
(Food and Price Control Inspector), Respondent**

S. C. 1163/67—M. C. Kegalle, 68375

Control of Prices Act—Charge of selling 14 oz. tin of Farm Brand Condensed Milk at excessive price—Proof of weight of tin unnecessary—Burden of proof—Evidence Ordinance, s. 114.

A Price Control Order fixed the maximum retail price of a 14 oz. tin of condensed milk. If a tin is sold bearing a label which specifies the weight of the contents as 14 oz., the prosecution need not, in the case of an alleged contravention of the Price Order, adduce proof of the actual weight of the contents of the tin. The statement as to weight on the label constitutes an admission as to weight by the seller.

APPEAL from a judgment of the Magistrate's Court, Kegalle.

Colvin R. de Silva, with *P. D. W. de Silva* and *I. S. de Silva*, for the Accused-Appellant.

L. D. Guruswamy, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 22, 1968. H. N. G. FERNANDO, C.J.—

The charge in this case, of which the appellant was convicted, was that he sold a 14 oz. tin of Farm Brand Condensed Milk for Re. 1, a price in excess of the maximum retail price of 90 cents for the said tin fixed by a Price Control Order published in Gazette No. 14,752/2 of June 9, 1967. I would ordinarily have dismissed the appeal without stating reasons, but for the statement of Counsel that the point of law which Counsel raised has been recently upheld by this Court in S.C. 1132/67 (S.C. Minutes of 31st March, 1968¹). The point, briefly stated, is that there was no evidence tendered by the prosecution to prove that the tin of milk sold by the appellant contained 14 oz. of condensed milk, and that in the absence of such evidence the appellant could not have been lawfully convicted of the offence charged. It is necessary first to refer to the relevant part of the Order alleged to have been contravened in this case :—

“ By virtue of the powers vested in the Controller of Prices (Food) by section 4 of the Control of Prices Act (Chapter 173) I, Pinnaduwage Arthur Silva, Controller of Prices (Food), do by this Order—

- (i) fix with immediate effect the prices specified in Columns 2 and 3 of the Schedule hereto to be the maximum retail prices per tin (or bottle) respectively, above which the brand of milk food specified in the corresponding entry in Column 1 of the Schedule shall not be sold within the Island of Ceylon ;
- (ii) direct that for the purpose of this Order—
 - (a) any sale of any quantity of an article specified in Column 1 of the Schedule for the purposes of resale or any sale of an article specified in Column 1 of the Schedule in a quantity of one dozen tins (or bottles) or more at a time shall be deemed to be a sale by wholesale ;
 - (b) any sale of any quantity of an article specified in Column 1 of the Schedule less than one dozen tins (or bottles) at a time for the purpose of consumption or use shall be deemed to be a sale by retail ; ”

The Schedule to the Order contains a list of milk foods, and of the corresponding wholesale prices and retail prices fixed by the Order, and a part of the Schedule is here re-produced :—

“ SCHEDULE

<i>Column 1</i> <i>Description</i>	<i>Column 2</i> <i>Maximum</i> <i>wholesale</i> <i>price per dozen</i> <i>tins (or bottles)</i>	<i>Column 3</i> <i>Maximum</i> <i>retail</i> <i>price per tin</i> <i>(or bottle)</i>
	<i>Rs. c.</i>	<i>Rs. c.</i>
Condensed Milk :		
Milk Maid Condensed Milk	.. 14 oz. tin 11 35..	1 0
Tea Pot Condensed Milk	.. 14 oz. tin 10 85..	0 95
Red Ruby Condensed Milk	.. 14 oz. tin 10 35..	0 90
Ideal Evaporated Milk	.. 14½ oz. tin 11 75..	1 05
Farm Brand Condensed Milk	.. 14 oz. tin 10 20..	0 90 ”

The Order fixes, in respect of each brand of milk, a wholesale price, and a retail price ; and we are here concerned only with the fixation of retail prices. Paragraph (i) of the Order fixes the prices specified in column 3 of the Schedule as the maximum retail prices per tin for the different brands of condensed milk specified in column 1, and paragraph (ii) (b) of the Order provides that the sale of any quantity of an article specified in Column 1 of the Schedule less than one dozen tins. shall be deemed to be a sale by retail.

There is thus no reference in the body of the Order to the *quantity* of condensed milk sold in any case, and the Order fixes retail prices only for *tins* of milk. The description of the “ controlled ” tins is contained in Column 1 of the Schedule, the appropriate description for present purposes being the last in the part of the Schedule which has been re-produced above, namely “ *Farm Brand Condensed Milk 14 oz. tin* ”, and the retail price fixed in Column 3 for such a tin is 90 cents.

Legal considerations apart, what then was the intention of the Controller of Prices when he made the Order, and what should and did a retailer and members of the public understand by this Order ? Common sense can furnish only one answer, namely that 90 cents is the maximum price for a 14 oz. tin of Farm Brand Condensed Milk. Thus the “ Controlled article ” for present purposes is simply the *14 oz. tin of Farm Brand Condensed Milk*.

The Schedule to this Price Control Order specifies 16 brands of Condensed Milk, and refers in all cases but one to 14 oz. tins. On any common sense view, why did the Controller in 15 of the 16 cases refer to 14 oz. tins ? Was it because the Controller knew that each and every tin available for sale in Ceylon had been actually weighed by some appropriate authority and found to contain 14 oz. ? Was it because every retailer of condensed milk is supposed to weigh each tin before

he exposes it for sale, and because he was to be free to sell a tin *at any price* if he found on weighing that in fact the tin contained, not exactly 14 oz. of condensed milk, but something less or something more than 14 oz. ? Or was it because all 15 brands of condensed milk are in fact marketed in tins bearing labels stating that the nett weight of the contents, or the gross weight of the tin is 14 oz. ? It seems to me that common sense affords only the answer that the Controller, the dealer and the public must know that the Order fixed prices for tins labelled 14 oz. tins.

The judgment in the recent case proceeds on the basis that the statement in the label of a tin, as to the weight of the contents, is hearsay, and therefore is not evidence of the actual weight. If that be so, then the statements on the label "Farm Brand", and "Condensed Milk", are equally hearsay, and there is thus no proof either that the accused sold Condensed Milk or that what he sold was the brand referred to in the Schedule to the Price Order as "Farm Brand". Accordingly a prosecution cannot succeed unless there is other evidence to prove (a) that the tin contained condensed milk, (b) that it is of the Farm Brand and (c) that the contents weigh 14 oz. I myself cannot think of any means by which there can be proof that milk is of a particular brand ; for all we know, the composition of different brands may be identical.

It is perfectly clear in my opinion that the Order was intended to apply to the sale of tins identifiable by the labels which they bear, and that references in the Order to the three matters mentioned at (a), (b) and (c) above were intended to distinguish, through the labelling, the different varieties of condensed milk ordinarily on sale. Particularly with regard to weight, it is absurd to suppose that the Controller of Prices knew the actual weight of all tins exposed for sale, or that he expected a dealer to know for himself the weight of every tin he sells. As to the actual weight of the contents of a tin, there are three possibilities :—

- (1) that the weight is 14 oz. ;
- (2) that the weight is less than 14 oz. ;
- (3) that the weight is more than 14 oz.

In the case (1), there is a clear contravention if the tin is sold at more than the Controlled price. In the case (2), the Order surely intended this to be a contravention : if the tin contains less than 14 oz., the sale of the tin at a price higher than the controlled price is a more serious contravention than is the first case. The third possibility, that the tin might contain *more than 14 oz.*, is contrary to common sense. The presumption in Section 114 of the Evidence Ordinance, as to "the existence of any fact which the Court thinks likely to have happened, regard being had to the common course of human conduct and public and private business", must be applied in this context. I myself have never enjoyed the pleasant surprise of finding that the quantity of any article sold in a *tin* or *bottle* or *packet* is greater than the quantity

stated in the label. It would be absurd to suppose that manufacturers of condensed milk adopt any uncommon course of conduct or business practice, and that they understate in their labels the weight of milk which they sell. The only result, therefore, which actual weighing in these cases could achieve is to establish, either that the contents weigh 14 oz. or that they weigh less than 14 oz. But each such result would mean that the seller contravened the Order. That being so, any actual weighing would serve no purpose.

I hold also that when a retailer sells an article bearing a label which specifies the quantity of its contents, e.g., "14 oz. condensed milk", "½ lb. butter" or "20 cigarettes", he adopts the specification in the label, and admits by his conduct that the weight or number stated on the label is the weight or number of that which he sells. That admission is *prima facie* evidence of the weight or number of the contents without further proof. If it is the seller's case that the weight or number was in fact different, the burden lies on him to prove the actual weight or number of the contents.

For these reasons, I must express firm disagreement with the judgment to which I have referred. The appeal is dismissed.

Appeal dismissed.

1968 Present: H. N. G. Fernando, C.J., T. S. Fernando, J., Abeyesundere, J., G. P. A. Silva, J., Siva Supramaniam, J., Samerawickrame, J., and Tennekoon, J.

THE COLOMBO APOTHECARIES CO. LTD.,
Petitioner

v.

1. E. A. WIJESOORIYA,
2. M. T. MARIKAR BAWA,
3. M. H. MOHAMED (Minister of Labour),
4. N. L. ABEYWIRI (Commissioner of Labour),
5. W. E. M. ABEYSEKERA (President, Labour Tribunal),

Respondents

S. C. 232/67 (ID/LT/121/67)—*In the matter of an Application for a Mandate in the nature of a Writ of Prohibition under s. 42 of the Courts Ordinance*

Industrial dispute—Termination of a workman's services—Dispute arising therefrom between the employer and the dismissed workman—Whether it is an “industrial dispute”—“Dispute or difference between an employer and a workman”—“Employer”—“Workman”—Interpretation Ordinance, s. 2—Industrial Disputes Act (Cap. 131), as amended by Acts Nos. 25 of 1956, 14 and 62 of 1957, 4 of 1962, ss. 2, 3, 4, 17, 31A (1), 31B (1), 31B (2) (b), 32 (2), 33 (1) (b), 33 (1) (c), 33 (1) (d), 33 (3), 33 (5), 33 (6), 47C, 48, 49.

The 2nd respondent was employed by the petitioner-Company as an Assistant. On or about 5th April 1965 his services were summarily terminated on the ground that he had been “guilty of gross insolence, rudeness, disobedience, defiance of authority and disrespect”. Subsequently he disputed the legality and propriety of his dismissal by the Company and brought his dispute with the Company to the notice of the Commissioner of Labour and, through him, to the Minister of Labour. The Minister then, claiming to act under section 4 (1) of the Industrial Disputes Act, referred the matter in dispute to a Labour Tribunal (the 5th respondent). The matter in dispute was whether the termination of the services of the 2nd respondent was justified and to what relief he was entitled.

It was contended on behalf of the petitioner-Company that after the services of the 2nd respondent were terminated by the Company, the employer-workman relationship between them had ceased to exist at the date of the reference and that a dispute arising between the ex-employer and the ex-workman as to whether the dismissal was justified was not a dispute between an employer and a workman and could not fall within the definition of “industrial dispute” in s. 48 of the Industrial Disputes Act unless it was raised by another workman who was still in the employ of the petitioner or by a trade union.

Held, by T. S. FERNANDO, G. P. A. SILVA, SIVA SUPRAMANIAM and SAMERAWICKRAME, JJ. (H. N. G. FERNANDO, C.J., ABEYESUNDERE and TENNEKOON, JJ., dissenting), that the dispute between the petitioner-Company and the 2nd respondent was an “industrial dispute” within the meaning of s. 48 of the Industrial Disputes Act and the Minister had the power to refer it for settlement by arbitration under s. 4 (1) of the Act. The 5th respondent, therefore, had jurisdiction to hear and determine the dispute.

APPLICATION for a Writ of Prohibition against a Labour Tribunal. This application was referred to a Bench of seven Judges in terms of section 51 of the Courts Ordinance.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *Vernon Wijetunge* and *Ben Eliyatamby*, for Petitioner.

Walter Jayawardena, Q.C., Acting Attorney-General, with *H. L. de Silva*, Crown Counsel, for 1st, 3rd, 4th and 5th Respondents.

N. Satyendra, with *S. Ponnambalam*, for 2nd Respondent.

Cur. adv. vult.

February 29, 1968. H. N. G. FERNANDO, C.J.—

I must confess that I had much doubt during the course of the argument of this case, as to the correct answer to the question which arises in this case, namely whether a dispute between a single employer and an employee whom he has dismissed is an “industrial dispute” contemplated in the Act. Because it appeared during the argument that my brothers Samerawickrane and Tennekoon each had fairly definite and opposing views on the problem, they prepared at my request draft judgments setting out those contrary views, and I am sure my other colleagues on this Bench have derived as much assistance as I have from a study of those draft judgments, which quite fairly set out the pith of the arguments addressed to us by opposing counsel. Having enjoyed the benefit of the assistance to which I have just referred, I find myself now able to accept the answer in the negative which my brother Tennekoon gives to the question which here arises and to accept also his reasons for that answer. That being so, and also because the judgment of Tennekoon, J., was prepared earlier and does not refer to some of the points which have influenced the reasoning of Samerawickrane J., my own statement of opinion has necessarily to take the form of a comment on the latter reasoning. In the circumstances, I trust that it is scarcely necessary for me to disclaim any intention of disparaging that reasoning in the course of the expression of my disagreement.

When the petitioner in this case summarily dismissed the 2nd respondent from service, there undoubtedly arose a “dispute” between the two parties in the ordinary sense of that term, and that dispute

apparently came to the notice of the Minister. At this stage, the question which concerned the Minister would have been whether (if I may state it this way) he could do anything about the matter. The Minister's statutory powers under the Act are set out in s. 4 of the Act, each subsection of which empowers him to refer an "industrial dispute" for settlement by arbitration. Thus the particular question which arose was whether this particular dispute is or is not an industrial dispute, and it seems to me beyond argument that the Minister's first duty (having regard to the form and structure of Acts of Parliament) was to seek a solution to the question in the Act's definition of the expression "industrial dispute". While definitions in our Statutes take various forms, this particular definition commences thus "industrial dispute *means*", a formula intended to exclude any meaning other than the meaning which the Legislature proposes to assign in the definition itself. The citation from Craie's Statute Law, on which my brother Samerawickrane relies for the proposition that a word can be given its ordinary meaning in a particular context is wholly applicable where a word or expression is not defined at all, and may also be applicable in other cases, where for instance the definition of a word or expression commences "'X' *includes*". But where a definition does commence "'X' *means*", a Court cannot in any opinion look for a meaning outside the terms of the definition save *in extremis*, i.e., to avoid manifest absurdity, or to disregard manifest error in the actual definition.

The dispute which came to the notice of the Minister in this case was one between a single employer and a person who, though previously employed by that employer, was not so employed at the time when the dispute arose; and the dispute related to the termination of the services of that person. Taking first the subject-matter of the dispute, there is no question but that the subject-matter fell within the scope of the definition: a dispute as to "the termination of the services of any person" is expressly mentioned in the concluding part of the definition of "industrial dispute" in the Act.

But in relation to each other, the parties to this dispute, at the time when it arose, were not an employer and a workman (in the ordinary sense of those words) but an employer, or perhaps an ex-employer, and an *ex-workman*. Hence I am in entire agreement with my brother Tennekoon that, when one has regard only to the definition of "industrial dispute", there was here no dispute between an employer and a *workman*. But that is not an end of the matter, for the words "employer" and "workman" are both defined in the Act in what I might term "*compelling*" definitions, because they employ the term *means*. In order therefore to determine what the Legislature intended by the word "workman", the Minister was bound by the definition of that word. Accepting Tennekoon J.'s clear and obvious division of this definition into three parts, I have no doubt that an *ex-workman*, i.e., a person whose employment has been terminated, is not contemplated in the first part; indeed no argument to the contrary was addressed to us.

But the question whether a workman whose services are terminated is nevertheless included in the second part of the definition of "workman" is not so easily answered. Had there been no third limb in the definition, the construction that the second part was intended to include any dismissed workman might have been reasonable.

The third limb or part of the definition, when read separately, is "workman", for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated." One cannot I fear ignore the apparent intention of the Legislature evidenced in the words which I have just italicized. Whereas the first two meanings which are assigned can apply whenever the word "workman" occurs in the Act, this third meaning can attach only when the word has to be construed in relation to *proceedings dispute*. Hence it seems to me that, if the Court were to hold that the second limb contemplates a workman whose services have been terminated, the Court would be transgressing the limitation deliberately stated in the third limb of the definition. Indeed, the construction that the second limb of the definition of "workman" does include a dismissed workman is negatived by the third limb, in which the Legislature assumes that a dismissed workman is not caught up in the earlier parts of the definition.

I am satisfied, on this examination of the definition of "industrial dispute", read as it must be with the first two limbs of the definition of "workman", that a dispute between an employer and his dismissed workman is not an industrial dispute. I trust I am right in thinking that Samerawickrama J. is thus far at one with me, because he relies only on the third limb of the definition of "workman" for his conclusion.

The next, and last, matter which arises in the inquiry, whether the dispute in the present case is an "industrial dispute" within the definition of that expression, is to consider whether that definition can properly be read, together with the third limb of the definition of "workman". Expressing the question in another way, is there anything in that third limb which has the effect of giving to the word "workman", when it occurs in the definition of "industrial dispute", the meaning "ex-workman or dismissed workman", I see no alternative but to hold that the third limb can have no such effect, because the introductory words of the third limb assign a meaning to the word "workman", not for all purposes, but only for the purposes of any proceedings under the Act in relation to an industrial dispute.

In my opinion, the proper approach of the Minister to a dispute which is brought to his notice is the approach which I have myself made, namely to inquire whether the dispute is one to which the Act applies, that is to say, an "industrial dispute" as defined in the Act. If by that test, a particular dispute is not an industrial dispute as so defined, then it is something unaffected by the Act, and the Minister has no statutory

power to take any action concerning it ; he cannot initiate a proceeding under the Act except in relation to a dispute which first satisfies this test.

With much respect, I must express disagreement with the opinion that there were in this case any “proceedings under the Act” at any stage before the Minister made a reference under s. 4. There is in existence a proceeding under the Act only when, and after, a reference under s. 4 is made ; and the third limb of the definition can operate only for the purpose of a proceeding thus in existence. At the stage when the Minister merely considers whether he should make such a reference, he is not exercising any power or function under the Act. Perhaps the very words of the preceding sentence convey adequately the distinction between the mere contemplation of the commencement of a proceeding, and the actual commencement of a proceeding. Perhaps also a valid analogy can be drawn with the principle of the criminal law that the mere contemplation or intention of doing a criminal act is (save very exceptionally) not a criminal offence. The reason of course is that it is only the doing of the act that the criminal law covers, and not the desire to do it. So also the “proceeding” which s. 4 of the Industrial Dispute Act covers or authorises is the making of a reference, and not the idea or intention to make it. Nothing is a statutory proceeding unless it has some legal effect or legal consequence, and the mere contemplation or intention of the Minister to make a reference has no legal effect or legal consequence and is not a proceeding under the Act. For these reasons, I am unable to agree with my brother Samerawickrane that a dispute between an employer and a dismissed workman can be construed to be an “industrial dispute” by calling in aid the third limb of the definition of “workman”.

When a Statute contains a definition of a subject or matter to which the Statute will apply, and especially when the definition uses the word “means”, the Statute will apply only to such a subject or matter as passes the test that it falls within the description, conditions and other particulars specified in that definition. In addition, if any word or expression which occurs in that definition is itself defined in another definition, then resort must also be had (in applying the test) to the meaning thus assigned to such a word or expression ; that precisely is the reason why, in this case, it is legitimate and necessary to read the definition of “industrial dispute” together with the definition of “workman”. But the third limb of the latter definition (unlike its first two limbs), while assigning a third meaning to “workman”, only does so “for the purposes of any proceedings in relation to any *industrial dispute*”. The third limb thus pre-supposes the existence of an industrial dispute and enacts some provision concerning it. Hence this third limb cannot form part of the test to which I have referred, because it pre-supposes that the test has already been satisfied. In testing the point whether some dispute is an “industrial dispute” as defined, it is in my opinion contrary, both to

common sense and to the rules of statutory construction, to call in aid a provision which pre-supposes that the case under consideration has passed that very test.

My opinion, that the third limb of the definition of "workman" is not relevant in a consideration of the question whether a particular dispute is an industrial dispute as defined in the Act, does not have the consequence that this third limb was enacted without purpose and is tautologous. There are in the Act many provisions, applicable in relation to proceedings under the Act, where the word "workman" occurs in contexts in which it might be doubtful whether reference to a dismissed workman is also intended. The third limb of the definition serves the useful purpose of avoiding such possible doubts. Statutory provisions of this kind are not uncommon, and indeed are often efficacious.

My brother Siva Supramaniam is of opinion that there was a dispute or difference between the petitioner and the 2nd respondent which arose before the termination of the services of the 2nd respondent, but the statement of the matter in dispute, namely "whether the termination of the services of the 2nd respondent was justified", do not indicate that there was any industrial dispute prior to that time. If a workman conducts himself in a manner which appears to his employer to constitute gross inefficiency or impertinence, and if the employer immediately dismisses the workman, there would be no dispute in existence prior to the dismissal. If thereafter the workman acquiesces in his dismissal there will be no dispute at all; but if the workman questions the propriety of the dismissal then there will arise the dispute whether his dismissal was justified. While there may be cases in which dismissal is the culmination of a pre-existing industrial dispute, the present case has not been shown to be of such a nature.

I cannot agree that the case of *R. v. National Arbitration Tribunal*¹ relates to facts similar to those of the present case. The judgment of Lord Goddard makes it clear that between November 1946 and March 1947 the Company's workmen and their Union had made demands for changes in wages and in conditions of service, and that the Company had always resisted those demands. At the time of the termination of the services therefore, there was in existence a dispute as to those matters. Immediately after the passage cited by my brother Siva Supramaniam from the judgment, these observations follow:—

"It is, in my opinion, quite clear that there was here a trade dispute existing at any rate down to the date of the dismissal of the workmen If there was a trade dispute it can, in my opinion, be referred to the tribunal whether or not the dispute has resulted in workmen being dismissed or in their having discharged themselves."

¹ (1947) 2 A. E. R. 693.

As I understand it the decision in that case proceeds on the common-sense principle that once a dispute has arisen, an employer cannot avoid the operation of the machinery for settlement by terminating the employment of his workmen. The reference actually made in that case included several matters regarding conditions of service which had been in dispute prior to the termination. In the instant case, however, the reference to arbitration does not refer to any matter alleged to have been in dispute prior to the termination of the employment of the 2nd respondent.

The conclusion which I reach in this case means that the machinery of settlement by arbitration is not available in the case of a dispute between an employer and an individual workman whose services are terminated before the dispute arises. That conclusion is unfortunate for the employee in the instant case, because apparently there is not now available to him the remedy provided in Part IVA of the Act. But that consequence is entirely fortuitous ; it was probably due to the fact that the present dispute arose at a time when this Court had decided, in the case of *Walker Sons & Co., Ltd. v. Fry*¹, that the provisions of Part IVA of the Act were *ultra vires* of the principle of Separation of Powers. Now that our decision has been reversed by the Privy Council, there is no longer any doubt that relief under that Part of the Act can be sought in cases like the present one. And if an individual's grievance does become the subject of a dispute to which a trade union or an actually employed workman is a party, then the procedure of settlement by arbitration is also available.

For these reasons, I agree to the order proposed by my brother Tennekoon.

T. S. FERNANDO, J.—

I agree to the making of the order proposed by Samerawickrame J. and with the reasons therefor set out by him in his judgment.

ABEYESUNDERE, J.—

The dispute between the 2nd respondent and the petitioner in regard to the termination of the former's services by the latter was considered by the 3rd respondent, who was the Minister of Labour, to be an industrial dispute within the meaning of the Industrial Disputes Act (hereinafter referred to as the Act). Purporting to exercise the powers under section 4 (1) of the Act, the 3rd respondent referred such dispute for settlement by arbitration to the 5th respondent who is the President of a Labour Tribunal. The petitioner prays for a writ of this Court prohibiting the 5th respondent from continuing the proceedings in relation to the alleged industrial dispute between the 2nd respondent and the petitioner.

¹ (1965) 68 N. L. R. 73.

Mr. H. V. Perera, Q.C., who appeared for the petitioner, contended that the dispute between the 2nd respondent and the petitioner was not an industrial dispute within the meaning of the Act as the 2nd respondent, having ceased to be a workman when the dispute arose, was not competent to be a party to an industrial dispute, that consequently the reference made by the 3rd respondent to the 5th respondent was invalid, and that therefore the petitioner's application for a writ of prohibition should be allowed. Mr. N. Satyendra, who appeared for the 2nd respondent, sought to counter Mr. Perera's contention with the argument that, by reason of the second part of the definition of "workman" in section 48 of the Act, the 2nd respondent was a workman for the purposes of the Act despite the termination of his services. Mr. Perera submitted that the second part of the definition of "workman" was intended to apply to the word "workman" in the expression "trade union consisting of workmen" occurring in the definition of "industrial dispute" in the Act and that it did not apply to the 2nd respondent. In connection with that submission Mr. Perera drew attention to the fact that the expression "trade union" was defined in the Act to be any trade union registered under the Trade Unions Ordinance and that the meaning of the word "workman" as expressed in the second part of the definition of that word in the Act occurred in the definition of "workman" in the Trade Unions Ordinance.

The second part of the definition of "workman" in the Act provides that "workman" includes any person ordinarily employed under a contract of service with an employer whether such person is or is not in employment at any particular time. The third part of the definition of "workman" in the Act provides that, for the purposes of any proceedings under the Act in relation to any industrial dispute, "workman" includes any person whose services have been terminated. If, as argued by Mr. Satyendra, the second part of the definition of "workman" has an unrestricted application in the Act, a person whose services have been terminated would be a workman within the meaning of the Act and consequently the third part of the definition of "workman" would be redundant.

Mr. Satyendra submitted that if Mr. Perera's interpretation of the definition of "workman" in the Act was correct, that definition would not apply to the word "workman" in section 31B of the Act which provided that a workman may make an application to a Labour Tribunal for relief in respect of the termination of his services by his employer. That submission is correct. But the inapplicability of the definition of "workman" in the Act to section 31B does not matter as it is clear that the context of that section requires the word "workman" occurring therein to mean a person whose services have been terminated and the definition of "workman" in section 48 of the Act is subject to the words "unless the context otherwise requires".

With regard to the third part of the definition of "workman" in the Act, Mr. Perera's submission was that it was necessary as awards and other proceedings under the Act in relation to an industrial dispute were sometimes required to apply to persons whose services had been terminated. Mr. Perera also examined the question whether the third part of the definition of "workman" in the Act applied to the 2nd respondent. He submitted that the consideration by the 3rd respondent whether the dispute between the 2nd respondent and the petitioner was an industrial dispute was not a proceeding under the Act in relation to an industrial dispute as there should first be an industrial dispute before any proceeding in relation thereto under the Act could arise and that therefore the third part of the definition of "workman" in the Act could not be relied on to determine the question whether the dispute between the 2nd respondent and the petitioner was an industrial dispute. I agree with Mr. Perera that such question must be determined without having regard to the third part of the definition of "workman" in the Act.

Unlike Mr. Satyendra's interpretation of the definition of "workman" in the Act, Mr. Perera's interpretation of that definition does not have the effect of making any part of that definition redundant. I accept Mr. Perera's interpretation. The dispute between the 2nd respondent and the petitioner is not an industrial dispute within the meaning of the Act because the parties to it are not competent under the Act to be parties to an industrial dispute as, at the time when the dispute arose, the 2nd respondent had ceased to be a workman of the petitioner and also the petitioner had ceased to be the 2nd respondent's employer.

I hold that, as the dispute between the 2nd respondent and the petitioner is not an industrial dispute within the meaning of the Act, its reference by the 3rd respondent to the 5th respondent for settlement by arbitration is invalid and consequently the petitioner is entitled to the writ of prohibition prayed for by him. He is also entitled to his costs, one half of which shall be paid by the 2nd respondent and the other half by the 3rd respondent.

G. P. A. SILVA, J.—

I have had the advantage of reading the judgments of My Lord the Chief Justice and my brothers Samerawickrame and Tennekoon. In agreeing with the conclusion reached by my brother Samerawickrame I wish to express my own views which have persuaded me to that course. As the facts preceding the application as well as the substance of the arguments advanced by counsel at the hearing have been fully set out in the judgments of my brothers Samerawickrame and Tennekoon, I shall not repeat them.

In considering the question at issue it is of the utmost importance that one should always have in the forefront the broad purpose of the Industrial Disputes Act. It is agreed by all the counsel associated with the discussion of the legal aspects of this matter—and there can be hardly any doubt—that the sole object of the Act is the promotion and maintenance of industrial peace. It is therefore reasonable to assume that the legislature at least intended that any industrial dispute which is or is likely to be a threat to industrial peace should be brought within the scope of the Act. When I consider the definition of the words "industrial dispute" in the present Act, I cannot help thinking that it is wide enough to include every serious problem that can arise between an employer and employee in relation to the employment. It is not as it were that the Act was silent as regards termination of employment and one is left to interpret whether that too was in contemplation but the Act specifically deals with it. Even if the Act was silent, reason and common sense would preponderate towards the view, unless there is good reason to the contrary, that, when less serious matters affecting industrial peace were brought within the purview of industrial disputes the subject of termination of employment, which is the most serious matter that can affect the relations between an employer and employee, should have been in contemplation. So far as the powers of the Minister under section 4 of the Act are concerned, experience has shown too often that the termination of services of one employee has resulted in considerable or complete dislocation of an industry with which he was associated. In these circumstances the question suggests itself whether a sagacious and prudent Minister, having all the data before him, would not be in the best position to consider whether the termination of services of a particular worker is or is not of such a nature as to be likely to lead to unrest in one or more industries and, when he so feels, whether he would not be justified in setting in motion the machinery contemplated in section 4 of the Act.

It is in the above background that I desire to consider the present question. In interpreting the provisions of this Act it would not be desirable to interpret one particular section in isolation and it is necessary to appreciate the scheme of the Act considered as a whole. At the outset, Part II of this Act deals with the functions of the Commissioner and the powers of the Minister in regard to industrial disputes. In setting out the functions of the Commissioner, section 2 requires him, on notice being given or otherwise, if he is satisfied that an industrial dispute exists or is apprehended, to take such steps as he may consider necessary with a view to promoting a settlement of the dispute. It seems to me that this section not only empowers but requires the Commissioner to adopt every means at his disposal, whether such means is specifically provided for in the Act or not, in order to promote a settlement of the dispute. As this court is not immediately concerned with the latter means, it is sufficient to concentrate on the machinery provided in the Act, namely, the proceedings contemplated in section 3 relating to the

powers of the Commissioner. To my mind the words “that any industrial dispute is...apprehended” in section 2(1) and similar words in section 3(1) “where he apprehends an industrial dispute” have a very important significance in considering the present question. For, an industrial dispute need not exist before he commences to perform his functions and it is sufficient if he apprehends an industrial dispute. Under these two sections, he would be the final arbiter as to whether there is such an apprehension or not and that apprehension may well be based on the dismissal of one workman. Where such an apprehension is entertained, therefore, the dispute which he will have to refer for settlement or endeavour to settle by conciliation will be the dispute as to the dismissal and no other. The only basis on which this dispute can be called an industrial dispute over which alone the Commissioner can exercise his powers under section 3 is in terms of the last limb of the definition ‘workman’ which includes a person whose services have been terminated, read together, of course, with the definition of ‘industrial dispute’.

Although sections 2 and 3 are not the sections which this court is called upon to interpret I think their implications have a bearing on the interpretation of the next section. Having regard to the sequence of the sections and the general functions of a Minister and a Head of a Department under him, it is not unreasonable to think that a dispute will reach Ministerial level only if the Commissioner as the Head of the Department fails to settle it by means provided for by the Act or otherwise. In addition to the reasons which I set out below independently for considering that the present dispute is an industrial dispute for the purposes of section 4, if the construction which I have placed on the words “industrial dispute” in section 3 is correct I feel fortified in giving the same meaning to the words in the next section where the Minister would be having recourse to his own powers to settle the dispute after the Commissioner himself has failed. For, it is fair to assume that in two consecutive sections in the same chapter where the functions and powers of the Commissioner and the Minister respectively in relation to industrial disputes are dealt with, the legislature intended to give the same meaning to the same words.

When the matter in dispute reaches the Minister, in my view, there is only one purpose for which he will consider it, namely, for the purpose of proceedings under section 4 of the Act in relation to the existing dispute. For this purpose he has to satisfy himself first that there is an industrial dispute and, if so, for the purposes of exercising his powers under sub-section (1), to form an opinion as to whether or not it is a minor dispute. In regard to the first matter I think he will be fully justified in deciding that there is an industrial dispute in this case by reference to the definitions of the words “industrial dispute” read with the definition of the word “workman” which includes, for the purpose of any proceedings under the Act in relation to an industrial dispute, a person whose services have been terminated. It seems to me to be an unwarranted restriction

of the meaning of this definition to hold that the Minister should first consider whether an industrial dispute in terms of the definition exists independently of the purpose for which he is indulging in such consideration. In my view he has necessarily to consider the meaning of the words, having the purpose of that consideration in the forefront, namely, to take proceedings under section 4. Else there is no occasion for him to consider whether there is an industrial dispute or not.

On an examination of the various provisions of the Act I think there is a good reason for the limitation which the legislature has imposed on the meaning of "workman" which in turn restricts the meaning of the words "industrial dispute" where proceedings under the Act in relation to an industrial dispute are not in contemplation. There are several sections in the Act making reference to the word 'workman' which clearly refer to a workman in the service of the employer and in which the concept of a discontinued workman will be quite inapplicable. A definition had therefore necessarily to be evolved where a person who was a workman at some stage and whose services had been terminated before any relevant question arose, had to be excluded. At the same time the legislature was anxious to empower the Minister to exercise powers under section 4 in regard to a dispute of such a person whenever the dispute was one which threatened industrial peace. The definition was, I think, the outcome of these two considerations and there is no justification in my view for this Court to impose any limitation on this definition. Indeed such a limitation would defeat the very object that the definition was intended to achieve and would deprive a dismissed worker of the possibility of availing himself of a right which the legislature conferred on him.

It was contended in the course of the argument that the remedy for a dismissed workman was to avail himself of the provisions of Part IVA and to seek redress before a Labour Tribunal which could take cognizance of an individual workman's complaint regarding the termination of his services by his employer. Instances are not rare where the legislature has provided for more than one remedy even in respect of the same grievance. Quite apart from that, as I have already referred to earlier in regard to proceedings under Chapter II by the Commissioner or the Minister, having regard to the possible impact on industrial peace, there may be certain considerations which persuade a Minister in possession of all the relevant material, to take proceedings under section 4 even in a case where the workman whose services have been terminated can independently have recourse to a Labour Tribunal. Furthermore, there is nothing in Chapter IVA of the Act, which provides for Labour Tribunals, to suggest that individual grievances relating to termination of services should be exclusively dealt with by such tribunals nor is there any provision earlier to exclude such grievances from the purview of industrial disputes regarding which the Minister is empowered to take certain proceedings.

Perhaps the most persuasive provision in the Act in favour of the interpretation that a termination dispute of an individual workman, which is not taken up by a Trade Union, can form the subject of a reference by the Minister under section 4 (1) is to be found in section 33 which sets out some of the decisions that may be contained in an award. If it was the intention of the legislature that such a dispute should be cognizable only by a Labour Tribunal established under Part IVA, the provisions of section 33 (1) (b) or (c) or 33 (3), (5) and (6) all of which make pointed reference to dismissal and reinstatement of a workman will cease to have any meaning in the context in which they occur. The conclusion therefore seems to me unescapable that the Minister's reference in this case is one which is justifiable in law. The petitioner's application cannot therefore succeed.

SIVA SUPRAMANIAM, J.—

I have had the opportunity of perusing the judgments of my Lord the Chief Justice and my brothers Samerawickrame and Tennekoon.

The facts have been fully set out in the judgment of Tennekoon J., and it is unnecessary for me to recapitulate them. The question that arises for decision is whether, on the facts stated, there existed an industrial dispute which the Minister had jurisdiction to refer for settlement by arbitration under S. 4 (1) of the Industrial Disputes Act (Cap. 131, as amended by Acts Nos. 25 of 1956, 14 and 62 of 1957 and 4 of 1962, hereinafter referred to as the Act). I am in agreement with the answer given to that question by Samerawickrame, J.

It has to be borne in mind that although the Legislature had by Act No. 62 of 1957 introduced Part IVA into the original Act and had provided a remedy to a workman whose services had been terminated by his employer, namely, the right to make an application for relief to a Labour Tribunal, it enlarged the definition of an "industrial dispute" in 1962 by expressly adding to that definition "any dispute or difference between an employer and a workman". Had this amendment not been effected, it might have been contended that the Legislature did not intend that the machinery of settlement by arbitration should be available in the case of a dispute between an employer and an individual workman whose services had been terminated, on the footing, perhaps, that such a dispute cannot endanger industrial peace. The amendment, however, made it clear that the Legislature intended that the machinery should be available to an individual workman in addition to the remedy provided under Part IVA of the Act. The relevant sections of the Act should, therefore, be construed in a manner which will give effect to that intention of the Legislature, unless, of course, such a construction is not possible.

The definition of "workman", as it stood before the amendment of 1957, included a person ordinarily employed under a contract with an employer "whether such person is or is not in employment at any particular time". Any dispute or difference between "employers and workmen" fell within the definition of an "industrial dispute". The words "employers and workmen" include "an employer and a workman" (S. 2 of the Interpretation Act). On the plain meaning of the words, therefore, a person, other than a casual employee, who had ceased to be in the employment of his employer was, nevertheless, a "workman" for the purpose of the Act and could have been a party to an "industrial dispute". Can it be said that the Legislature, when it effected the amendment in 1957, by adding to the definition of "workman" the words "and for the purpose of any proceedings under this Act in relation to any industrial dispute, include any person whose services have been terminated," took away a right to which a workman was already entitled? In my opinion, the amendment was only intended to make the position clear since, under the same amending act, "the termination of the services or the reinstatement in service" of a workman was specifically included in the definition of "industrial dispute" as a subject matter of an "industrial dispute", although such a dispute was already within the ambit of an "industrial dispute" by reason of the words "connected with the employment or non-employment" contained in the earlier definition. (*Vide* the judgment of the Federal Court of India in *Province of Bombay v. West India Automobile Association*¹.)

There was no corresponding amendment in the definition of 'employer' to include a person who had ceased to be an employer. Since the employer was a person against whom orders for the payment of money or the reinstatement of workmen could be made and enforced, the Legislature provided for those matters in respect of a person who had ceased to be an employer by enacting a new section 47C instead of amending the definition of "employer", as the aforesaid matters cannot be adequately dealt with by an amendment of the definition.

With great respect, I find it difficult to agree that the provisions of this section lead to a necessary inference that a dispute connected with the termination of services can be referred to an Industrial Court or a Labour Tribunal for settlement only if the dispute arose while the relationship of employer and workman subsisted.

On the facts of the instant case, however, I am of opinion that the dispute which was referred for settlement by arbitration arose when the relationship of employer and workman subsisted between the petitioner and the 2nd respondent. Under S. 48 of the Act, "industrial dispute" means, *inter alia*, "any dispute or difference between an employer and a workman . . . connected with . . . the termination of the services . . . of any person." "Any person" will, of course, include the workman

¹ A. I. R. 1949 Federal Court, page 111.

whose services had been terminated. The “industrial dispute” that was referred by the Minister for settlement by arbitration was set out as follows:—“Whether the termination of the services of Mr. M. T. Marikar Bawa is justified and to what relief is he entitled.”

The contention on behalf of the petitioner is that on the date on which the dispute arose the relationship of employer and workman had ceased to exist between the petitioner and the 2nd respondent and consequently there was no “dispute or difference between an employer and a workman” which would constitute an “industrial dispute” in terms of S. 48 in respect of which the Minister could make an order under S. 4 (1) of the Act. It was submitted, however, that the dispute as to whether the termination of the services of the 2nd respondent was justified will fall within the definition of “industrial dispute” if it was raised by another workman who was still in the employ of the petitioner or by a trade union but not by the 2nd respondent himself, although the 2nd respondent was the person most vitally and directly concerned in the dispute.

It is necessary to examine when the “dispute or difference” in connection with the termination of the services of the 2nd respondent arose between the parties. What are the differences between the parties which the arbitrator will be called upon to consider in connection with the termination of the services of the 2nd respondent to determine *whether the termination was justified*? They will necessarily be differences that arose between the parties which culminated in the termination of the services and not differences which arose thereafter. Where the propriety of a summary dismissal is questioned by a workman, the dispute or difference arises at least contemporaneously with the communication of the order of dismissal. The dispute or difference between the petitioner and the 2nd respondent which formed the subject of the reference therefore arose before the relationship of employer and workman came to an end. Any dispute or difference that arose between the parties after the termination of the services of the 2nd respondent will be irrelevant for a consideration of the question whether the termination was justified. The dispute that existed between the parties which was referred for settlement by arbitration by the Minister was therefore an “industrial dispute” within the meaning of S. 48 of the Act. The fact that at the date at which the order was made by the Minister under S. 4 (1) of the Act the relationship of employer and workman had ceased to exist cannot affect the Minister’s power to make an order in respect of the “industrial dispute” which had already arisen.

A contention similar to that advanced by the petitioner in this case was considered by the Court of Appeal in England in the case of *R. v. National Arbitration Tribunal, Ex parte Horatio Crowther & Co. Ltd.*¹ The Conditions of Employment and National Arbitration Order, 1940, made under certain Defence Regulations, provided as follows:—Article 2 (1) “If any trade dispute exists or is apprehended, that dispute . . . may be reported to the Minister.”

¹ (1947) 2 A. E. R. 693.

Article 7. “Trade dispute means any dispute or difference between employers and workmen or between workmen and workmen connected with the employment or non-employment or the terms of employment or the conditions of labour of any person.”

“Workman means any person who has entered into or works under a contract with an employer . . .”

A dispute arose between a company and certain workmen in November 1946 over the terms and conditions of service. On 4th April 1947 the company terminated the services of the workmen after giving them notice of termination on 28th March 1947. On 14th April 1947 the matter was reported to the Minister who referred the dispute to the National Arbitration Tribunal. The validity of the order made by the Tribunal was attacked on the ground, *inter alia*, that no dispute existed or was apprehended on the date on which the dispute was reported to the Minister and that as the workmen had ceased to be in the employment under the Company at the date of reference, there was no matter on which the tribunal could arbitrate. The Court (Lord Goddard C.J. and Humphreys and Croom-Johnson JJ.) held that although the contract of service between the Company and the workmen had been terminated at the date of the report to the Minister, there was nevertheless a trade dispute within the meaning of Article 7 (supra). In the course of his judgment, Lord Goddard said :

“It was submitted by counsel for the company that as at the date of the reference due notice had been given to the workmen to terminate their employment and their employment had thereby been terminated, there could be no trade dispute to refer, because there could not be a dispute or difference on any subject between those employers and workmen as the workmen were not in the service of the employers, and he reinforced this argument by reference to the definition of “workman” which he submitted contemplated an existing contract of service so, as he put it, that there must be some contract on which the reference could “bite”. I cannot agree with that submission. If effect were given to it, it would mean that any employer, or, indeed, any workman, could nullify the whole provisions of the Order and the object of the regulation under which it was made by terminating the contract of service before a reference was ordered, or even after the matter was referred but before the tribunal considered it.”

I am of opinion that in the instant case there was an “industrial dispute” within the meaning of S. 48 of the Act and that the order under S. 4 (1) was properly made by the Minister. In the result, the petitioner’s application fails and must be dismissed with costs payable to the 2nd and 3rd respondents. I agree to the amounts fixed by my brother Samerawickrame.

SAMERAWICKRAME, J.—

The Petitioner, the Colombo Apothecaries Company Limited, has made an application for a mandate in the nature of a writ of prohibition, forbidding the 5th respondent, who is the President of a Labour Tribunal, from hearing, determining and continuing proceedings in respect of a dispute referred to him by the 3rd respondent. The matter in dispute was whether the termination of the services of Mr. M. T. Marikar Bawa (who is the 2nd respondent) was justified and to what relief he was entitled. The 3rd respondent, who is the Minister of Labour, referred the matter in dispute to the 5th respondent, claiming to act under Section 4 (1) of the Industrial Disputes Act.

Mr. H. V. Perera, Q.C., appearing for the petitioner, supported his application on the ground that the 3rd respondent had no power under the Statute to refer the dispute for settlement by arbitration, because the dispute which had arisen upon the summary dismissal of the 2nd respondent was one between an employer and a person whose services had been terminated and was, therefore, not a dispute between an employer and a workman within the relevant provisions of the Act.

The last part of the definition of "workman" in Section 48 of the Industrial Disputes Act is as follows:—"and, for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated". The term "Industrial Dispute" has itself been defined in this Section, but appearing as it does in the provision defining "workman", it need not be given the meaning set out in the definition in Section 48, for that definition itself uses the word "workman". Again, it is a rule of construction that though the meaning of a term is defined in the Interpretation clause of an Act, the definition is not necessarily applicable on every occasion where the word interpreted is used in the Act. *Vide Craies on Statute Law, 5th edition, page 200.* A term should be given its ordinary meaning in the context in which it occurs and recourse need be had to the definition in the interpretation clause only where the meaning is not clear.

It is necessary, therefore, to interpret the words "for the purposes of any proceedings under this Act in relation to any industrial dispute" without reference to the meaning given to the term "Industrial Dispute" in Section 48. On an examination of the provisions of the Industrial Disputes Act, it appears that sections 2 (1), 3 (1), 4 (1) and 4 (2) of the Act provide that proceedings in respect of an industrial dispute may be initiated or commenced either by the Commissioner or the Minister, in the circumstances and for the purposes set out in those provisions. I am, therefore, of the view that the words set out above do no more than state in compendious form what may be stated at length by the following "for the purposes of any proceedings that may be initiated or commenced either by the Commissioner or by the Minister under Sections 2 (1) or 3 (1) or 4 (1) or 4 (2) of this Act".

It follows that for the purposes of proceedings that may be commenced or initiated by the Minister under Section 4 (1) of the Act, a workman includes a person whose services have been terminated. Section 4 (1) of the Act is as follows :—“ The Minister may, if he is of opinion that an industrial dispute is a minor dispute, refer it, by an order in writing for settlement by arbitration to an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference ”.

This provision sets out the first step to be taken in a proceeding in relation to an industrial dispute : it states that the Minister may, if he is of opinion that an industrial dispute is a minor one, refer it by an order in writing for settlement by arbitration. Accordingly, as for the purposes of such a proceeding, a “ workman ” includes a person whose services have been terminated, the Minister should, in forming an opinion whether a dispute is an industrial dispute, consider whether the dispute is between an employer and a workman and/or an employer and a workman whose services have been terminated.

Learned Counsel for the petitioner urged that the object of legislation like the Industrial Disputes Act was the preservation of industrial peace ; that it has been held that a dispute between an employer and a single workman or an employer and a dismissed workman was not an industrial dispute unless the dispute had been taken up by the other workmen, because the absence of support for such disputes from other workmen prevented them from presenting any threat to industrial peace. It may be that one view is that it is sufficient for the preservation of industrial peace to provide remedies for disputes which affect or are taken up by a number of workmen or by a Trade Union. Another view is that industrial peace is best secured if protection is given to the individual worker by extending legislation relating to industrial disputes to afford remedies for a dispute between an employer and a single workman and redress for a workman whose services have been terminated, whether or not such matters are taken up by other workmen. Legislation amending the Industrial Disputes Act enacted in 1957 and thereafter have been based on the second view. Act No. 4 of 1962 has introduced an amendment which expressly makes a dispute between employer and workman an Industrial Dispute. Amending Act No. 62 of 1957 has introduced Part IV A enabling a workman or a Trade Union on behalf of a workman who is a member of it to make an application for relief or redress to a Labour Tribunal in respect of the termination of his services. I am, therefore, of the view that, at the lowest, there is no ground for assuming that our Legislature was unlikely to make a dispute between an employer and a dismissed employee an industrial dispute and to provide a remedy for it on the ground that it presented no threat to industrial peace.

I have considered the submissions made by learned counsel for the petitioner on the footing that the object of the Industrial Disputes Act was the preservation of industrial peace because it cannot be denied

that whether it is so stated therein or not it must necessarily be the ultimate purpose of any legislation similar to that Act. There is, however, substance in the contention of Mr. Satyendra, Counsel for the 2nd respondent, that if one is seeking aid for the interpretation of the Act, one should look to the preamble of the Act to ascertain its purposes. The preamble to the Industrial Disputes Act does not mention the preservation of industrial peace and is as follows:—"An Act to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto".

Section 31 A (1) provides for the establishment of Labour Tribunals "for the purposes of the Act". If the establishment of a Labour Tribunal to receive applications for relief or redress in respect of the termination of the services of a workman falls within the purposes of the Act, it cannot reasonably be said that the settlement by arbitration of a dispute between an employer and a dismissed workman does not also fall within those purposes.

The application for relief or redress to Labour Tribunals in respect of termination of services of a workman provided for by Part IV A is an application to be made directly by the workman or his Union on his behalf. The workman or those acting as agents for him will be the party applicant and have control over the conduct and presentation of his case. Where an industrial dispute is referred by the Minister for settlement by arbitration under Section 4, the arbitrator is required to hear such evidence as may be tendered by the parties to the dispute, vide Section 17 of the Act. Section 31B (2) (b) requires a Labour Tribunal, if it is satisfied that the subject matter of an application before it forms part of an industrial dispute referred by the Minister for settlement under Section 4, to make order dismissing the application without prejudice to the rights of parties in the industrial dispute. If the contention made on behalf of the petitioner is correct, a workman who has made an application for relief or redress in respect of the termination of his services may have his application dismissed if it forms part—perhaps an incidental part—of an industrial dispute which has been referred for settlement by arbitration and to which dispute he cannot in law be a party. Consequently, he would be deprived of the opportunity of seeking relief in proceedings in which he would have control personally or by his agents over the conduct and presentation of his case and he would be referred for relief to arbitration proceedings in which the arbitrator is not required to hear such evidence as he may adduce because he is not a party to the dispute. I do not think that the Legislature could have intended a result of this kind and I am of the view that the provision in Section 31 B (2) (b) was made because the Legislature contemplated a workman whose services have been terminated being a party to an industrial dispute which may be referred by the Minister for settlement by arbitration.

Learned Counsel for the petitioner raised the question whether if a dismissed employee could be a party to an industrial dispute, he may, without seeking reinstatement for himself, raise a dispute with regard to the rates of pay and other terms of employment of the other workmen. To fall within the Act a dispute must, in my view, not be merely a theoretical or academic disagreement. It must be a real dispute between employer and workman or ex-workman and must be connected with the terms of employment of a person. A dismissed workman who is not seeking reinstatement for himself is not personally interested in the terms of employment nor does he have such interest in or duty towards the workmen who continue in employment, that he can be a party to a dispute in respect of their terms of employment within the meaning of the Act, even if there is a disagreement between the employer and himself in regard to the propriety of such terms. *In R. v. Industrial Disputes Tribunal*¹ it was held that workers may be parties to a dispute though they are not workers to whom the award will apply, but the judgment of Devlin J. indicates that they should have some interest in having the dispute resolved. He stated, “The mere fact that a person is not materially affected by decisions on the subject-matter of the dispute does not appear to us automatically to prevent him from being a party to a dispute. There are all sorts of industrial disputes which arise out of a difference between the employer and the employees in a factory in relation to a claim made merely by one man, cases for example, where one man is unfairly victimised, or is unfairly victimised in the estimation of his fellow employees, and his fellow employees may make themselves parties to the dispute because they may say : “ Unless this man is treated in the way in which we think that he ought to be treated, there is going to be trouble ”. Or there may be other reasons which cause men to be interested and to wish to make themselves parties to a dispute which concerns only the claim of one man. Without being materially affected, other people may feel that their prospects of promotion are injured generally. They may be interested in the principle of the thing. They may say : ‘ If a person of the length of service of Mr. Carreck is not promoted, what is going to happen to us when we get to that stage ? ’. Or there may be, on the facts which I have recounted, some general principle involved in the dispute on which this particular claim happens to be founded which is selected as a test action,..... ”. He stated later, “ We think that there is no reason why persons should not make themselves parties to a dispute although they are not workers to whom the award applies. For the reasons which we have given, questions of general principles, matters of supporting or assisting a fellow worker, make them parties to the dispute although they are not people to whom the award is going to apply. I suppose that somewhat similar considerations apply to the ordinary case where a guarantor is interested in the construction of a contract although he need not be strictly a party to whom the contract

¹ (1957) 2 A. E. R. 776.

applies". Again, where a Union boycotted a company claiming to act in furtherance of a trade dispute and the Court found that the Union was actuated by inter-union rivalry rather than interested in the terms of employment of the workers, an injunction was issued on the ground that it did not appear that there was any trade dispute, *vide J. T. Stratford & Son Ltd. v. Lindley and another*.¹

I should state that the learned Acting Attorney-General, who appeared for the 3rd respondent, submitted that documents before this Court showed that the employee had been suspended by the petitioner-Company without any reason being assigned for his suspension; that the employee requested the petitioner-Company to state the grounds of his suspension and that he received no reply to his request but was summarily dismissed. He, therefore, contended that the dismissal of the employee was in consequence of an industrial dispute that had arisen between the parties and he further submitted that if there was in fact an industrial dispute the faulty formulation of the dispute at the time it was referred for settlement by arbitration did not afford a sufficient basis for the exercise of the powers of this Court to issue a writ of prohibition. Learned Counsel who appeared for the 2nd respondent, who is the person most nearly concerned in the success or failure of the application, was content to have the matter decided on the footing that the dismissal of the employee, the 2nd respondent, was not consequent upon a prior dispute between the parties. In view of this and in view of the finding I have made in regard to the matters argued, it was not necessary to deal with or decide the matters raised by the learned Acting Attorney-General.

Upon a consideration of all the matters set out above, I hold that the dispute between the petitioner-Company, and the 2nd respondent, was an industrial dispute which the Minister had power to refer for settlement by arbitration and that consequently the 5th respondent has jurisdiction to hear and determine that dispute. The application of the petitioner is accordingly dismissed with costs payable to the 2nd and 3rd respondents. The amount of costs payable to each of the said respondents is fixed at Rs. 1,050.

TENNEKOON, J.—

This is a case in which the petitioner, the Colombo Apothecaries Company Limited (hereinafter referred to as "the Company") applies for a Mandate in the nature of a Writ of Prohibition on the 5th respondent who is a Labour Tribunal President forbidding him from entertaining, hearing or determining or continuing the proceedings in relation to an Industrial Dispute referred to him by the Minister of Labour for settlement by arbitration under section 4 (1) of the Industrial Disputes Act (Chapter 131).

¹(1964) 3 A. E. R. 102.

The Minister's order was accompanied by a statement prepared by the Commissioner of Labour (4th respondent) setting out, in terms of section 16 of the Act, the matter in dispute in the following terms :—

“ In the matter of an industrial dispute

between

Mr. M. T. Marikar Bawa, No. 9, Zaleski Place, Colombo 10, and the Colombo Apothecaries Company Ltd, P. O. Box 31, Prince Street, Colombo, is whether the termination of the services of Mr. M. T. Marikar Bawa is justified and to what relief he is entitled.

Date at the Office of the Commissioner of Labour Colombo this 12th day of April, 1967.”

The same dispute had earlier been referred to one Mr. E. A. Wijesooriya (1st respondent) who declined jurisdiction on the basis of certain Supreme Court decisions prevailing at that time. Those decisions of the Supreme Court were overruled by the decision of the Privy Council in the case of *The United Engineering Workers' Union v. K. W. Devanayagam*¹ pronounced on March 9, 1967. The Minister's reference of the same dispute to the 5th respondent was made after the Privy Council's decision. The present application to this Court was based on the ground *inter alia* that the 5th respondent had no jurisdiction to deal with the dispute referred to him for the reason that such of the provisions of the Industrial Disputes Act which gave power to Labour Tribunals to hear and determine disputes of this nature were unconstitutional. When this matter was first listed before a Bench of two Judges, of whom My Lord the Chief Justice was one, Counsel for the petitioner indicated that despite the Privy Council decision in *The United Engineering Workers Union v. K. W. Devanayagam*⁶ the constitutional attack on the Industrial Disputes Act was still open to him, as in his submission, any pronouncements made by their Lordships of the Privy Council on the question arising in this case were *obiter* or at least that the facts relating to the question of jurisdiction in the Privy Council case were capable of being distinguished from the facts that arise in the instant case. My Lord the Chief Justice being of opinion that it was desirable in the public interest that a question of such a nature should be clearly and finally settled, referred the matter to a Bench of seven Judges. It is in this way that this matter has come up before the present Bench consisting of that number of Judges.

At the argument, however, Counsel for the petitioner indicated that having examined the matter further he found it unnecessary to support his case on the ground that so much of the Industrial Disputes Act which authorises the Minister to refer a dispute relating to termination of the services of a workman for settlement to a Labour Tribunal was unconstitutional and void; he stated that he intended to support the

¹ (1967) 69 N. L. R. 289.

application on a ground which, if it was narrower because it had nothing to do with constitutional law, was equally important, viz. that the 5th respondent's lack of jurisdiction arose not from any unconstitutionality in the enabling Act, but for the reason that the dispute referred to the 5th respondent was not an "industrial dispute" within the meaning of the Industrial dispute Act.

It would appear from the affidavit of the petitioner—and these facts are not disputed by any of the respondents—that the 2nd respondent Marikar Bawa was employed by the Company as an Assistant; and that his services were summarily terminated on or about the 5th of April 1965 on the ground that he had been 'guilty of gross insolence, rudeness, insubordination, disobedience, defiance of authority and disrespect'; subsequent to the said termination of his services the 2nd respondent disputed the legality and propriety of his dismissal by the Company and brought his dispute with the Company to the notice of the Commissioner of Labour, and through him to the Minister of Labour.

It is contended by Counsel for the petitioner that *at the time this dispute arose* the relationship of employer and workman no longer existed between the Company and the 2nd respondent. It is therefore submitted that although it may be said that there was and is a dispute or difference connected with the termination of the services of a person, i.e., the 2nd respondent, that dispute was not one "*between an employer and a workman*" within the meaning of that expression as used in the definition of the term "industrial dispute" as found in the Act.

The expression "industrial dispute" has been given the following definition in the Act:—

"In this Act, unless the context otherwise requires—

'industrial dispute' means any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of services, or the reinstatement in service, of any person, and for the purpose of this definition 'workmen' includes a trade union consisting of workmen."

It is necessary for the purpose of examining the meaning of the expression "any dispute or difference between an employer and a workman", in the first instance to look at the meaning attributed to the words 'employer' and 'workman' in the Act. These two words are defined as follows:—

"Employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman.

“ Workman ” means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and, for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated.

“ Employer ”, one observes at once, is defined by reference to “ workman ”; the verb “ employs ” occurring repeatedly in the definition is in the present tense ; the grammatical ‘ object ’ of that verb is ‘ any workman ’ (in the singular) and not ‘ any workmen ’ (in the plural) ; if the plural was used it would have suggested a continuum of activity as the test for identifying an “ employer ”. But the contrary is the implication here. It seems to me that a person is an ‘ employer ’ within the meaning of this definition only in relation to another or others (i.e., a workman or workmen) with whom there is a subsisting contract of service. A may be an employer in relation to X or in relation to X, Y, and Z who are workmen serving under him, but not in relation to M or M, N and O who are not employed under any person or who are employed under B but not under A.

To turn now to the definition of the word “ workman ” ; it falls into three parts, the 2nd and 3rd only serving to extend its ordinary meaning :

- (i) any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour,
- (ii) any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time,
- (iii) for the purposes of any proceedings under the Act in relation to any industrial dispute, any person whose services have been terminated.

The third part is an extension of the meaning to be applied in limited circumstances and will be considered later.

The first two parts of the definition are a verbatim reproduction of the definition of the word “ workman ” occurring in the Trade Unions Ordinance. This had necessarily to be so because the expression “ Trade Union ” occurs repeatedly throughout the Act and is defined as “ any trade union registered under the Trade Unions Ordinance ”.

The first part of the definition gives the primary meaning of the expression. What is important to note about it is that it postulates a subsisting contract of service. Thus, under this part, if the contract is at an end there would be no employer (so far as that workman is concerned) and no workman.

The second part of the definition of 'workman' partially overlaps the first. It deals with persons who belong to a particular class, i.e., persons who are ordinarily workers whether or not they are under contracts of service at any particular given time. This part in so far as it catches up a person who has at any given time a contract of service is tautologous as such a person is already a workman under the first part of the definition. The importance of this part however lies in the fact that it brings within the meaning of the term 'workman' persons who are 'ordinarily' employed under contracts of service but who at any given time are not employed under such contracts of service. Thus we have the word 'workman' catching up within its meaning a person who at any particular given time has no contract of service *and no employer*. This extension of the meaning of the term 'workman' is understandably important in Trade Union Law where it is necessary to enable a workman to remain a member of his trade union notwithstanding the termination of his contract of service by dismissal, resignation, retrenchment or laying off. In the Industrial Disputes Act which itself gives such a prominent and significant place to trade unions, the word 'workman' when used in relation to trade unions would naturally bear the meaning signified in both parts of the definition. Vide such expressions as "a trade union of workmen" or "a trade union consisting of workmen"; but even a cursory examination of the Act will show that the word 'workman' in other contexts bears only a limited meaning and that too the meaning set out in the first part of the definition: for example, in the expressions "reinstatement of any workman", "discontinuance of any workman" and "workman who was dismissed" the term 'workman' means a person who (immediately prior to termination of his services) was a workman within the meaning of the first part of the definition; in the expression "no workman shall commence, or continue, or a strike" (section 32 (2)) the word workman means a workman within the first part. Thus in many contexts the second part of the definition does not come into play at all.

If we may now come back to the definition of the term "industrial dispute", this too falls readily into three parts:

- (i) there must be a dispute or difference

- (ii) the dispute or difference must be between an employer and a workman or between employers and workmen or between workmen and workmen (the word 'workmen' being read as also including a trade union consisting of workmen),
- (iii) the dispute or difference must be connected with the employment or non-employment or the terms of employment, or with the conditions of labour or the termination of the services or the reinstatement in service of any person.

The first part refers to the *factum* of a dispute or difference ; the second part to the parties to the dispute and the third to the subject matter of the dispute.

The nature of the submission made by Counsel for the petitioner is such that it is necessary before examining it to have some regard to the true scope and effect of the definition in its wider aspects.

If we look first at the third part of the definition (i.e., the nature of the subject matter of the dispute) one important feature to be noted is that while in the second part the parties are described by reference to such words as "employers" and "workmen", the legislature in describing the subject matter of the dispute did it by reference not to 'any workman' but by reference to '*any person*'. Now it becomes obvious upon a careful examination of the definition that the expression 'any person' is not as wide as it at first sight appears. It cannot include for instance a person in the employment of the Crown or the Government (see section 49 which provides that the Act is not to apply to the Crown or the Government or to workmen of the Crown or the Government) ; further limitations on its meaning became apparent when one reads it in the various permutations and combinations of words of which the definition is capable. For example when read with the words "non-employment" the words 'of any person' can only mean a candidate for employment under the employer with whom the dispute or difference has arisen ; when read with "the termination of the services or the reinstatement in service", the expression "of any person" can only refer to a person recently discharged from the service of the employer who is one of the parties to the dispute that has arisen. Thus it would appear that the words 'any person' refer to a person in service, or a person discharged from service or a candidate for employment. But it is unnecessary, at least for the purposes of this case, in which the question does not directly arise for consideration, to

give an unduly restricted meaning to the words 'any person'; while *prima facie* they appear to refer to any person who is in service or has been recently discharged from service or who is a candidate for employment, it can also catch up a person in whose employment, non-employment, terms of employment or conditions of labour or in whose termination of services or reinstatement in service the workman or workmen raising the dispute have a substantial interest or a community of interest. It is in this sense that the words 'any person' occurring in a somewhat similar definition of 'industrial dispute' in the Industrial Disputes Act (1947) of India has been understood by the Indian Courts (see the case of *Workmen D. T. E. v. Management D. T. E.*¹.) What is important to note, of course, is that the legislature, in using the expression 'any person' instead of the term 'workman' in that portion of the definition of 'industrial dispute' which relates to the subject matter of the dispute, used an expression wide enough to include a person who is not a *de facto* or *de jure* workman in its primary sense and into this class would fall both a person who has never had employment before and also a person who having been in service has been discharged.

To turn now to the parties to an industrial dispute: Under the definition an industrial dispute can arise only—

- (i) between an employer and a workman,
- (ii) between employers and workmen,
- (iii) between workmen and workmen.

It should be noted that in (i) the word 'workman' can also be read in the plural and that the word 'workmen' includes a Trade Union consisting of workmen.

Before proceeding to examine the question whether the expressions "employer" and "workman" as used in the definition of 'industrial dispute' are subject—if at all—to any contextual limitation, it is necessary to remind oneself of the scope and objects of the Act. The long title of the Act reads :

"An Act to provide for the Prevention, Investigation and Settlement of Industrial Disputes, and for matters connected therewith or incidental thereto."

It has been said frequently, and quite recently reiterated by their Lordships of the Privy Council that the purpose and object of the Act is the maintenance and promotion of industrial peace; and it may be added

¹ *A. I. R. 1958 S. C. 353.*

that the preservation of industrial peace is directed not to the redress of private and personal grievances but to the securing of the uninterrupted supply of goods and services to the public by employers engaged in such enterprises. The Act takes as the prime danger to industrial peace that kind of situation which is capable of endangering industrial peace and given it the name "industrial dispute". In the definition of industrial dispute the emphasis is thus not on the denial or infringement of a right of a workman by his employer but on the existence of a dispute or difference between given parties connected with the rights not merely of a party to the dispute but also of third parties. (I use the word 'right' and 'wrong' in this context not in the sense of legal rights and wrongs but in the larger sense in which right and wrong may be determined by reference to equitable standards of employment and labour.) The reliefs contemplated are not mere redress of individual wrongs. The purport and direction of the proceedings in relation to an industrial dispute is *settlement* of the dispute and the avoidance of a disturbance of industrial peace; relief or redress to individual workmen is only incidental to the more important function of restoring peace. It is in this background that one must examine the meaning and intent of such phrases as "a dispute or difference", "between an employer and a workman" or "between workmen and workmen" occurring in the definition of industrial dispute. I am not for a moment suggesting that the words 'employer' and 'workman' appearing in the definition of "industrial dispute" can be given a meaning outside the sense in which they have been defined. What Counsel for the petitioner submits, and I think correctly submits, is that the words 'employer' and 'workman' receive a limitation in their meaning from the context and that, that limited meaning is still within the definitions.

Take for instance the following collocation of words from the definition of "industrial dispute" :—

"a dispute or difference between an employer and a workman connected with the non-employment of a person."

In my opinion the phrase "between an employer and a workman" can only mean "between an employer and one of *his* workmen". This is the result (i) of the juxtaposition of the word 'employer' and the word 'workman' each of which is necessary to complete the meaning of the other and (ii) of the concept of an industrial dispute as one which is capable of disrupting industrial peace and one which must be settled to remove the danger to industrial peace. If A is the employer, B one of

his existing workmen, and C a person who has been discharged and refused re-employment by A, a dispute or difference between A and B in connection with A's non-employment of C would be an industrial dispute, because, granted a community of interest between B and C, B's dispute with his employer A can snowball into a dispute between A and many more of his existing workmen resulting in a strike in A's establishment, and reducing or stopping production. On the other hand a dispute between employer A and the applicant for employment C who it must be assumed has been unable to find any support among the existing workmen of A does not contain any danger to industrial peace either in A's establishment or elsewhere. This would be so even if C is indeed a workman under another employer E at the time A rejects his application for employment under him.

A similar analysis can be made of the collocation of words "a dispute or difference between an employer and a workman connected with the termination of the services of any person". It is only necessary to emphasise that a dispute between the one-time employer and his one-time employee who is unable to find one single workman in the service of his former employer to take up his cause, constitutes no danger to industrial peace. Thus in the context under consideration 'employer' means the person under whom the workman with whom the dispute arises *has* a subsisting contract of service or under whom he is actually working under a contract of service ; and 'workman' similarly means a person who has a subsisting contract or works under a subsisting contract of service with the employer with whom the dispute arises. In short the expression "a dispute or difference between an employer and a workman" means only a dispute or difference between an employer and one of *his workmen* and not between an employer and any person who is a prospective or discharged employee of his or a person who is a workman under some other employer.

Even if the plural form of the word 'workman' is taken the result is the same. Counsel for the 2nd respondent suggested that it would be anomalous if in a case where an employer dismissed all his workmen the dismissed ex-workmen could not raise a dispute amounting to an industrial dispute within the meaning of the Act ; the answer in my opinion is that a dispute between the dismissed workmen and their former employer constitutes no danger to industrial peace ; there is no danger to the community by a possible cessation of production or the supply of services. The 'employer' in question may have dismissed all his workmen because he was selling the business, or because he was

employing a whole set of new hands or because he was closing down his business completely ; in the first two cases production or supply will go on despite the dispute between the ex-employer and ex-workmen, and in the third case the stoppage of production or supply of services is caused not by reason of the dispute between the two parties but by reason of the exercise of the ordinary right of an entrepreneur to give up his business, which is not a matter which the Act as it stands at present concerns itself with.

This view of the meaning of the term “ workman ” when used in the expression “ a dispute or difference between an employer and a workman ” receives support from other parts of the Act. The most important of these is the last part of the definition of the word “ workman ” :

“ and, for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated.”

Now it seems to me that this part of the definition (which was introduced by an amendment in 1957 (Act No. 62 of 1957) contemporaneously with the insertion of the words “ or the termination of the services or the reinstatement in service ” into the third part of the definition of “ industrial dispute ”) only makes explicit what was implicit before. It is not strange to find the legislature doing this in an Act which gives judicial (or at least quasi-judicial) functions to lay persons and before whom experience has shown, lawyers spend interminable hours splitting hairs on the meaning of words. Whatever else it does this amendment does not import any new meaning to the expression ‘ industrial dispute ’ as defined in the Act. The amendment does not say that *for the purposes of determining whether an industrial dispute exists or has arisen* connected with the termination of the services of any person, the word ‘ workman ’ shall include the person whose services have been terminated. There is no need, even were it a proper function of interpretation, to take such liberties with the language used by Parliament when one has regard to the scope and object of the legislation. Indeed, when one bears in mind the fact that Act No. 62 of 1957 also brought in Part IVA into the Act enabling a dismissed workman to seek private relief and redress in connection with the termination of his services even in cases where such termination has not given rise to an industrial dispute calling for the intervention of the public authorities, the need for straining the language used by the legislature under a supposed spirit of giving a liberal interpretation to social legislation does not at all

arise. The amendment to my mind merely, *ex abundanti cautela*, removed a terminological anomaly of referring to a person no longer in service as a workman in numerous provisions of the Act dealing with proceedings and powers of various authorities and tribunals in relation to an industrial dispute. If the amendment has done anything it has finally closed the door to any suggestion or contention that a person whose contract of service has been terminated is still a workman for the purpose of deciding the question whether an industrial dispute connected with the termination of services exists between an employer and a "workman".

Further indication of the legislative intent is to be found in section 47 C which is also a provision that was introduced by Act No. 62 of 1957. It reads as follows :—

" 47 C. Notwithstanding that any person concerned as an employer in any industrial dispute has ceased to be such employer—

- (a) such dispute may be referred for settlement to an industrial court or for settlement by arbitration to an arbitrator and proceedings on such reference may be taken by such court or arbitrator ;
- (b) if such dispute was so referred for settlement while such person was such employer, proceedings on such reference may be commenced or continued and concluded by the industrial court or arbitrator to which or whom such reference was made, and
- (c) in any award made by such court or arbitrator such person may be ordered to pay to any other person concerned in such dispute as a workman employed by the first-mentioned person while he was such employer any sum whether as wages in respect of any period during which such other person was employed by the first-mentioned person or as compensation as an alternative to the reinstatement of such person, and such order may be enforced against the first-mentioned person in like manner as if he were such employer."

This section is dealing with a case where the employer-workman relationship between one person and another or others contemplated in the definition of the term ' employer ' and in the first part of the definition of the term ' workman ', has ceased. It is also evident from the wording

of the section that the dispute under contemplation had arisen prior to the cessation of that relationship. It then goes on to provide in sub-paragraph (a) that such a dispute may be referred for settlement to an Industrial Court or to an arbitrator (which expression includes a Labour Tribunal) ; and sub-paragraph (b) further provides that if such dispute had been referred while the employer-workman relationship subsisted, proceedings may be commenced and/or continued by the Industrial Court or arbitrator.

This section to my mind completely supports the submission made by Counsel for the petitioner that a dispute connected with the termination of services can be referred to an Industrial Court or a Labour Tribunal for settlement only if the dispute arose while the relationship of employer and workman subsisted ; and on the principle *inclusio unius exclusio alterius* a dispute on such a matter which arises between an ex-employer and an ex-workman after the employer-workman relationship has ceased to exist is not an industrial dispute within the meaning of the Act.

It has been contended by Counsel for the 2nd respondent that the word ' workman ' is used in other parts of the Act to include a person who *had* a contract of service which had been terminated. He referred us to some instances of which I will take three (i) 31B (1) which enables a *workman* to apply to a Labour Tribunal for relief or redress in respect of the termination of his services by his employer ; (ii) section 33 (1) (b) which speaks of *the reinstatement in service of his former employer of any ' workman '* and (iii) section 33 (1) (d) which speaks of *payment by any employer of compensation to any ' workman '*. Counsel for the 2nd respondent submits that in all these cases the legislature was applying the term ' workman ' to a person whose contract of service had been terminated and there is no reason why the word ' workman ' should not be read in that sense in the definition of " industrial dispute ".

What is important to note here is that the legislature is using the word ' workman ' in referring to a person who *was* once *within the first part of the definition of the term ' workman '* and whose contract has been terminated ; it is not suggested that a person who had a contract of service which has been terminated is a workman by virtue of the second part of the definition ; indeed such a contention is not possible for the reason that, as noted earlier in this judgment, the essence of the second part of the definition of ' workman ' is the absence of a contract of service

and an employer to complete the concept of a workman, whereas in each of the instances under consideration there is an employer in contemplation who has terminated the contract of service.

It will now be seen that in sections 31B (1), 33 (1) (b) and 33 (1) (c) the context, which presupposes a termination of services, requires the attribution of a meaning to the word 'workman' which is even *outside the definition given in the Act*; for his contract having been terminated he does not fall into the first part of the definition; nor into the second part for the reasons noted above; nor into the third part unless the question arises in the course of proceedings in relation to an industrial dispute. Is there any similar contextual compulsion in the definition of the term 'industrial dispute'? It seems to me there is clearly no such compulsion for here the expressions 'termination of services' and 'reinstatement in service' are coupled not with the expression 'of a workman' but with the expression 'of a person'.

To uphold the contention of Counsel for the 2nd respondent would be to subscribe to the proposition "once a workman always a workman". If the contention that a person whose contract of employment has been terminated still remains a workman for the purposes of the definition of "industrial dispute" is correct it would mean that such a person could raise an industrial dispute not only in regard to the termination of his own services or the reinstatement of himself but also in regard to the employment, non-employment, terms of employment or condition of labour of any person other than himself, while he himself remains unemployed or has become a servant under the Crown or indeed has turned to business and become an employer himself.

For the reasons stated above I am of opinion that at the time the dispute arose neither the company nor the 2nd respondent qualified as 'employer' or 'workman' respectively within the meaning of those words in the phrase 'dispute or difference between an employer and a workman' occurring in the definition of industrial dispute; I accordingly hold that the Minister's order referring the alleged dispute between the Company and the 2nd respondent is *ultra vires* section 4 (1) of the Act and would allow the application for a Mandate of Prohibition on the 5th respondent with costs payable by the 2nd respondent as to one half and by the 3rd respondent as to the other.

Application dismissed.

1966 *Present : T. S. Fernando, J., Abeyesundere, J., and Sri Skanda Rajah, J.*

IN RE U. N. WIJETUNGE

APN/GEN/39/65—In the matter of a Rule under section 47 of the Courts Ordinance

Commissions of Inquiry Act (Cap. 393)—Sections 10 and 12—Offences punishable as offences of contempt of the authority of the Commission—Limited number only—Courts Ordinance (Cap. 6), ss. 3, 47, 57—Civil Procedure Code, ss. 109, (2), 137 (2), 140, 294, 295, 650, 656, 682 (2), 713, 717, 718—Penal Code (Cap. 19), ss. 2, 3, 4—Industrial Disputes Act, s. 40A (1)—Applicability of maxim expressio unius exclusio alterius.

No acts and omissions are punishable by the Supreme Court under section 10 of the Commissions of Inquiry Act as offences of contempt against or in disrespect of a Commission of Inquiry except the offences specified in section 12 (1) of that Act. Accordingly, a person who writes an article in a newspaper in disrespect of a Commission of Inquiry cannot be punished for an offence of contempt.

RULE under section 47 of the Courts Ordinance.

H. W. Jayewardene, Q.C., with D. S. Wijewardene and A. Ameresinghe, for the respondent.

*V. Tennekoon, Q.C., Solicitor-General, with H. L. de Silva, Crown Counsel, as *amicus curiae*.*

Cur. adv. vult.

June 29, 1966. T. S. FERNANDO, J.—

Acting under section 2 of the Commissions of Inquiry Act (Cap. 393), the Governor-General on the 6th May 1965 appointed a Commission of Inquiry consisting of three members to inquire into and report on the working and administration during the period 1st January 1960 to 6th May 1965 of the Co-operative Wholesale Establishment established under the Co-operative Wholesale Establishment Act (Cap. 126), with special reference to certain matters specified in the warrant of appointment.

Sometime after the Commission had commenced public sittings to hear evidence there appeared in an issue of the "Sun" daily newspaper of the 16th September 1965 an article entitled "High Cost of Living and the Government" purporting to have been written by the respondent. That article contained the following passage regarding the Commission of Inquiry referred to above :—

"A Commission is inquiring into the affairs of the C. W. E. just now. But we fear the Commission will unduly drag out the inquiry until another election is on the way."

The Commission requested the respondent to appear before it on the 21st September 1965. The respondent did so, accepted authorship of the article and stated that he meant no disrespect to the Commission. He was called upon by the Commission to show cause on the 24th September 1965 why he should not be reported to this Court for having committed the offence of contempt of the authority of the Commission. The respondent appeared by counsel before the Commission on the said 24th day of September and repeated that he meant no disrespect to the Commission, and counsel for him contended (before the Commission) that there is no provision in the Commissions of Inquiry Act for punishment of a contempt of this nature, if indeed it was a contempt at all. He submitted that the only contempts punishable under section 10 of the Act are those acts or omissions declared by section 12 (1) of the said Act to be contempts against or in disrespect of the authority of the Commission. The Commissioners, however, stating that in their opinion the respondent has committed a contempt against or in disrespect of the Commission made a report to this Court, and the Court issued a *Rule nisi* on the respondent requiring him to show cause why he should not be punished under section 47 of the Courts Ordinance (Cap. 6).

Section 47 of the Courts Ordinance empowers the Supreme Court to take cognizance of and to try in a summary manner any offence of contempt committed against or in disrespect of the authority of itself or of any other Court which such other court has not jurisdiction under section 57 to take cognizance of and punish. Section 57 confers a special jurisdiction on every District Court, Court of Requests or Magistrate's Court to take cognizance of and punish (by the procedure and with the penalties in that behalf by law provided) every offence of contempt committed in the presence of the Court itself and all offences which are committed in the course of any act or proceeding in the said courts and which are declared by any law for the time being in force to be punishable as Contempts of Court. That section itself expressly indicates that this special jurisdiction was conferred for the purpose of enabling the Courts concerned to maintain their proper authority and efficiency.

On behalf of the respondent it was contended before us that a Commission of Inquiry is in no sense a "Court" which the Courts Ordinance defined (in section 3) as denoting a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially. As was said in *Brajnandan Sinha v. Jyoti Narain*¹, "in order to constitute a court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement".

¹ A. I. R. (1956) S. C. 66.

A Commission of Inquiry is merely a fact-finding body reporting to the Authority that appointed it (in this case the Chief Executive of the State), and no consequences flow by reason of the Act (Cap. 393) from the findings embodied in that report. They are neither authoritative nor binding.

Mr. Jayewardene, on behalf of the respondent, argued that the only acts or omissions which the Act contemplated as punishable are those "statutory" contempts defined in section 12 (1), *i.e.*, the failure to obey summons, refusal or failure without cause (a) to give evidence and (b) to produce a document or other thing. These failures or refusals render a person so failing or refusing guilty of the offence of Contempt against or in disrespect of the authority of the Commission. Section 10 of the Act which enacts that "every offence of contempt committed against or in disrespect of the authority of a commission appointed under this Act shall be punishable by the Supreme Court or any Judge thereof under section 47 of the Courts Ordinance as though it were an offence committed against or in disrespect of the authority of that Court"—so the argument proceeded—was intended to punish only the "statutory" contempts above referred to.

The learned Solicitor-General who appeared before us as *amicus curiae*, and whose assistance at the argument I acknowledge thankfully, did not suggest that a Commission of Inquiry exercised anything near a judicial function, but he contended that what section 10 of the Act has effected is a conferring on the Supreme Court of a jurisdiction to punish contempts committed against or in disrespect of the authority of a Commission of Inquiry. He pointed out that section 10 has not defined what constitutes an offence of contempt of a Commission just as section 47 of the Courts Ordinance did not attempt to define what constituted an offence of contempt of a court. He submitted that, as in the exercise of its jurisdiction under section 47 the Court has not declined to act on the ground that the offence of contempt of court has not been defined, so in the exercise of its powers under section 10 of the Act the Supreme Court should evolve a body of precedents in the same way that the Court has evolved a body of precedents which serves now as a guide in understanding what constitutes a contempt of a court.

I am inclined to agree with the contention of Mr. Jayewardene that section 12 which defines the 'statutory' contempts has the effect of limiting the operation of section 10 to those acts or omissions described in section 12. It is correct to observe that section 12 should ordinarily have preceded section 10, but the order in which the sections appear in the enactment has no particular significance in the context here, and in any event the Act has to be considered and construed as a whole.

Our attention was drawn by the learned Solicitor-General to several sections of the Civil Procedure Code (*i.e.*, sections 109 (2), 137 (2), 140, 294, 295, 650, 656, 682 (2), 713, 717 and 718) as indicating that a number

of acts and omissions have been expressly made punishable as contempts of court or have been deemed by law to be contempts of court, and that these are by no means exhaustive of the acts and omissions that constitute contempt of court. It was therefore submitted that the class of acts mentioned in section 12 of the Act are themselves not exhaustive of the category of contempts which the Act contemplated.

The reason for making this kind of non-exhaustive express provision to which the learned Solicitor-General drew our attention is made intelligible, in my opinion, by a consideration of the judgment of the Collective Court in the case of *In re Ferguson*¹. That was a judgment delivered in the year 1874, at a time anterior to the enactment of the present Courts Ordinance (No. 1 of 1889). Morgan A.C.J., delivering the judgment of the Court, stated—(see p. 188)—that the power to punish for contempts generally—a power which, with certain qualifications, is inherent in every court—was not expressly given even to the Supreme Court by the Charter of 1801 nor was it, on the other hand, expressly taken away. Regulation 2 of 1816 which purported to regulate the practice in criminal proceedings before Provincial and Sitting Magistrates' Courts described therein as “Inferior Courts” expressly provided that nothing therein contained “shall be construed to extend or in any wise affect the proceedings or authority of the Supreme Court”. That regulation further provided for all cases of contempt to be transmitted to the Advocate Fiscal, for that officer to decide whether the accusation was fitting to be tried before the Supreme Court or referred to an inferior jurisdiction. That Regulation was amended by Regulation No. 15 of 1820 which authorized the Provincial and Sitting Magistrates' Courts of Colombo “to punish by fine or imprisonment, or both, to the extent of their general powers in that respect, all contempts committed before them before their own view and also, upon proof, all contempts of their process or of the officers acting in the execution thereof”. The Regulation of 1820 expressly provided that nothing therein should be “construed to extend to or in any wise affect the proceedings or authority of the Supreme Court”.

The Charter of 1833 contained no reference to the power of the Supreme Court or District Courts (the two Courts which that Instrument established) to dispose of cases of contempt; but it drew the distinction between the two courts, and gave larger powers to the former. The Rules and Orders of Court framed under the authority of the Charter, and promulgated with that Instrument, provided for District Judges punishing by fine or imprisonment, or by both if necessary, “all contempts committed before themselves, and also upon due proof all contempts of their process or of their officers acting in the execution thereof”.

The offence of contempt of court was one recognised by the Roman-Dutch law—see Voet Bk. V—Title 1—Section 2.—(2 Gane's translation, p. 5)—and I might usefully refer here to section 4 of the Penal Code

¹ (1874) 1 N. L. R. 181.

(Cap. 19) enacted in 1883 to provide a general penal code for Ceylon. While abolishing by section 3 thereof the Roman-Dutch criminal law and enacting by section 2 that “ every person shall be liable to punishment under this Code, and not otherwise, for every act, or omission contrary to the provisions thereof, of which he shall be guilty within Ceylon ”, it preserved by section 4 “ the power heretofore possessed by the Supreme Court or any Judge thereof of summarily punishing persons guilty of contempts of the said Court ”.

I have quoted extensively from the judgment of the Collective Court as I think it indicates the explanation for or the reason why all the sections to which the Solicitor-General drew our attention providing expressly for the punishment of certain specified acts or omissions came to be enacted. After their enactment in that way, the District or other Court concerned received power to take cognizance of those contempts which might otherwise have had to be reported to the Supreme Court to be adjudicated upon and punished by that Court. Merely because the acts and omissions so declared to be contempts of court are not exhaustive of the offences of contempt of court, it would be fallacious, in my opinion, to seek to find an analogy in bodies other than Courts and to say that the acts and omissions expressly declared to be contempts of a Commission are not exhaustive of the acts and omissions that can constitute contempts of a Commission.

Section 12 (2) of the Commissions of Inquiry Act provides for the transmitting by a Commission to the Supreme Court of a certificate setting out whether a person has committed any offence of contempt referred to in section 12 (1), but makes no provision for transmitting a certificate in any other case. This consequential provision does lend some little support to the argument on behalf of the respondent that only the ‘statutory’ contempts are punishable, although one must recognise, as the Commission itself has already observed, that it is far from conclusive of the validity of the respondent’s main argument. Moreover, the Commission is not thereby deprived of adequate or satisfactory means of communicating or reporting to the Supreme Court an act or omission which in the Commission’s opinion is a contempt of its authority provided the Supreme Court was empowered to take cognizance thereof and impose punishment therefor.

Mr. Jayewardene, however, brought to our notice section 40A (1) of the Industrial Disputes Act, No. 43 of 1950, as amended by Act No. 62 of 1957 as affording an illustration of the kind of provision the legislation has enacted when it intended to render an act bringing a body other than a regular court into disrepute a contempt of court. The absence of such a provision in reference to acts bringing a Commission of Inquiry into disrepute strengthens, in my opinion, the validity of the argument that the Commissions of Inquiry Act intended to punish only the ‘statutory contempts’ described in section 12 (1). The maxim *expressio unius exclusio alterius* is, in my opinion, also applicable here.

Moreover, if the argument in support of making this Rule absolute cannot be placed higher than that the interpretation of the relevant provisions admits of ambiguity, our duty is to favour a strict construction of this penal provision.

In my opinion, however, the point we have here to decide admits of no serious ambiguity. Any little doubt one might have been induced to entertain has been dispelled by reference to the provisions of the Tribunals of Inquiry Act, 1921 (11 Geo. 5, Ch. 7), which is of particular significance on the point I have hitherto discussed in this judgment. By section 1 (2) of that Act, if any person—

- (a) on being duly summoned as a witness before a tribunal makes default in attending ; or
- (b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer ; or
- (c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been a contempt of that court ;

the chairman of the tribunal may certify the offence of that person to the High Court and the Court may thereupon inquire into the alleged offence and punish that person in like manner as if he had been guilty of contempt of the Court. Paragraphs (a), (b) and (c) of section 12 (1) of our Act (Cap. 393) appear to reproduce in effect all that is there in paragraphs (a) and (b) of section 1 (2) of the United Kingdom Act ; but the omission to enact a provision similar to paragraph (c) of this last-mentioned Act, being deliberate, is a strong indication that the intention of the legislature was not to punish things other than those expressly described.

I have set out above the reasons why I reached the decision at the end of the argument that the Rule should be discharged and that was the decision of the majority of the Court.

ABEYESUNDE, J.—I agree.

SRI SKANDA RAJAH, J.—

I would respectfully adopt the view expressed by Holmes, J., in *Northern Securities Co. v. United States*¹ that it is useless and undesirable as a rule, to express dissent. Therefore, I would content myself by stating that the submissions made by the learned Solicitor, and which have been set down at length by my brother T. S. Fernando, appear to me to be right.

Rule discharged.

¹ 193 U. S. 197 at 400.

1965

Present : Tambiah, J., and Abeyesundere, J.

R. B. TAMMITTA, Appellant, and C. B. PALIPANE,
Respondent

S. C. 681/64—D. C. Kandy, 7277/L

Kandyan law—Donation—Revocability—“Voluntary transfer”—Kandyan Law Declaration and Amendment Ordinance (Cap. 59), ss. 2, 5 (1).

A Kandyan deed of gift executed after the Kandyan Law Declaration and Amendment Ordinance came into operation is irrevocable if the donor has expressly renounced his right to revoke and, although an undertaking was given by the donee to give succour and assistance to the donor during the donor's life-time, the undertaking was not one of the conditions on which the grant was made to the donee by the donor.

APPEAL from a judgment of the District Court, Kandy.

C. D. S. Siriwardena, for the defendant-appellant.

W. D. Gunasekera, for the plaintiff-respondent.

Cur. adv. vult.

December 15, 1965. TAMBIAH, J.—

This is an action by the plaintiff-respondent against the defendant-appellant for a declaration of title and ejectment brought in respect of the thirteen lands described in the schedule to the plaint. The plaintiff-respondent based his title to the said lands on two deeds of gift marked P1 and P2 from one G. E. W. Palipane, and the defendant-appellant claimed the same lands on deed D2 from the same source. It is common ground that these deeds of donations are governed by the Kandyan Law.

The learned District Judge has held that the deeds P1 and P2 are irrevocable and therefore Palipane could not have executed the deed D2 in favour of the defendant, and gave judgment for the plaintiff. The defendant-appellant has appealed from this order.

The terms of P1 and P2 are almost the same and it is sufficient therefore to give the relevant portions of the deed P1, deed No. 286 of 1/11/54 which gifted the properties “absolutely” “in consideration of the love and affection” which the donor had towards his nephew, the plaintiff. The recital of the gift shows that the gift was also made for “diverse other good reasons and considerations” specifically moving the donor. The habendum clause is as follows :

“To have and to hold the said lands and premises hereby gifted unto the said Donee and his heirs executors administrators and assigns absolutely for ever.”

The deed, after stating that the donor "expressly renounces his right to revoke", contains a clause whereby the donee "thankfully accepts the said Gift and undertakes to render all succour and assistance to the Donor during his life-time".

Mr. Siriwardena, who appeared for the defendant-appellant, contended that although the deeds P1 and P2 were executed after the Kandyan Law Declaration and Amendment Ordinance came into operation, yet it does not come within the purview of its operation. He submitted that the deeds P1 and P2 are not voluntary deeds of donation and therefore section 5 (1) of the Kandyan Law Declaration and Amendment Ordinance has no application. Section 2 of the Kandyan Law Declaration and Amendment Ordinance defines the word "gift" as follows :

"Gift" means a voluntary transfer, assignment, grant, conveyance, settlement, or other disposition *inter vivos* of immovable property, made otherwise than for consideration in money or money's worth.

The appellant's counsel contended that since there is an undertaking to give succour and assistance by the donee the deeds P1 and P2 are not voluntary gifts and therefore the law applicable to donations is the Kandyan Law before it was altered by the Kandyan Law Declaration and Amendment Ordinance.

A careful perusal of the deeds P1 and P2 does not support the contention of the appellant. Although the donee has given an undertaking to give succour and assistance it is not one of the conditions on which the grant was made to the donee by the donor. Therefore I am of the view that the Kandyan Law Declaration and Amendment Ordinance applies to the deeds P1 and P2. It was conceded by counsel for the appellant that if the Kandyan Law Declaration and Amendment Ordinance applies, the deeds P1 and P2 are irrevocable and the plaintiff has title.

Even if the Kandyan Law Declaration and Amendment Act does not apply to deeds P1 and P2 I am of the view that under the general principles of Kandyan Law the deeds P1 and P2 are irrevocable. In *Kirihenaya v. Jotiya*¹ it was held that a Kandyan deed of gift in which the donor expressly renounces the right of revocation and which is not dependent on any contingency, is irrevocable. The principle underlying this decision is that a deed of gift is a contract and there is no rule of law which makes it illegal for any one of the parties to the contract to expressly renounce the right the law would otherwise give him. Subsequent to the decision in *Kirihenaya v. Jotiya*, as stated in the Report of the Kandyan Law Commission, the courts appear to have given recognition to the general proposition that a Kandyan donor can, irrespective of whether a gift was dependent on any contingency or not, render the gift irrevocable by an express renunciation of the right to revoke (vide The

¹ (1922) 24 N. L. R. 149.

Report of the Kandyan Law Commission, Sessional Paper XXIV, 1923 paragraph 56). This view has been followed in subsequent cases (vide *Kumarasamy v. Banda*¹ and *H. M. Ukku Amma v. A. M. Dingiri Menika and others*²). The words used in the deeds P1 and P2 make it clear that the donor had renounced his rights of revocation and therefore the defendant did not get title to the lands which are the subject matter of this action.

For these reasons I affirm the judgment of the learned District Judge and dismiss the appeal with costs in both courts.

ABEYESUNDERE, J.—I. agree.

Appeal dismissed.

1967

Present : T. S. Fernando, A.C.J.

L. ABRAHAM PERERA, Petitioner, and W. J. B. PERERA, Respondent

S. C. 377 of 1967—Application to revise an order made in Case No. 11036 of the Rural Court of Pinwatte

Rural Court—Order of acquittal entered by it—Appeal therefrom to District Judge—Reversal of acquittal then—Remedy of complainant—Rural Courts Ordinance (Cap. 8), ss. 26 (1), 41 (1), 41 (5)—Courts Ordinance (Cap. 6), s. 5.

Where a District Judge, purporting to act in the appellate jurisdiction conferred on him by section 42 of the Rural Courts Ordinance, sets aside an order of acquittal in contravention of the proviso to section 41 (1) and returns the record of the case to the Rural Court with a direction to the President to impose a lawful sentence, the sentence imposed thereafter by the President may be quashed in revision by the Supreme Court notwithstanding the provisions of section 41 (5) which debars an appeal to the Supreme Court from an order of the District Judge on appeal.

APPLICATION to revise an order of the Rural Court, Pinwatte.

F. N. D. Jayasuriya, for the accused-petitioner.

Desmond Fernando, for the complainant-respondent.

Cur. adv. vult.

December 7, 1967. T. S. FERNANDO, A.C.J.—

The petitioner was charged in the Rural Court of Pinwatte with the commission of an offence punishable under section 26 (1) of the Rural Courts Ordinance, No. 12 of 1945 (Cap. 8). The offence was alleged

¹ (1959) 62 N. L. R. 68.

² (1965) 69 N. L. R. 212.

to have been committed by the petitioner inasmuch as he did carry on a dangerous or offensive trade, to wit, the smoking and manufacturing of rubber sheets without a permit from the Chairman of the Village Committee.

The learned President of the Rural Court, after trial, made order on the 19th May 1967 acquitting the petitioner. The complainant (who is the respondent in the proceedings in revision before me) appealed to the District Judge in terms of section 41 of the Rural Courts Ordinance, and that judge by his order of the 11th July 1967 set aside the verdict of acquittal entered in the Rural Court and purported to convict the petitioner on the ground that the President had misdirected himself on a material question of law. He returned the record of the case to the Rural Court with a direction to the President to impose a lawful sentence. Accordingly, on receipt of the record, the learned President, on the 4th August 1967, in the presence of the petitioner, imposed on the latter a fine of Rs. 25, in default of payment of which the petitioner is to undergo rigorous imprisonment for two weeks.

On behalf of the petitioner it is claimed, and this claim is not disputed by counsel for the respondent, that upon an appeal from an order of a Rural Court it is not competent for the District Judge on appeal to interfere with an order of acquittal. The proviso to section 41 (1) of the Ordinance is too clear to permit a contrary contention to be advanced.

Section 41 (5) bars any appeal to this Court from the decision of a District Judge on any appeal preferred to the latter under section 41, except in accordance with the procedure indicated in sub-section (5). The petitioner therefore seeks the intervention of this Court by an exercise of the powers of revision vested therein. Counsel for the respondent has contended that this Court is not empowered to revise an order of a District Judge acting in the appellate jurisdiction conferred on him by section 42 of the Rural Courts Ordinance, and that the petitioner's remedy, if any, may be by way of an application for interference by this Court by way of a mandate in the nature of *certiorari*. The point relating to this Court's jurisdiction in the instant case is not free from all difficulty, but it is clear enough that the immediate order by which the petitioner is aggrieved is not the order of the District Judge on appeal, but the sentence imposed on him by the Rural Court on the 4th August 1967. Even though that sentence resulted directly from the order of the District Judge on appeal, it is claimed that what is sought to be revised is the order of the Rural Court sentencing the petitioner. A Rural Court is itself a court contemplated by the Courts Ordinance (Cap. 6)—vide section 3—, and I think this claim of the petitioner should be upheld.

For the reason so briefly indicated I would quash the sentence imposed on the petitioner by the Rural Court.

Sentence quashed.

1967

Present : Alles, J., and Siva Supramaniam, J.

A. GUNAWARDENA, Appellant, and S. BANDARANAYAKA and another, Respondents

S. C. 335/1965—D. C. Badulla, 2130/L

Compensation for improvements—Value of the fruits of the improvements cannot be deducted.

A *bona fide* possessor who is entitled to compensation for improvements effected by him is under no liability to account, to the owner of the property improved, for the value of the fruits which he derived from his own improvements.

APPEAL from a judgment of the District Court, Badulla.

Bala Nadarajah, for the plaintiff-appellant.

T. B. Dissanayake, with *Nalin Abeysekera*, for the defendants-respondents.

Cur. adv. vult.

February 13, 1967. ALLES, J.—

The plaintiff instituted this action against the two defendants as heirs of the late T. B. M. Bandaranayake for a declaration of title to a portion of land called Hirimoletenne described in the schedule to the plaint, or in the alternative that the defendants be ordered to pay to the plaintiff compensation for the value of the improvements made by him in the event of the defendants being declared entitled to the land. According to the plaintiff, he cleared the land in 1947 when it was in scrub jungle, constructed some buildings and made certain plantations. The plaintiff maintained that prior to his death in 1952, Bandaranayake gave the land to him on an informal verbal agreement, having received a sum of Rs. 200 as consideration and promising to give him a deed later. This evidence has not been accepted by the learned District Judge. By Indenture of lease No. 15545 of 22nd July, 1953 marked P4, Bandaranayake's widow leased an undivided seven acres in extent from the land called Hirimoletenne of ten acres extent to the plaintiff. The lease was to continue for five years, at the expiration of which the plaintiff was required to hand over possession of the leased premises to the defendants. According to the terms of the lease bond it was expressly agreed between the parties that the plaintiff would not be entitled to compensation for any improvements effected by him. It was the plaintiff's case that the portion leased to him on P4 did not constitute any part of the land in suit while the defendants contended otherwise. The learned District Judge has accepted the evidence of Surveyor Balasingham to the effect that the land in suit falls within the premises leased to the plaintiff on P4.

The learned Judge's findings on the above facts may be summarised as follows :—

- (a) that the plaintiff is not entitled to a declaration of title in his favour to the land described in the schedule to the plaint ;
- (b) that although the said land was subsequently included in the lease bond P4, the plaintiff was a bona fide possessor of the said land and is entitled to compensation for the improvements effected by him.

We see no reason to disturb the aforesaid findings.

When the lease expired in 1957, the plaintiff continued to remain in possession of the land and in 1958 the widow, the first defendant in the present action, sued the plaintiff in the Court of Requests, Badulla, in Case No. 15453 for ejectment from the land and claimed damages at the rate of Rs. 25 per year till she was restored to possession. The present plaintiff, who was the defendant in that case, filed answer on 20th January 1961 claiming title to the land. The case however did not proceed to trial and the present plaintiff undertook to file an action for declaration of title and the present action was instituted on 6th May 1961. The learned District Judge has held on a balance of evidence that the buildings and plantations had been made by the plaintiff prior to the execution of the lease and that therefore these improvements did not fall within the ambit of the covenant in the lease that the plaintiff was not entitled to claim compensation for the improvements.

The learned Judge has assessed the compensation payable in respect of the buildings at Rs. 3,000. As regards the compensation payable in respect of the plantations, he has accepted Welgolla's valuation. Surveyor Welgolla valued the lime plantation at Rs. 634 and the other permanent plantations at Rs. 49. There were also temporary plantations which he valued at Rs. 180. The sum payable as compensation for the permanent plantations is therefore Rs. 683 and not Rs. 634 as stated by the learned Judge. The total compensation payable is Rs. 3,683.

Having held that the defendants were liable to pay compensation for the improvements effected by the plaintiff, the learned Judge proceeded to state :

“ From this amount, however, the plaintiff has to restore to the defendants who are the owners of the soil, all the fruits actually gathered by him after the ‘*litis contestatio*’, that is, after the closing of the pleadings in the action with reference to the possession or ownership of the ground, because by the ‘*litis contestatio*’ a bona fide possessor becomes converted into a mala fide possessor. ”

He fixed the date of *litis contestatio* to be 20th January 1961, being the date on which answer was filed in the C. R. action ; and he determined the value of the fruits at Rs. 700 per annum on the basis of an admission

by the plaintiff in the course of his evidence that he sold limes from the trees on the land for Rs. 900 in 1962 and for Rs. 500 in 1963 and on the average for about Rs. 600 a year. Although the plaintiff did not say that the sums stated by him represented the nett profits from the sale of fruits, the learned Judge appears to have assumed that they were nett profits. He has held that on a set-off of the value of the fruits payable by the plaintiff to the defendants against the compensation payable by the defendants to the plaintiff, no sum of money is payable by the defendants and has dismissed the plaintiff's action.

In arriving at the aforesaid conclusion, the learned Judge has erred both on the facts and in law. In view of the finding that the plaintiff was a *bona fide* possessor who was entitled to compensation for improvements, the plaintiff was under no liability to account to the defendants for the value of the fruits which he derived from his own improvements. Voet in his Title on Vindications (Book 6, Title 1, Sections 38 and 39) states :

“ since decisions to the contrary are also found, I consider that the opinion of those is better founded on reason who hold it unfair that the fruits of improvements should be set off against the improvements themselves.”

vide Gane's translation at p. 252 of Vol. 2). The reasons given by Voet for this view are worthy of reproduction. He says :

“ If such set-off were to be allowed, the ridiculous consequence would in the first place flow from it that a possessor in good faith would see his own improvements paid for out of his own property and his own fruits, which had been received by him in right of ownership from his personal funds invested in the benefit. Thus when the result is looked at, the possessor in good faith would for the whole period of such possession receive precisely no benefit from his own funds disbursed in the hope of profit, but the owner of the property alone would feel it. Not only that, but bear in mind that a possessor in good faith never recovers a greater value for improvements than what they are worth at the time of restoration, so that the whole expenditure is at the risk of such possessor, and he gets either little or nothing according as either little or nothing is left of the improvement made. Thus if set-off is allowed, the effect would surely be that all gain from disbursements indeed would pass to the owner of the property improved, but the burden of the risk of them would fall only and solely on the possessor in good faith.” “ To this may be added that the more careful the possessor in good faith has been, and the more zealous like a good father of a household to bring the property which he thinks his own into a better state, the worse by so much would be his condition ; but the more careless he has been so much the more would he profit. No one can help seeing how far that departs from natural fairness.”

Voet's view has been adopted in South Africa—vide *Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd.*¹ and in Ceylon—*Beebee v. Majid*² and *Newmam v. Mendis*³. In the latter case, Browne, J. at p. 80 states as follows :—

“ And though in assessing compensation for *impensae utiles* the mesne profits including fruits consumed are to be taken into account yet the fruits of the expenditure itself, *fructus ex ipsa melioratione percepti*, are to be excluded from the accounting and not to be set off as against the claim (1 N. L. R. 226). The reason thereof seems obvious. The mesne profits arise out of the original capital of the parties, the land itself, the fruits of improving the expenditure arise from the additional capital brought in by the improver.”

In the case of *Bilindi v. Aththadassi Thero*⁴ all the earlier authorities were referred to and this Court held that in a claim for compensation for improvements a bona fide possessor need not deduct the value of the fruits obtained by him, before the date of assessment, from the improvement itself. The date of assessment was held to be the date of the judgment. The finding, therefore, that the plaintiff should account to the defendants for the value of the fruits of his own improvements is wrong in law.

The learned Judge has also overlooked the fact that, in the answer filed by the defendants they did not claim a set-off of the value of the fruits gathered by the plaintiff from the land and there was no issue on that point raised at the trial. All that the defendants prayed for, apart from a declaration of title in their favour and the ejectment of the plaintiff, was a decree for damages in a sum of Rs. 250 and continuing damages at Rs. 50 per annum from the date of the answer, namely, 25th October 1961, until possession of the land was restored to them. Issue 9 (b) suggested by the defendants was as follows :—

“ What damages are the defendants entitled to ? ”

No evidence was placed before the Court by the defendants on that issue and the learned Judge did not answer that issue, stating that it did not arise for consideration.

On the basis that he was a *bona fide* possessor, the plaintiff was entitled to remain in possession of the land until the compensation due to him was paid. The defendants are not entitled to claim any damages until they pay to the plaintiff or deposit in Court to the credit of the plaintiff with notice to him the sum of Rs. 3,683 payable as compensation. On the date of such payment or deposit, the plaintiff will be liable to deliver possession of the land to the defendants and, on his failure to do so, will be liable to pay to the defendants the entire income derived or derivable by him from the said land (which will include reasonable rental for the

¹ (1915) A. D. 636 at 651 and 660.

² (1929) 30 N. L. R. 361 at 362.

³ (1900) 1 Browne 77.

⁴ (1946) 47 N. L. R. 276.

buildings) from the said date, in addition to damages calculated at Rs. 50 per annum until possession of the land is restored to the defendants. In that event, the learned Judge will, after holding such enquiry as he may think fit, determine the amount that should be paid by the plaintiff to the defendants as refundable income.

We set aside the decree entered in this case and direct that a fresh decree be entered—

- (a) dismissing the plaintiff's action for a declaration of title to the land set out in the schedule to the plaint and declaring the defendants entitled to the said land ;
- (b) ordering the defendants jointly and severally to pay to the plaintiff a sum of Rs. 3,683 as compensation for improvements ;
- (c) for ejectment, as prayed for in paragraph (c) of the defendants answer, the writ of ejectment to issue only on deposit in Court or on proof of payment to the plaintiff of the sum of Rs. 3,683 by the defendants ; and
- (d) ordering the plaintiff to pay to the defendants, with effect from the date of payment to the plaintiff or deposit in Court with notice to the plaintiff by the defendants of the sum of Rs. 3,683, all income derived or derivable by him from the said land, inclusive of reasonable rental for the buildings thereon, along with damages calculated at Rs. 50 per annum from the said date, until possession of the said land is restored to the defendants.

The parties will bear their own costs in the lower Court. The appellant will be entitled to his costs in appeal.

SIVA SUPRAMANIAM, J.—I agree.

Decree set aside and a fresh decree entered.

1968

Present : T. S. Fernando, J., and Tambiah, J.

V. E. HERAT, Applicant, and E. A. NUGAWELA (Chairman of the Public Service Commission) and 2 others, Respondents

S.C. 448/67—Application for the issue of a mandate in the nature of a Writ of Certiorari on the Public Service Commission

Public officers—Public Service Commission—Power to require a public officer to retire after the age of 55 years—Rule fixing the age of optional retirement—Validity—Should the officer be given a hearing?—Natural justice—Public Service Commission Rule 61—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 58, 60—Public and Judicial Officers (Retirement) Ordinance (Cap. 355), s. 2—Ceylon Independence Order in Council, 1947 (Cap. 377), s. 8.

Section 60 of the Ceylon (Constitution) Order in Council, 1946, read with the rules passed under section 2 of the Public and Judicial Officers (Retirement) Ordinance and with the Proclamation made under section 8 of the Ceylon (Independence) Order in Council, 1947, empowers the Public Service Commission to require a public officer to retire from the public service upon his completing the age of fifty-five years or at any time thereafter.

Quaere, whether the public officer should be given a hearing before he is required to retire.

APPLICATION for a writ of *certiorari* on the Public Service Commission.

C. Thiagalingam, Q.C., with A. H. C. de Silva, Q.C., N. Sivagnanam-sunderam, E. B. Vannitamby and T. Jothilingam, for the applicant.

H. L. de Silva, Crown Counsel, for the respondent.

Cur. adv. vult.

March 18, 1968. T. S. FERNANDO, J.—

The applicant joined the Public Service on January 4, 1937 and served in the Department of Public Works where at the date of the filing of this application he was occupying the post of Deputy Director of Public Works. He reached the age of 55 years on September 3, 1967.

The Administrative Regulations of the Government require a public servant who wishes to continue in service after the age of 55 years to make an application for that purpose to the Head of his Department. In compliance with the relevant administrative regulation (187), the applicant by letter A of March 3, 1967 informed the Director that he wished to continue in service after September 3, 1967. In reply to this letter the Director by letter B of June 23, 1967 informed the applicant that he proposed to take steps to retire him from the public service as from September 3, 1967, and called upon him to make any statement

he desired so that it may be forwarded to the Permanent Secretary of the Ministry of Public Works. By his letter C of June 30, 1967, the applicant made representations to the Public Service Commission in support of his request that he be allowed to remain in the public service even after he has reached the age of 55 years. The Permanent Secretary of the Ministry by letter E of September 5, 1967 intimated to the applicant that the Public Service Commission had ordered that he be retired from the public service after three months' notice and that, accordingly, he has made order for retirement of the applicant as from December 6, 1967.

On this application the applicant seeks a mandate in the nature of a writ of *certiorari* from this Court quashing the order of retirement made by the Public Service Commission on two main grounds, (1) that the Commission had no legal power or authority to order his retirement and (2) that, if it did have such power or authority, the order has been made in excess of that authority and contrary to the principles of natural justice.

With the introduction of a new Constitution for Ceylon by the Ceylon (Constitution) Order in Council, 1946, the appointment, transfer, dismissal and disciplinary control of public officers became vested in the Public Service Commission (section 60) established in the manner described in section 58 of that Order in Council. The ordinary meaning of the word "dismiss" when used in relation to employment is wide enough to include a release or other termination; but, even on an assumption that power to retire public officers is not vested in the Public Service Commission by the (Constitution) Order in Council as such, it is undeniable that such a power can be granted to it by other law. The Public and Judicial Officers (Retirement) Ordinance (now Cap. 355) makes provision for the compulsory retirement of public and judicial officers. Section 2 (1) of that Ordinance empowers the Governor-General to make rules regulating the age at which, the reasons for which, and the conditions subject to which, public or judicial officers shall be required to retire from the public or judicial service. Section 2 (2) enacts that "in particular and without prejudice to the generality of the power conferred by the preceding sub-section, such rules may—

- (a) prescribe the age at which the retirement of public or judicial officers or of any particular class of public or judicial officers shall be compulsory;
- (b)
- (c) prescribe an age earlier than the age at which retirement from the public or judicial service is compulsory at which the authority competent to make the respective appointments may, subject to such conditions as to notice and otherwise as may be prescribed, require public or judicial officers to retire from the public or judicial service."

An argument was addressed to us designed to show that the modification or adaptation of section 2 (2) (c) of this Ordinance to

enable the authority competent to make the respective appointments to require retirement of public or judicial officers, as the case may be, was devoid of lawful authority ; but we think that this argument failed to take sufficient note of section 8 of the Ceylon (Independence) Order in Council, 1947, which empowered the Governor-General to make by Proclamation additions to and modifications or adaptations of any written law as he was satisfied was necessary to bring such written law into accord with that Order in Council and the (Constitution) Order in Council. Whereas before the establishment of the Public Service Commission the Governor was the appointing authority, after the introduction of the new Constitution, the Governor-General was required to take the action necessary to bring the written law into conformity with the paramount law. The modification or adaptation that was questioned on behalf of the applicant was properly effected by Proclamation published in *Gazette* 9,889 of July 28, 1948, and, in our opinion, the written law is now correctly reproduced in the existing provisions of Cap. 355.

Certain Rules published in *Gazette* 9,970 of April 29, 1949, have been made under section 2 of the Retirement Ordinance (Cap. 355), and these have been amended from time to time. Rule 1 (1) of the Rules of April 1949 fixed the age of compulsory retirement at sixty years, while Rule 2 (1) of the same Rules empowered the authority competent to make the appointment concerned also to require the officer in question to retire upon his completing the age of fifty-five years or at any time thereafter. This latter may, for convenience, be referred to as the rule fixing the age of optional retirement. While the April 1949 Rules specified in Rule 2 (2) certain conditions which require to be specified before an officer could be called upon in terms of Rule 2 (1) to retire upon his reaching the age of optional retirement, this Rule 2 (2) was deleted by the Rule published in *Gazette* 10,713 of September 17, 1954. It was submitted that this deletion was capable of working injustice to officers who had given of their best to the service concerned ; this submission was, in our opinion, not devoid of merit, but, beyond making that observation, there is nothing that this Court can do in regard to the present state of the rules. We are bound to assume that the rule-making authority had good reason for the deletion of the sub-rule referred to above.

It was next submitted on behalf of the applicant that the rule in question (Rule 2 (1)) is *ultra vires* the powers of the Governor-General by reason of non-compliance with the conditions under which the rule could have been made. More specifically, it was argued that, inasmuch as section 2 (1) of the Public and Judicial Officers (Retirement) Ordinance empowers rules to be made regulating the age at which, the reasons for which, and the conditions subject to which, officers shall be required to retire, the power has to be construed as one exercisable conjunctively and not disjunctively. For instance, the argument is that, if a rule seeks to regulate an age of retirement, that rule should also regulate the reasons for which and the conditions subject to which the retirement

should take place. We did not find ourselves at all able to agree with the argument that was put forward by counsel. For instance, Rule 1 (1) which fixes the age of compulsory retirement has been and obviously can be made by construing the rule-making power as one that can be exercised disjunctively. Even if it may be conceded, for the sake of argument, that the reasons for requiring compulsory retirement at a certain age are obvious and may therefore be implied, such a rule does not need to set out the conditions subject to which retirement shall take place. Then again, if the power conferred by section 2 (1) has to be construed as one that has to be exercised conjunctively, such a construction cannot easily be reconciled with section 2 (2) (c) which, while prescribing the optional retiring age, seeks to empower the authority competent to make the appointment to prescribe conditions as to notice or otherwise. The power to prescribe conditions granted by Rule 2 (2) (c) would clearly be superfluous if the power granted by Rule 2 (1) is construed as one exercisable conjunctively. Examples of this nature could be multiplied. It is not possible to place an interpretation on section 2 (1) of the Ordinance which reduces the Court to hold that in the case of certain rules the power is one that may be exercised disjunctively, while in the case of others it must be exercised conjunctively. The contention that Rule 2 (1) is *ultra vires* is unsound and must be rejected. The first main ground relied on in support of the application therefore fails.

In regard to the other main ground upon which the intervention of this Court has been prayed for, viz. the denial of natural justice, learned Crown Counsel brought to our notice a decision of the Supreme Court of India in *Dhingra v. Union of India*¹ where that Court, in construing Article 311(2) of the Constitution of India which is in the following terms :

“No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.”

held that any and every termination of service is not a dismissal, removal or reduction in rank. In the words of Das, C.J., “a termination of service brought about by the exercise of a contractual right is not *per se* dismissal or removal Likewise, the termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract Article 311 (2) It is true that misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is

¹ *A. I. R. 1958, S. C. p. 37 at p. 49.*

wholly irrelevant The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences.”

The tests applied by the Supreme Court of India in the case referred to above, it is interesting to note, were applied by the Privy Council in the Malaysian case of *Munusamy v. Public Service Commission*¹.

While I have referred to these two decisions of the Indian Supreme Court and the Privy Council respectively, I must point out that in the case of this applicant the Director of Public Works, the Head of the applicant's Department, at the time the applicant was informed by letter B that it is proposed to take steps to retire him from the Public Service, called upon him to make any statement he desired so that it may be forwarded to the Permanent Secretary. Public Service Commission Rule 61 requires the Permanent Secretary when making the recommendation to the Commission in respect of the proposal to retire to forward the statement of the officer, if any. It is the Commission that ultimately decided that this officer should be retired. The application filed in this Court itself recites that the procedure prescribed by the Public Service Commission Rules has been followed and, indeed, the applicant has appended to his application here a copy of his very full statement which we have no reason to think has not been considered by the Commission before ordering his retirement. Therefore, even if this had been a case where the applicant had to be given a hearing before the order was made, the procedure of calling upon him to make a statement, a procedure of which he took advantage, would have rendered it difficult for him to maintain his contention that there was here a denial of natural justice. Moreover, natural justice does not invariably require that a personal hearing be granted.

For the reasons outlined above, we dismissed with costs the application for intervention by this Court by way of *certiorari*, but we must here state that learned Crown Counsel at the outset of his argument submitted that, in any event, the order made by the Public Service Commission was one that could not be questioned by way of an application for a writ of *certiorari*. There are certain decisions of this Court which support this contention of Crown Counsel, but we intimated to him at the time he raised the point that, having regard to the importance of deciding upon the validity of the Rules made under the (Retirement) Ordinance, we need consider the point only if the question of the validity of the Rules is decided in favour of the applicant. In the result it has been possible for us to dispose of this application without ourselves considering the question of the availability of the remedy sought for by the applicant.

TAMBIAH, J.—I agree.

Application dismissed.

¹ (1966) 3 W.L.R. 872.

1968

Present : Weeramantry, J.

PRECIA W. FERNANDO (*nee* Perera), Petitioner, and
DUDLEY W. FERNANDO and 2 others, Respondents

S.C. 118 of 1968—Habeas Corpus Application

Habeas corpus—*Custody of children—Rival claims of father and mother—Considerations applicable—Putative marriage—Children born of such marriage—Interim custody of them pending action for annulment of marriage—Which spouse is entitled to such custody?*

In all questions of custody of children the interests of the children stand paramount. Questions of matrimonial guilt or innocence of a parent would not therefore be the sole determining factors in questions of custody, though they are not factors which will be ignored. The interests of the children being paramount, the rule that the custody of very young children ought ordinarily to be given to their mother ought not to be lightly departed from.

A marriage is null and void *ab initio* if it was contracted in consequence of a fraudulent misrepresentation by the wife that she was unmarried, when in fact she was already married. Assuming, however, that the husband is entitled to the custody of children born of the putative marriage, the Supreme Court will not necessarily grant him the custody in *habeas corpus* proceedings during the pendency of an action instituted by him in the District Court for the annulment of the marriage. In such a case, if the children are of tender years (e.g. 3 or 4 years old), their mother will be entitled to interim custody so long as she is shown to be fit to care for them. If she happens to be employed in England, an undertaking given by her that she will not leave Ceylon or remove the children pending the matrimonial action is sufficient.

APPLICATION for a writ of *habeas corpus*.

K. Shinya, with Nimal Senanayake, for the petitioner.

Eardley Perera, for the 1st respondent.

*Shiva Pasupati, Crown Counsel, as *amicus curiae*.*

Cur. adv. vult.

March 29, 1968. WEERAMANTRY, J.—

The petitioner in this case asks for the custody of her two minor children, the 2nd and 3rd respondents. The 1st respondent is the husband of the petitioner and the father of the two children. The marriage

between the petitioner and the 1st respondent took place in London on 13th June 1964 but the parties had been living together in London from early 1962.

The elder child was born on 4th November 1963, that is prior to the marriage, and the second child was born on 5th February 1965. There is no dispute as to paternity.

The 1st respondent on 14th February 1968 without notice to the petitioner left London by air for Ceylon with the 2nd and 3rd respondents, and the petitioner followed, as soon as she could make the necessary arrangements, on 2nd March 1968. The 1st respondent has thereafter filed proceedings in the District Court of Panadura for a decree of nullity based on an earlier marriage of the petitioner to one Navaratne, or in the alternative for a decree of divorce on the ground of constructive malicious desertion, and these proceedings are now pending.

The petitioner comes into this court on the basis that the removal of the children from the matrimonial home was without notice to her and that despite daily attempts by her on reaching Ceylon to obtain access to the children, the doors of the 1st respondent's house are closed on her, that a threatening attitude is adopted towards her by persons in this house on her visits there, that the 1st respondent goes into hiding at the approach of the petitioner and that she is not allowed to speak to or fondle the children although she sees them in the house.

It is the position of the 1st respondent that the petitioner prior to her purported marriage to him had been married to one Navaratne on 21st May 1949 and that she had had eight children by this marriage. The 1st respondent's position is that the fact of this marriage to Navaratne as well as the fact that there were eight children of that marriage had been concealed from him and that but for this suppression of fact by the petitioner he would not have married her.

In support of the contention that the petitioner has been guilty of fraud in suppressing the fact of her earlier marriage, the 1st respondent has produced, marked R2, the certificate of marriage relating to her marriage to Navaratne, and also R3, the certificate of her subsequent marriage to the 1st respondent. In R3 the petitioner has described herself falsely as a spinster and has given her name as Winifreda Perera, thus suppressing completely, at any rate as far as the registrar was concerned, the fact of her marriage to Navaratne.

If this be the correct factual position, the marriage between the petitioner and the 1st respondent would be a nullity, the ordinary consequence of which would be to render the children illegitimate, and to deprive the father of the right to custody.

Mr. Eardley Perera for the 1st respondent points out, however, that the rule that a marriage which is null and void *ab initio* has none of the consequences of a valid marriage is subject to exceptions in the case of a putative marriage, that is a marriage which is null and void but solemnised with the prescribed formalities and contracted by both or one of the spouses in good faith. Thus if it be correct that the first respondent was unaware that the petitioner had been married earlier, and entered into his marriage with the petitioner in good faith, such a marriage would be a putative marriage as the 1st respondent would have been ignorant of the impediment to his marriage.¹ It would appear that both according to the old Roman-Dutch authorities and according to the modern law the children of a putative marriage are considered legitimate², and further that the innocent spouse is entitled to apply to Court to have the children declared legitimate. The legal position of such a child *vis a vis* the innocent parent is thus not different from that of any other legitimate child.³ Mr. Perera submits on this basis that although the marriage between the parties was a nullity his client was entitled to all the rights over the 2nd and 3rd respondents which he would have had in case the children had been legitimate.

The deception alleged is however denied by the petitioner who states that the marriage to Navaratne and the fact that children were born of that marriage were circumstances well known to the first respondent at the time of the marriage. The petitioner states further that the truth of this statement is borne out by the circumstance that although the elder child's birth was registered with the father's name as Navaratne, the registration was subsequently altered by substituting the name of the 1st respondent as the father. She states that this was done upon the basis of affidavits filed by both the petitioner and the 1st respondent and that therefore the 1st respondent at any rate at the time of the affidavit knew of such marriage and nevertheless continued to live with her on the same basis as before. She submits that the second child was born in these circumstances. However no evidence has been placed before me in regard to the date of that affidavit and I am therefore unable to arrive at a definite conclusion in regard to the question of the 1st respondent's knowledge of the earlier marriage. We are left then with an allegation by the 1st respondent of deception, which allegation is contradicted by the petitioner. I will for the purpose of this order nevertheless assume, without in any way deciding upon the matter, that the 1st respondent was the innocent party and that the law in regard to putative marriages therefore entitled the first respondent to the right to custody which he would have had in the case of legitimacy.

However, even if this be assumed, the further question must be considered whether this right is to yield in the present case to the

¹ *Hahlo, South African Law, Husband & Wife*, 2nd ed., p. 479.

² *Hahlo, ibid* p. 480.

³ *Hahlo, ibid* p. 481.

circumstance that the children are of the ages of three and four, and that children of such tender years are ordinarily entitled to a mother's comfort and care.

It has been urged against the mother that she is guilty of a serious and fraudulent suppression of fact, a contention which will no doubt be examined in detail in the District Court proceedings. For the purpose of a free investigation of this matter in the District Court unfettered by any views which this court may express, I have not acceded to a suggestion by the 1st respondent's counsel that there should be an examination and cross-examination of parties so that this court could arrive at its conclusions on this matter. The learned District Judge will therefore be free to adjudicate upon those questions of guilt and innocence which will to some extent weigh with him when he brings his mind to bear upon the question of permanent custody. I shall limit the scope of this inquiry to the ascertainment of the most suitable interim order which the interests of the children demand during the period between this order and the eventual adjudication upon custody by the District Court.

Apart from the circumstance of this alleged deception it has not been urged against the petitioner that she is now living in immorality or otherwise so conducting herself as to make her an unsuitable person to be entrusted with the custody of the two children. It is true the eight children by the marriage to Navaratne are alleged to be living in Ceylon and so is this Navaratne, but it is not contended that the petitioner is living with Navaratne or with these children. It must further be observed that the youngest of these eight children is now ten years of age and I do not think that the presence of those children in Ceylon is likely to take away from the care and affection a mother would ordinarily show to children so tender in years as the second and third respondents.

In this state of the facts what legal principles are applicable in determining the right to interim custody?

There can be no doubt that in all questions of custody the interests of the child stand paramount, a principle on which the English and the modern Roman-Dutch law are agreed. As Lord Simonds observed in *McKee v. McKee*,¹ it is the law of England (and, as he observed, of Canada, Scotland and most if not all of the States of the United States) that the welfare and happiness of the infant is the paramount consideration in questions of custody, and to this paramount consideration all others yield. The modern Roman-Dutch law likewise stresses this consideration in questions of custody and has "grown away from rules directed towards penalising the guilty spouse and towards a recognition of predominance of the interest of the child".² This emphasis on the child's interests as being paramount no doubt obtains in our law³ and

¹ (1951) 1 All E.R. 942 at 948.

² *per Schreiner J.A. in Fletcher v. Fletcher* 1948 (1) S.A. 130 (A.D.) at 144.

³ *Karunawathie v. De Silva* (1961) 64 N. L. R. 252 at 257; *Weragoda v. Weragoda* (1961) 66 N. L. R. 83 at 86.

questions of guilt and innocence would not therefore be the sole determining factors in questions of custody, though of course they are not a factor which will be ignored.¹ This principle leaves me free to decide on interim custody without being obliged to investigate questions of matrimonial guilt or innocence as a preliminary to such order.

The interests of the children being then the paramount factor, there is a rule commended alike by law and ordinary human experience, which to a large extent will determine the matter before me. This is the rule that the custody of very young children ought ordinarily to be given to the mother, a rule which ought not to be lightly departed from.² It is no answer to this rule that the law ordinarily gives the father a superior right to custody³ and it is too late in the day to urge that the father's right to custody is absolute and not to be interfered with.⁴ As was observed in *Fernando v. Fernando*⁵, "So long as the mother is shown to be fit to care for the child it is a natural right of the child that she should enjoy her mother's care and not be deprived of that right capriciously." As was also pointed out in the last case referred to, "the very fact of the forced separation and the knowledge that the mother with whom the child had lived for a fairly long period can have no part to play in the child's future is at least likely to affect the mental health of the child".

Overriding considerations taking their force from the mother's past character or conduct or from her inability to give the children a suitable home may no doubt in individual cases prevail over this principle, but no such circumstances have been alleged in this case.

While it is true that any order I may make is of a purely interim nature pending the order of the District Court, there is every possibility that the District Court trial may not proceed to a final determination for a considerable period and every possibility also of any order made in that trial being subject to appeal and its attendant delays. The present order may therefore well be operative for a considerable period which may extend over several months and possibly well beyond a year or two; and in the lives of children of this tender age so long a separation from their mother ought not to be decided upon except for compelling reasons.

There is moreover a further feature in this case which simplifies a decision on the question of interim custody. This circumstance is the removal by the first respondent of the children from the common matrimonial home on February 14th 1968 without reference to the petitioner. The first respondent states that he did so upon his discovering that he had been deceived in regard to his marriage. Whatever may be his

¹ *Hahlo, South African Law of Husband & Wife*, 2nd ed., p. 445.

² *Hahlo, South African Law of Husband & Wife*, 2nd ed., 446.

³ *Karunawathie v. De Silva*, *supra*; *Weragoda v. Weragoda*, *supra*.

⁴ See *Karunawathie v. De Silva*, *supra*.

⁵ (1956) 58 N. L. R. 262 at 263-4.

reasons for resorting to this unusual piece of conduct and whatever his justification for his himself deciding to leave, he certainly had no right by such an act to deprive the mother of her two children without notice. I do not think that a parent should be permitted by a unilateral act of this nature, performed behind the back of the other parent, to gain any position of *de facto* advantage over the children which he would not have enjoyed but for such conduct. To do so would be to lend the encouragement of the courts to those who decide to take the law into their own hands.

There is before me the averment of the petitioner that on 15th February 1968, the day after the removal of the children, she took all possible steps through her solicitors in London to trace the first respondent and to prevent him from leaving the country with the 2nd and 3rd respondents, and that to this end she informed the Home Office and the police and had the children made wards of the High Court of England. This latter averment has been substantiated by the document P7 showing that these children became wards of court on 16th February 1968.

The petitioner further avers that as soon as she learnt that the first respondent had left London by air with the two children she made necessary arrangements to obtain leave of absence from her employer in London and arrived in Ceylon by air on 2nd March 1968. We have thus the uncontroverted fact that the children were on 14th February brought to this country suddenly by the father without notice to the mother and that she has apparently been so agitated by this removal that she has promptly taken every step within her power to recover the children.

This is a most important circumstance which to my mind has an almost decisive effect on the question whether the parent who has so brought the children away from the mother is entitled to retain them pending final adjudication.

Considerable fears were expressed by learned Counsel appearing for the respondent in regard to the possibility of the children being surreptitiously taken away to England by the petitioner in the event of this court awarding interim custody to the petitioner. It was submitted that while the 1st respondent has no intention of returning to the United Kingdom, there was no guarantee that the petitioner would remain in this country whatever be her assurances in this regard. It was further submitted that there was no means available to this court of compelling obedience to any order this court may make restraining the petitioner from taking the children out of this jurisdiction, for it was her avowed intention at the commencement of this inquiry to revert to her employment under the London Transport Board in three weeks' time. It is true that in the course of these proceedings she stated quite categorically that if she were granted the custody of the children she would give an undertaking that she would not leave the country or remove the children.

Such a removal of the children, it was argued, could occur in breach of any undertaking given to this court, and would render nugatory all subsequent control by this court over the custody of the children. It was further submitted that it was not within the competence of this court to issue directions to the authorities responsible for the issue of passports and supervising departure from the country, and that even should such instructions be issued there was every possibility of their being lost sight of or suppressed.

This aspect of the matter caused me considerable anxiety for both parties hold Ceylon passports, the children are now resident in this country and there is a matrimonial suit now pending in the Ceylon courts. Further, the Ceylon courts are apparently the courts of the matrimonial domicile, considering that the husband has disavowed any intention of returning to the United Kingdom. It is therefore of the utmost importance that pending the divorce proceedings the children should not be taken out of this jurisdiction and that any orders whether of this court or of the District Court should not in view of such a possibility stand in danger of being flouted. In view of the importance of these considerations I requested the assistance of Crown Counsel as *amicus curiae* on the resumed date of inquiry, and in response to this request Mr. Shiva Pasupathy, Crown Counsel, appeared at the inquiry. I appreciate very much the considerable assistance he has rendered to this court on the legal questions involved in any attempt at removal of the children.

On the resumed date of inquiry the petitioner produced an informative document, P4, in regard to Immigration and Emigration procedure in so far as concerns the entry of children to the United Kingdom. This document, issued by the British High Commission on 22nd March, indicates that under section 2 of the Commonwealth Immigrants Act, 1968, children under the age of sixteen now have the right of admission to the United Kingdom only if both parents are resident there or both parents are accompanying the children or one parent is accompanying the children and the other is already resident in the United Kingdom. A child may also be admitted to join one parent although the other is resident outside the United Kingdom if the parents' marriage has been dissolved and the parent in the United Kingdom has legal custody. Admission accompanying or to join only one parent in other circumstances is authorised only if family or other special considerations make exclusion undesirable.

The British High Commission states further that any application for a child to accompany or join one parent where the parents are divorced or have been granted a legal separation will be considered only when the parent making the application has satisfied the High Commission that the divorce decree or separation document as the case may be contains no stipulation that the child remains in Ceylon and further that proof has been shown that there is no overriding Ceylon law which might make the removal of a child in such circumstances subject to express

permission having been granted by a court of law. It is further stated that the onus is on the parent making the application for an entry certificate for the child to satisfy these requirements and that all such applications have to be referred to the Home Office in London for decision.

A document P5, from the Controller of Immigration and Emigration, was also produced by the petitioner to the effect that action is being taken to see that the two children do not leave Ceylon until the *habeas corpus* action is finally disposed of by the Supreme Court.

It would appear from this material that the removal of the children from the country and their admission to the United Kingdom would present insurmountable difficulties to the petitioner and that in any event the Department of Immigration and Emigration will await the orders of this court before it feels free to issue the necessary travel documents in respect of the two children.

Learned Crown Counsel has referred me to section 36 (1) (e) of the Immigration and Emigration Act (Chapter 351) which provides that regulations may be made in respect of the terms and conditions that may be attached to passports. In terms of this provision regulations have been made making it a condition of every passport, emergency certificate or identity certificate that the competent authority or the appropriate officer, as the case may be, may in his absolute discretion cancel or suspend a passport or emergency certificate or identity certificate or restrict its period of validity upon service of a notice that such action has been taken and the holder of such document is required to surrender it.

This is not of course a discretion which will be arbitrarily exercised, but one principle governing the grant of passports is that, broadly speaking, passports will not be granted if there is reason to believe that minor children are being taken out of the father's custody and without his consent.¹ Furthermore the passports of the two children are contained in the passport of the respondent. Any attempt on the part of the petitioner, therefore, to have the two children's names included in her passport or to obtain independent passports for the two children would have to surmount this additional difficulty.

Having regard to all these considerations I have little doubt that whether or not this court has power to issue directions to the Department of Immigration and Emigration in regard to the refusal of a passport, the Department will not issue such a passport having regard to the circumstances in which the parties are placed and having regard also to the fact that proceedings for the determination of the custody of the children are in progress. Should the Department by some oversight or some deception practised upon it so far depart from the terms of its letter P5 as to issue a passport to the children, it is clear that these

¹ *Mervyn Jones, British Nationality Law and Practice, p. 290.*

children will not in any event be allowed entry into the United Kingdom. It seems quite reasonable therefore to exclude the possibility that the children may be taken away from Ceylon without notice to the 1st respondent or in breach of any undertaking given to this court.

It was then contended on behalf of the first respondent that whatever may be the position in regard to the removal of the children there is every possibility that the petitioner may implement her earlier decision to return to London in three weeks' time and thereby leave the children stranded in this country. The simple answer to this contention is that should the petitioner choose to act so irresponsibly, she will forfeit all claims to the custody of the children, and her rights in this respect would probably be lost to her for all time. There will further be an automatic reversion of the children to the custody of their father. I do not think it conceivable that the children will be abandoned by their mother in such circumstances as to leave them destitute and without any attention whatsoever, having regard to the anxiety she has so far shown to regain their custody. There is moreover the fact that the divorce action in which the matrimonial rights of the parties will be finally adjudicated upon is pending, and the prejudice that will be caused to her by her so leaving and abandoning the children would be such that, apart from considerations of the welfare of the children, considerations of self-interest by themselves would render such a course on her part unlikely.

I have questioned learned counsel for the first respondent in regard to the facilities available to the 1st respondent for looking after these children, where the 1st respondent now resides. I am told that the 1st respondent lives with his mother and that she is at present looking after the children. It is said on behalf of the petitioner that this lady is elderly and not in the best of health. Apart from the 1st respondent's mother there would appear to be no female relatives residing with the 1st respondent who would be able to give to these children anything like a substitute for a mother's care and affection.

Having regard to all the foregoing circumstances I make order that the 1st respondent hand over the 2nd and 3rd respondents to the petitioner.

The petitioner through her Counsel has stated that she will continue to reside in Ceylon and I think that it would be appropriate also to insert a condition that the custody of the children will automatically revert to the father in the event of the mother leaving this country. She must also enter into a bond in a sum of Rs. 5,000 with one or two sureties that she will not remove the children from this country pending the determination of the divorce proceedings. This order must also be communicated to the Controller of Immigration and Emigration drawing his attention to the undertaking by the petitioner and requiring him to desist from issuing any passport to the two children as long as the divorce proceedings in case No. 11080 D.C. Panadura are pending.

There is the further question of access to the minors by the first respondent pending the final settlement of custody by the District Court. Feelings between the parties seem to be so strained that it is most undesirable that the father's right of access should be exercised in the house where the mother resides. I have therefore made inquiries from parties with a view to ascertaining whether there is a neutral place to which the children can be brought for the purpose of being met by the other parent and parties are agreed that the premises of the Dehiwela Catholic Church will be mutually acceptable for this purpose. I therefore make order that, pending the determination by the District Court of Panadura of the question of custody, the 1st respondent should have access to the children at the premises of the Dehiwela Catholic Church on any two days of the week to be notified by him to the petitioner two days in advance. It will be the duty of the petitioner to make the children available to the 1st respondent at the premises on these days at all reasonable hours.

Application allowed.

[COURT OF CRIMINAL APPEAL]

1966 *Present : H. N. G. Fernando, S.P.J. (President), Abeyesundere, J., and Manicavasagar, J.*

THE QUEEN *v.* A. ADAMBAWA

APPEAL No. 33 OF 1966, WITH APPLICATION No. 22

S. C. 19/65—M. C. Batticaloa, 16043

Charge of murder—Summing-up—Non-direction.

Where, in a prosecution for murder, the evidence showed that there was only one injury on the deceased and that it had been possibly caused by a club—

Held, that the jury should have been directed that they could convict the accused of culpable homicide not amounting to murder on the basis that he had no intention to kill but only the knowledge of likelihood of death.

APPEAL against a conviction at a trial before the Supreme Court.

K. Sivasubramaniam, with A. R. Mansoor and D. V. A. Joseph (Assigned), for the Accused-Appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

April 30, 1966. H. N. G. FERNANDO, S.P.J.—

Having regard to the fact that there was only one injury and the possibility that it had been caused by a club, we think it was the duty of the learned Judge to direct the jury that they could convict the accused of culpable homicide not amounting to murder on the basis that he had no intention to kill but only the knowledge of likelihood of death. As this direction was not given we set aside the conviction and sentence for murder, and substitute a conviction of culpable homicide not amounting to murder and pass a sentence of eight years' rigorous imprisonment.

Conviction altered.

1967

Present : Alles, J.

H. R. PODI APPUHAMY, Appellant, and THE GOVERNMENT AGENT, KEGALLA, Respondent

S. C. 635/1967—M. C. Kegalla, 59559

Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by s. 22 of Finance (No. 2) Act No. 2 of 1963—Section 2 (7)—Order made by Minister—Requirement that it should be laid before House of Representatives within a specified period—Effect of non-compliance—Control of Prices Act, s. 4 (3)—Holidays Act No. 17 of 1965, ss. 11 (4), 12 (2)—Ceylon Tourist Board Act of 1966, s. 48—Interpretation of statutes—Delegated legislation—Point of time at which it becomes valid.

An Order made by the Minister under section 2 of the Heavy Oil Motor Vehicles Taxation Ordinance, as amended by section 22 of the Finance (No. 2) Act No. 2 of 1963, is valid even though there is no strict compliance with sub-section 7 (b) of that Section by its being laid before the House of Representatives on a date subsequent to the termination of the specified period. The provisions of section 2 (7) (b) are not mandatory. The Order, therefore, in such a case, can be utilised for the imposition of tax at the altered rate.

APPPEAL from a judgment of the Magistrate's Court, Kegalla.

M. M. Kumarakulasingham, with C. Ganesh, for the defendant-appellant.

N. Tittawella, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 11, 1967. ALLES, J.—

In this appeal Counsel has questioned the validity of an Order made by the Minister under the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by Section 22 of the Finance (No. 2) Act No. 2 of 1963, under which the Government Agent, Kegalle, filed a certificate in the Magistrate's Court seeking to recover from the appellant a sum of Rs. 3,948 as tax for the period 1.11.64 to 30.9.65.

Section 22 of the Finance Act introduced a new sub-section to section 2 of the Heavy Oil Motor Vehicles Taxation Ordinance and reads as follows :—

“ (7) (a) The rates prescribed in the First Schedule to this Ordinance may, from time to time, be varied by the Minister of Finance by Order published in the Gazette.

(b) Every Order made under paragraph (a) of this sub-section shall come into force on the date of its publication in the Gazette or on such later date as may be specified in the Order, and shall be brought before the House of Representatives within a period of one month from the date of the publication of such Order in the Gazette, or, if no meeting of the House of Representatives is held within such period, at the first meeting of that House held after the expiry of such period, by a motion that such Order shall be approved. There shall be set out in a Schedule to any such motion the text of the Order to which the motion refers.

(c) Any Order made under paragraph (a) of this sub-section which the House of Representatives refuses to approve shall, with effect from the date of such refusal, be deemed to be revoked but without prejudice to the validity of anything done thereunder. Notification of the date on which any such Order is deemed to be revoked shall be published in the Gazette.”

When this same point was raised at the trial, the learned Magistrate took the view that sub-section (7) (c) validated the Order but in my opinion he was in error in so holding because there was never a refusal of approval by the House as contemplated by this sub-section.

The Order made under sub-section (7) (a) has been produced and marked P2 and was published in the Gazette of 29.4.63 prescribing the new rates to be effective from 1.5.63. According to the evidence of the Clerk Assistant to the House of Representatives the first meeting of the House within a period of one month from the date of the publication of P2 was on 17.7.63, on which date, according to (7) (b), the Order should have been brought before the House, but the Order was in fact brought up only at the fifth session which took place on 20.8.64. Counsel therefore submits that in view of the non-compliance with the provisions of sub-section (7) (b), P2 was not valid and therefore could not be utilised for the imposition of any tax. It was Counsel’s submission that the requirement of bringing the Order before the House within the specified period was mandatory and he sought support for his view from a passage from De Smith on Judicial Review of Administrative Action where the learned author was dealing with the subject of delegated legislation and in particular with the Statutory Instruments Act of 1946. That Act provided in section 2 (1) that when a statutory instrument was made it shall be sent to the Queen’s Printer, numbered and printed and sold and in section 4 (1) that where any instrument was required to be laid before Parliament after being made, a copy must be laid before both Houses and shall be so laid before the instrument comes into

operation. De Smith was of the view that the rules governing printing and issue are no more than directory. In regard to laying before Parliament he states as follows :—

“ If, however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. It is true that laying requirements have generally been regarded as directory both by the courts and by learned commentators ; but the wording of the 1946 Act is very strong and there is a recent dictum to the effect that these words are to be read in their literal sense ; moreover, the duty to lay an instrument before Parliament, especially when it is accompanied by a provision for the annulment or affirmation of the instrument by resolution, is a constitutional safeguard of some value, and an omission to carry out this duty ought not to be lightly regarded.”

Counsel submits on a parity of reasoning that in the instant case the requirement in sub-section (7) (b) is mandatory particularly since the word ‘ shall ’ is used in the sub-section.

There is no provision of law in Ceylon corresponding to the Statutory Instruments Act and in order to ascertain whether the particular piece of subordinate legislation has the force of law at the time of its publication in the Gazette or after it has been approved of by Parliament, one must examine the terms of the Statute under which the legislation is made and the language used. In Ceylon (and it must be so in England as well—vide the proviso to section 4 (1) of the Statutory Instruments Act) all subordinate legislation need not pass the scrutiny of Parliament before it is declared to have the force of law and Parliament can decide whether it should have such force or not. Subordinate legislation made under the Revenue laws or orders made under the Control of Prices Act to be effective must have the force of law at the time of its publication in the Gazette and not await the approval of Parliament. Crown Counsel has drawn my attention in this connection to several statutes under which this distinction is appreciated. Under section 4 (3) of the Control of Prices Act an Order made by the Controller of Prices “ shall come into operation when such Order is made and signed by the Controller ”. Under section 11 (4) of the Holidays Act No. 17 of 1965 all regulations made by the Minister under the Act shall have effect only after it has been approved by the Senate and the House of Representatives and until notification of such approval is published in the Government Gazette. The same Act in section 12 (2) states that an Order made by the Minister under section 12 (1) shall come into force on the date of its publication in the Gazette or upon such later date as may be specified thereunder. Under section 48 of the Ceylon Tourist Board Act of 1966 an Order made under section 47 would come into force upon the date of its publication in the Gazette. There is therefore no uniformity with regard to the procedure that has to be followed in Ceylon in regard to the time at which delegated legislation becomes valid.

The question whether words similar to that found in sub-section (7) (b) are mandatory or directory has been the subject of discussion by

commentators. Craies (Statute Law 9th Edn. p. 317) seems to take the view that requirements relating to time are only directory in nature. In the latest edition of Allen 'Law and Orders' (1965) the following passage appears at pp. 145 and 146 :—

" If the statute expressly indicates what the effect of non-compliance is to be, the matter is plain ; but in many cases it merely gives its command and says nothing about the consequences of disobedience. The courts then have to look at the general intendment of the section, and often of the whole statute, and, although there can be no invariable rule, the general principle of interpretation is well stated by Maxwell :

' Where the prescriptions of a statute relate to the performance of a public duty ; and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. '

Although it is a little startling to say that a command to lay Ministerial regulations before the Legislature is 'a mere instruction for the guidance and government of those on whom the duty is imposed', it is believed that this principle is applicable to Statutory Instruments which are required to be laid and are subject to negative resolution. I understand that this view has always been held in the departments, and it is supported by the fact that it is not uncommon to insert in statutes a provision that if a Statutory Instrument is annulled within the prescribed period, this shall be without prejudice to acts done before the annulment. The same proviso is often made even for Statutory Instruments which depend on positive Parliamentary resolution for their confirmation or continuance. In both cases the assumption is that the sub-legislation is valid from the beginning, but *sub condicione*. It is, in the phrase which is associated with a bond, 'defeasible on condition subsequent'. "

In the present case the Order is to *come into force* on the date of its publication in the Gazette (language similar to some of the local Statutes referred to earlier) and also requires 'a positive Parliamentary resolution for its confirmation or continuance'. The sub-section merely 'gives its command and says nothing about the consequences of disobedience' and the general principle of interpretation stated by Maxwell in the above passage would be applicable particularly in regard to the functions of the Government Agent who issues the certificate and has no control over the proceedings in the House.

I am inclined to adopt the principles laid down by Allen and hold that in this case, even though there is no strict compliance with sub-section (7) (b), the Order P2 is a valid Order under which a certificate could be issued for the recovery of the tax. I would therefore dismiss the appeal.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1967 Present : T. S. Fernando, A.C.J. (President), Abeyesundere, J., and Alles, J.

THE QUEEN *v.* B. M. A. S. THELIS

C. C. A. APPLICATION No. 139 OF 1967

S. C. 217 of 1966—M. C. Panadura, 95712

Sentence—Previous conviction—Scope of its relevancy.

In assessing the sentence that should be passed on an accused person when he is convicted, the Court must not take into account a conviction of the accused for an offence committed after the date of the commission of the offence in respect of which he is being sentenced.

APPEAL against a conviction at a trial before the Supreme Court.

C. Ganesh (Assigned), for Accused-Appellant.

Ranjith Abeysuriya, Crown Counsel, for the Crown.

November 2, 1967. T. S. FERNANDO, A.C.J.—

The appellant who at the relevant time was 18 years of age, and according to the evidence, a mechanic by occupation, was convicted of an attempt to commit the offence of culpable homicide not amounting to murder by causing an injury on the back of a man named Vincent. We are not disposed to interfere with the conviction but the sentence imposed on the appellant is one of 5 years' rigorous imprisonment. While we must bear in mind that the weapon used is a pointed one, we have to take into account the fact that the appellant on this occasion caused the injury in the course of intervening in a quarrel between two of his friends and Vincent. Having regard to the appellant's youth and the circumstances in which he became involved in the quarrel we consider that the sentence imposed on him is excessive. We also think it reasonable to infer that the learned Judge took into account—in our opinion, contrary to the provisions of the Procedure Code—a conviction of the appellant in respect of an offence committed after the date of the commission of the offence in this case. The learned Judge had some doubt as to whether that conviction could have been taken into account in assessing sentence, but Crown Counsel who appeared at the trial erroneously expressed the view to the Judge that it could be so taken. We have little doubt that had it not been for the circumstance that this previous conviction had been wrongly taken into account, the appellant would not have had imposed on him the fairly heavy sentence of 5 years' rigorous imprisonment. Bearing these considerations in mind, we think a sentence of one year's rigorous imprisonment would serve the ends of justice in this case, and we alter the sentence accordingly.

Sentence reduced.

1968

Present: H. N. G. Fernando, C.J.

ILLEPERUMA SONS LTD., Petitioner, and GOVERNMENT
AGENT, GALLE, Respondent

*S. C. Applications 394 and 395 of 1967—M. C. Galle,
50170/B and 50174/B*

Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249), as amended by Finance Act No. 2 of 1963—Sections 2 (1), 2 (7), 4 (1)—Alteration of rates of tax—Order made by Minister—Requirement that it should be laid before House of Representatives within the specified period—Effect of non-compliance—Interpretation of statutes—Delegated legislation—Procedure.

Where rates of tax prescribed in the First Schedule to the Heavy Oil Motor Vehicles Taxation Ordinance, as amended by the Finance Act, No. 2 of 1963, are varied by the Minister by Order published in the *Gazette* in terms of sub-section (7) of section 2 of that Ordinance, the provisions of paragraph (b) of sub-section (7) requiring the Order to be laid before the House of Representatives within the specified period are mandatory and must be complied with in order to give validity to the Taxation Order.

Podi Appuhamy v. The Government Agent, Kegalla (70 N. L. R. 544) not followed.

APPLICATIONS to set aside two orders of the Magistrate's Court, Galle.

C. Ranganathan, Q.C., with M. T. M. Sivardeen, for the Petitioner.

N. Tittawella, Crown Counsel, for the Respondent.

Cur. adv. vult.

May 17, 1968. H. N. G. FERNANDO, C.J.—

A certificate under Section 4 (1) of the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 249) was issued by the Government Agent, Galle, on 12th August 1967 certifying that tax amounting to Rs. 6,192 was due under the Ordinance, in respect of a motor vehicle (No. 22 Sri 1961) owned by the present petitioner, for certain periods commencing from 1st June 1964 and ending on 31st December 1965. Another certificate so issued and dated 14th August 1967 was in respect of another vehicle (22 Sri 8511) for certain periods between 1st May 1963 and 31st December 1965. In each of these cases the learned Magistrate of Galle made order in terms of s. 4 (1) of the Ordinance for the recovery of the specified amounts in the same manner as a fine imposed by the Court.

In these two applications the petitioner has challenged the validity of the Certificate on grounds to which I will immediately refer.

Section 2 (1) of the Ordinance provides that the tax in respect of Heavy Oil Motor Vehicles shall be paid in accordance with the rates prescribed in the First Schedule to the Ordinance. The Finance Act No. 2 of 1963 amended s. 2 of the Ordinance by inserting therein a new sub-section (7) which reads as follows :—

“ (7) (a) The rates prescribed in the First Schedule to this Ordinance may, from time to time, be varied by the Minister of Finance by Order published in the *Gazette*.

(b) Every Order made under paragraph (a) of this subsection shall come into force on the date of its publication in the *Gazette* or on such later date as may be specified in the Order, and shall be brought before the House of Representatives within a period of one month from the date of the publication of such Order in the *Gazette*, or if no meeting of the House of Representatives is held within such period, at the first meeting of that House held after the expiry of such period, by a motion that such Order shall be approved. There shall be set out in a schedule to any such motion the text of the Order to which the motion refers.

(c) Any Order made under paragraph (a) of this subsection which the House of Representatives refuses to approve shall, with effect from the date of such refusal, be deemed to be revoked but without prejudice to the validity of anything done thereunder. Notification of the date on which any such order is deemed to be revoked shall be published in the *Gazette*. ”

In pursuance of the provisions of the new sub-section (7) an Order was made by the Minister of Finance setting out a new Schedule of the rates of tax in variation of the rates previously contained in the Schedule to the Ordinance, and this Order was published in *Gazette* No. 13,620 of 29th April 1963. Accordingly the tax due in respect of the two vehicles involved in these applications has been calculated at the rates specified in that Order. But the contention raised on behalf of the petitioner has been that the Order is invalid and of no effect on the ground of non-compliance with the provisions of paragraph (b) of the new sub-section (7). This paragraph (b) requires that the Order be brought before the House of Representatives “ within a period of one month from the date of the publication of such Order in the *Gazette*, or if no meeting of the House is held within such period, at the first meeting of that House held after the expiry of such period, by a motion that such Order shall be approved.”

In the case of the present Order therefore a motion for approval should have been moved in the House before 29th May 1963 if a meeting took place before that date or else at the first meeting which took place thereafter. Owing, however, to what must obviously have been gross official negligence, the motion for approval was not moved in the House until 20th August 1964. Counsel for the petitioner has argued that

because a motion for approval was not passed in the House within the time specified in paragraph (b) the Order was fully inoperative, or at the least that the Order became operative only on the date of the approval of the House and not earlier.

Crown Counsel, however, has referred to a judgment of Alles J., in S. C. 635/67 M. C. Kegalla Case No. 59559 delivered on 11th November 1967¹, holding that the provisions of the new paragraph (b) of the new section are not mandatory, and that by virtue of the motion passed in the House on 20th August 1964, the Order remains valid as from the date of its first publication in the *Gazette*.

I regret that I am unable to agree with that judgment. It is a fundamental principle of British Constitutional Law that the subject cannot be taxed except directly by Statute enacted by Parliament, or alternatively by Resolution of the House of Commons passed by virtue of enabling power in a Statute. The new sub-section (7) of Section 2 of Cap. 249 provides for this alternative method which is prescribed in the Revenue Protection Ordinance (Cap. 250) and is often utilised in the case of the imposition or variation of customs duties.

Provisions of the nature contained in the sub-section (7), which gives statutory force to a taxation Order prior to its being approved by the House of Representatives is considered to be expedient only because it is sometimes necessary to prevent speculative dealings and other similar transactions which might take place in the interval between the time when notice of a motion or resolution is given in Parliament and the time when the motion or resolution is actually passed. But a *sine qua non* for such temporary validity of a Taxation Order is that the Minister responsible must perform the obligation which he owes to Parliament to bring the Order before the House of Representatives for approval.

Paragraph (c) of the new sub-section no doubt provides that even if the House refuses to approve a Taxation Order and the Order thereby becomes revoked, the levy of the taxes prior to the time of such revocation will be valid. But this validity flows, in my opinion, from the fact that the law is observed and that Parliament is duly invited to consider whether or not to approve the Order. But in a case where the order is not brought before Parliament at all or where as in this case the order is brought before Parliament long after the prescribed time, paragraph (c) is of no avail. The simple reason I have for this conclusion is that paragraph (c) does not contemplate either any omission or any delay in moving the requisite motion for approval.

I hold for these reasons that the failure to comply with the provisions of paragraph (b) of the new sub-section (7) had the consequence that the Order as published in the *Gazette* of 29th April 1963 had no validity as such.

Different considerations however arise by reason of the fact that the House of Representatives did approve the new rates of tax by the motion passed on 20th August 1964. The method of taxation provided for in the new sub-section is—

- (a) that an Order is made by the Minister fixing rates of tax, and
- (b) that the House of Representatives passes a motion approving the rates of tax.

The Minister's Order is temporary and provisional. But the motion in the House is intended both to validate the Minister's Order and to approve the new rates of tax permanently. The House of Representatives having thus approved the new rates of tax permanently by the motion passed on 20th August 1964, the constitutional requirement that taxation must be approved in the House has been satisfied. In these circumstances the Court must be slow to hold that the proceedings in the House were a nullity. Accordingly I hold that the new Schedule of rates became valid and operative as from the date of the passing of the motion of approval, i.e., as from 20th August 1964.

The orders made by the Magistrate in these two cases for the recovery of these certified amounts as fines and for the issue of distress warrants for the recovery are set aside.

I must note however that the Government Agent may yet be entitled to recover, by means of the issue of fresh Certificates, tax for the period ending on 20th August 1964 at the rates specified in the original Schedule to Cap. 249, and to recover tax for the periods subsequent to 20th August 1964 at the new rates. But even if he is so entitled, such recoveries cannot be made by virtue of the certificates issued on 12th and 14th August 1967, because in these Certificates tax for at least part of the entire period was levied at rates which were not valid prior to 20th August 1964.

Orders set aside.

1968 Present : H. N. G. Fernando, C.J., and Abeyesundere, J.

M. GIRAN APPUHAMY, Appellant, and M. ARIYASINGHE
and 26 others, Respondents

S. C. 195/66 (Inty.)—D. C. Gampaha, 8207/P

Partition action—Inclusion, in plaint, of a land possessed dividedly by prescriptive possession—Alienation of that land pending the partition action—Validity—Partition Act, s. 67.

Res judicata—Opinion thereon of Judge who heard the earlier action—Irrelevancy.

- (i) Where, in a partition action, a particular portion of land is excluded from the partition on the ground that some person or persons have title to it as a separate land, whether by prescriptive possession or otherwise, section 67 of the Partition Act does not render void dealings with that portion during the pendency of that action.
- (ii) If a party to an action sets out a claim of title, and if a finding as to his title has to be reached, and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion to the contrary expressed by the trial Judge.

APPEAL from an order of the District Judge, Gampaha.

E. S. Amerasinghe, for the Plaintiff-Appellant.

No appearance for the Defendants-Respondents.

Cur. adv. vult.

March 3, 1968. H. N. G. FERNANDO, C.J.—

The corpus of this action for partition is described in the plaint as Lots 5 and 6 depicted in Plan No. 543 dated 15th May 1952. That plan was prepared for the purposes of an earlier partition action, No. 2612/P D. C. Gampaha. One of the two persons who were plaintiffs in that action is the 8th defendant in the present action. The present plaintiff and one Siman Appu intervened in that action and filed a statement of claim asking for the exclusion of Lots Nos. 5 and 6 of the land depicted in the Survey Plan No. 543. In so doing, they pleaded also that they had acquired prescriptive title to those two Lots. These claims

were disputed in that action, and judgment was delivered in 1958, the District Judge upholding the claim of prescription and excluding these 2 Lots 5 and 6 from the partition.

Although the present plaintiff and Siman Appu jointly intervened in the earlier action, it would appear that the major interests in Lots 5 and 6 had belonged to Siman Appu, and that at the time when their statement of claim was filed the present plaintiff had a claim only to a small share in these Lots. But in January 1952 and April 1952, while the earlier action was pending, Siman Appu executed two deeds of Gift in favour of the present plaintiff, and the latter's claim of title in the present action is based largely on these two deeds.

One of the substantial points of contest in the present action is that these two deeds, having been executed during the pendency of action No. 2612/P, were void by reason of the provisions of section 67 of the Partition Act. On this point the learned Judge who tried the present action has held that the deeds were void, and that is the principal reason why this action has been dismissed.

A similar point was considered by this Court in the case of *Perera v. Attale*¹. In that case an action for partition had been dismissed on the ground that the land had been possessed dividedly and not in common. During the pendency of the action, the owner of one of the Lots transferred her interests and the transferee also thereafter executed another transfer. In subsequent proceedings these transfers were challenged on the ground that they were void because they were executed during the pendency of a partition action, but this Court held in appeal that section 17 of the old Partition Ordinance did not render the transfers void. De Kretser J. made the following observations in the judgment of this Court :—

“ The present is a case of many separate lands being included in a partition action and the action was dismissed on the ground that the land was not held in common. Each owner of each lot was not therefore affected by the abortive partition action and was free to dispose of his land as he chose. As Wood-Renton J. remarked in *Abeysekera v. Silva* (1 C. A. C. 37) “ undivided ” in section 17 means undivided in the eyes of the law. Here the larger land had long ceased to be undivided in the eyes of the law.”

The facts of the present case are not in all fours with those of the case just cited, because in the present case the partition action 2612/P was not dismissed, but it seems to me that the *ratio decidendi* of the cited case is applicable to the present facts. Although a partition decree was entered in action No. 2612/P, Lots 5 and 6 were excluded from that decree on the ground that the present plaintiff and Siman Appu had,

¹ (1944) 45 N. L. R. 210.
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at the time when the action was filed, already acquired a title by prescription to these Lots. To use the language of Wood-Renton J. which was quoted in the cited case, Lots 5 and 6 were thus not “undivided in the eyes of the law”, because by reason of the acquisition of prescriptive title to these Lots, they had ceased to be an undivided part of the larger land.

De Kretser J. also referred to a situation in which the plaintiff in a partition action includes another's separate property in the corpus of the action, and pointed out the injustice of preventing the true owner from dealing with his property merely because of a false allegation concerning the property made in a partition action.

The learned District Judge in the present action thought that the decision in 45 N. L. R. is no longer applicable because the provision of law which now applies is Section 67 of the new Partition Act. Section 17 of the old Ordinance prohibited alienations of an undivided share or interest in any “property as aforesaid”, that is to say, in any property which “shall belong in common to two or more owners”, and the decision in 45 N. L. R. was in effect that the alienation of property pending a partition action is not void if in law it does not belong in common to the co-owners of the land which is the subject of the partition action.

Section 67 of the Partition Act prohibits the alienation pending a partition action of an undivided share or interest in the land to which the action relates; and the expression “partition action” is defined as an action for the partition or sale “of any land or lands belonging in common to two or more owners”. Hence, if a land, which is included by a plaintiff in the corpus of a partition action, is in law a separate land, and is excluded from the partition on that ground, it is not a land belonging in common to the owners of the land ultimately partitioned. It seems to me therefore that the construction placed by de Kretser J. on the former s. 17, namely that it rendered void only the alienation of shares of a land which is *properly* the subject of a partition action, must be placed also on s. 67 of the new Act.

The partition action which was referred to in the case of *Perera v. Attale* had been instituted in 1928 and was ultimately dismissed in 1937 or 1938; and unfortunately it is not uncommon that partition actions may be pending for very long periods. If then it turns out at the final determination of a partition action that some portion of the corpus described in the plaint did not in law properly form part of the subject of the action, section 67 of the Partition Act, if construed according to the opinion of the trial Judge in this case, can have extremely harsh consequences. If that construction be correct, the true owner of that portion of land would be unreasonably deprived of the liberty of selling or donating his property. The ordinary principle, that s. 67 does not prevent dealings in the interest to be ultimately allotted in a partition

decree, would be of no avail to such an owner ; for his right is, not that any interest will be allotted to him in the decree, but that his property cannot be the subject of partition. Accordingly, even if there be any slight doubt on the question, I much prefer to lean towards the construction that the Legislature, in enacting s. 67, had no intention of rendering the decision in that case inapplicable in connection with actions under the new Partition Act.

I would hold for these reasons that where a particular portion of land is excluded from a partition on the ground that some person or persons have title to it as a separate land, s. 67 does not render void dealings with that portion during the pendency of that action. The learned District Judge therefore erred in holding to be void the deeds of 1952 under which the present plaintiff claimed title to Lots 5 and 6.

The case for the plaintiff was that he is entitled to the entirety of Lots 5 and 6, less an undivided half acre, and that the 1st defendant is entitled to that undivided half acre. Although a number of persons intervened and filed statements of claim, the only claims which were pressed were those of the 3rd, 4th and the 7th defendants. The 3rd defendant claimed a title by prescription to Lot A of the land depicted in Plan No. 1990 prepared in this action. That claim was rejected by the learned trial Judge. The 7th defendant claimed interests under a deed No. 33091 of 3rd January 1952 alleged to have been executed by Siman Appu. The learned trial Judge, however, held that the 7th defendant failed to prove the due execution of this deed. The 4th defendant, a man by the name of W. A. Jan Singho, claimed certain interests under a person referred to in plaintiff's pedigree. This 4th defendant was a party to action No. 2612/P, having been the 19th defendant in that action. Counsel for the plaintiff has argued in appeal that the 4th defendant, as well as all other persons who were parties to action No. 2612/P, can now have no claims because the finding that the present plaintiff and Siman Appu had title by prescription to Lots 5 and 6 binds those parties as *res judicata*. This argument was rejected by the trial Judge owing to a quite unusual circumstance.

When the points of contest were framed in action No. 2612/P the learned Judge who tried that action referred *inter alia* to the point raised as to the prescriptive rights of the present plaintiff and Siman Appu to Lots 5 and 6, and he observed that he was “ averse in a partition action to adjudicate upon points of contest which may be used as *res judicata* in some other action ”, and he proceeded to state that he was allowing this point of contest to remain “ not for the purpose of any other parties obtaining an adjudication, but purely as a guide for me ”. These observations have influenced the trial Judge in the present action to hold that the earlier finding on prescription is not *res judicata*.

It is clear, however, from the judgment in action No. 2612/P that the question of the prescriptive rights to Lots 5 and 6 was actively contested, and that the finding in favour of the present plaintiff and Siman Appu was based on convincing evidence of their exclusive possession. In fact, therefore, despite those earlier observations, the point of contest No. 5 was not merely used or regarded as a guide for the Judge. In any event, if a party to an action sets out a claim of title, and if a finding as to his title has to be reached, and is in fact reached, that finding is in law *res judicata* between the parties despite any opinion or inclination to the contrary which the trial Judge might entertain. On this ground, the claim of the 4th defendant in the present action should have been rejected.

The 26th defendant made no statement of claim prior to commencement of the trial. He was called on behalf of the 3rd defendant as a witness at the trial, presumably in an attempt to support the case of the 3rd defendant. In the course of his cross-examination he stated as follows :—

“ I was not a party to that case No. 2612/P. I had rights in this land from my mother Punchihamy. I sold those rights to Siman.

Q. After that you had no rights in this land ?

A. Still I own another 1/64 share.

Q. But you have not intervened in this action and claimed that share ?

A. There is no proper case for this land.

Q. You haven’t up to date claimed this 1/64 share ?

A. I have intervened as a party in this case. I have not filed any answer.”

At this stage he was permitted to file a statement of claim, which at the most upon his own deeds is that he is entitled to a 1/64 share. It is clear, however, from the document P6, that the 26th defendant had in 1942 sold to Siman Appu (the predecessor of the present plaintiff) the interests which, as stated in P6, he had derived from his mother Punchihamy. There being no reservation whatsoever in this deed of any portion of the land thereby conveyed, his claim that he still owned a 1/64 share is very nearly absurd. There is nothing in the evidence to explain how he retained a right to this particular share. He admitted that he had been served with summons and that he had not intervened in this action prior to the very late stage at which he was permitted to file a statement of claim. That circumstance alone casts grave doubt on the validity of his claim. I hold that the learned trial Judge should have rejected this claim.

It is unfortunate that there was no appearance at this appeal for any of the defendants, but I am satisfied on an examination of the evidence that the claims of the contesting defendants would have been rejected by the trial Judge but for his erroneous decisions on the two questions of law which I have discussed.

I would accordingly allow this appeal and set aside the decree dismissing the plaintiff's action. The 3rd, 4th and 7th defendants must pay to the plaintiff the taxed costs of contest in the District Court and of this appeal. The case is remitted to the District Court for Interlocutory Decree for partition to be entered as prayed for in the plaint, and for further proceedings to be taken as provided in the Partition Act.

ABEYESUNDERE, J.—I agree.

Appeal allowed.

— [COURT OF CRIMINAL APPEAL]

1967 *Present* : T. S. Fernando, A.C.J. (President), Abeyesundere, J., and Alles, J.

M. K. FRANCIS ALWIS, Appellant, and THE QUEEN, Respondent

C. C. A. APPEAL 109 OF 1967, WITH APPLICATION 143

S. C. 198 of 1966—M. C. Gampaha, 5799/A.

Criminal procedure—Calling of fresh evidence by Court after case for defence is closed—Scope of s. 429 of Criminal Procedure Code—Misdirection—Court of Criminal Appeal Ordinance, proviso to s. 5 (2).

Where, after the cases for the prosecution and the defence have been closed, the Court, purporting to act under section 429 of the Criminal Procedure Code, calls a fresh witness whose name appears on the list of witnesses contained in the indictment, it would be wrong to direct the jurors that the fresh evidence may be relied upon, either by itself or as corroboration of the evidence of the principal witness for the prosecution, to convict the accused.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with E. St. N. D. Tillekeratne, G. Seneviratne and L. F. Ekanayake (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

November 17, 1967. T. S. FERNANDO, A.C.J.—

The appellant (the 1st accused) and his son (the 2nd accused) stood their trial before a judge and jury on a charge of attempt to commit the offence of murder by cutting a man named Marshal with a sword. The jury returned a unanimous verdict of guilty of voluntarily causing grievous hurt as against the appellant, but by a similar verdict found his son not guilty of any offence. The son was accordingly acquitted, and the appellant was sentenced to 10 years' rigorous imprisonment.

Learned Counsel for the appellant has contended before us that, by a violation of the rules governing the calling of fresh evidence after the cases for the prosecution and the defence had been closed, the appellant has been deprived of a fair trial.

The names of two witnesses who could have testified as to the identity of the person or persons who made an attempt upon the injured man Marshal appeared on the list of witnesses contained in the indictment. These two witnesses were Marshal himself and another man bearing the name of Dharmadasa. Counsel for the Crown who must ordinarily be presumed to be aware of the strength and the weakness of the Crown case decided, as he was undoubtedly entitled to do, to call only one of these two witnesses, viz., Marshal. That witness stated that the appellant and his son both cut him shortly after midnight on the evening in question. At the close of the case for the Crown both the appellant and his son gave evidence on their own behalf denying their presence anywhere near the place where Marshal was alleged to have been attacked. At the end of the day there was no other evidence which the defence wished to call, and although there is no record made that the defence case had then been closed, the nature of the recorded proceedings thereafter makes it fairly clear that the defence had indeed closed its case. What remained for the next day was for counsel to address and for the judge to charge the jurors summing up the evidence and laying down the law by which they were to be guided.

The next day's proceedings commenced with the learned judge addressing Crown Counsel and informing him that he wished to call Dharmadasa "as my witness". Crown Counsel stated "Very well, my Lord". I make mention of this proceeding in Court because the record does not indicate that the learned judge addressed defence counsel on the matter at all. Although it was an assigned junior counsel who was conducting the defence of both accused, there was no inquiry made from him as to whether he had any objection to the course of action proposed. Dharmadasa was then called, and his entire examination-in-chief (which ran into four typed pages) was conducted by the learned judge. Crown Counsel was asked whether he wished to cross-examine Dharmadasa, and, on his replying to the judge that he did not, Dharmadasa was cross-examined at some length by defence counsel. During that cross-examination, counsel marked two passages from Dharmadasa's evidence

as recorded in the Magistrate's Court, probably with the object of discrediting his evidence on certain matters which do not appear to have been of any real importance. Defence counsel was next allowed to prove these two contradictions by calling the Clerk of Assize to produce the record of the Magistrate's Court proceedings. When that had been done, defence counsel made an application that the police officer who prepared the sketch be called by the Court. The Crown, it may be mentioned, had not called this police officer, but his name was on the list of witnesses and, it may be assumed, he was present and available to be called. Defence Counsel's object was to prove that the place of attack as shown to the police officer was some distance away from the place of attack as deposed to by Marshal and Dharmadasa. That part of the record of the trial as relates to the unsuccessful attempt of the defence counsel to have this evidence placed before the jury in order at least to discredit Dharmadasa in respect of the place which he said was the place of attack is reproduced below :—

Defence Counsel : My Lord, I would like to make an application that Your Lordship be pleased to call the officer who made the sketch.

Court : I refuse that.

Defence Counsel : May I make my submissions why I want that evidence?

Court : Why should I call ? You had your opportunity of calling any witnesses you wanted, and if you did not want them why should I call them ?

Defence Counsel : In the light of this witness's evidence whom we did not anticipate would be called.....

Court : What is your complaint ? Is it your complaint that I have no right to call witnesses ? How does that arise ?

Defence Counsel : No, my Lord, with respect I submit that it would be in the interests of justice to have the officer who made the sketch called because the injured person pointed out to him a place where he said he was cut by the 1st accused which is entirely different from the place where it had happened.

Court : You have no right to make such a submission in the presence of the jury—that anything incorrect was pointed out. If you wanted to make any such submission you should have first asked the jury to retire. You must not lead inadmissible evidence in that fashion.

Defence Counsel : I am sorry, my Lord. May I make that application ?

Court : I refuse the application to call the sketch officer.

The scope of a court's power under section 429 of the Criminal Procedure Code to call a witness at any stage of a trial has been examined in many cases by this Court. In *The King v. Aiyadurai*¹, it was observed that the power is not incompatible with the relevant English rule, and this Court formulated the principle accepted in the English Court of Criminal Appeal to be that fresh evidence called by a judge *ex proprio motu*, unless *ex improviso*, is irregular and will vitiate the trial, unless it can be said that such evidence was not calculated to do injustice to the accused.

The Crown in the instant case decided to rest its proof with the evidence of the single witness Marshal. The learned Commissioner who presided at the trial, having called Dharmadasa as a witness in pursuance of the power vested in a court by section 429, expressed himself thus in the course of his charge to the jury :—

“ Now, the reason why I called Dharmadasa today was because I wanted you to know that Dharmadasa who was there and who claims to have come there straightaway and seen the assault did not see the 2nd accused there. That, gentlemen, would be of some importance to you, because, while it is just possible that witness Marshal is possibly true in the story that he says, it is curious that Ruban and this 2nd accused have disappeared not to be seen at the time Dharmadasa comes to see Puran (the 1st accused) still cutting the man. So that, in those circumstances, in view of the fact that the injured man himself in the first instance to the Police is recorded as having said “ Puran cut ”, coupled with the fact that Dharmadasa did not see the other accused, I think, in my opinion, would make you doubt, apart from anything else, as to whether it is safe to find the 2nd accused guilty in a case like this.”

If the sole effect of Dharmadasa being called by the Court after the close of the evidence for the defence was to assist the jury to decide whether the 2nd accused was a participant in the attack, the course adopted by the learned Commissioner could not be the subject of legitimate criticism. As was pointed out by this Court in *The Queen v. Don Wilbert*², the rule in regard to the calling of fresh evidence is strictly observed only when such evidence is intended to support the prosecution case, but where the defence is concerned a certain degree of latitude is permitted.

The actual shape the charge to the jury took thereafter was, however, unfortunate. Said the learned Commissioner in respect of the evidence against the appellant :—

“ In regard to the first accused there is the evidence of Dharmadasa who says I saw the 1st accused cut Marshal as he lay fallen. So that it is for you to decide whether you can act on the evidence of

¹ (1942) 43 N. L. R. 289.

² (1962) 64 N. L. R. at 89.

Marshal as against both accused. If you doubt his evidence, first of all, in regard to the 2nd accused, then there is no evidence against the 2nd accused and he must be acquitted. Then, can you act on his evidence against the 1st accused ? For the moment consider that he had not given evidence, and that the only witness was Dharmadasa who gave evidence and said " I saw this 1st accused cutting Marshal ". Would you act on the evidence of Dharmadasa ? Because, if you feel that it is safe to act on the evidence of Dharmadasa, then Dharmadasa corroborates Marshal in regard to the cutting. Then, even if you do not believe Marshal by himself, it is open to you to say " Well, we believe him because he is corroborated by Dharmadasa " or " We act on the evidence of Dharmadasa alone ". These are entirely matters for you."

The jury's verdict clearly shows that they relied either only on Dharmadasa's evidence or on that part of Marshal's evidence as was corroborated by Dharmadasa. It is therefore relevant to remind ourselves of what was stated in *John Owen's case*¹ that

" The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that where it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex v. Browne*², the calling of a fresh witness."

The prosecution had an opportunity of calling Dharmadasa, but deliberately refrained from doing so. Probably the prosecutor correctly felt that the calling of Dharmadasa would weaken his case against the 2nd accused. Each of the accused then gave evidence in support of his respective alibi. Thereafter any application by the Crown to call Dharmadasa, which could only have been done by way of evidence in rebuttal, could not possibly have been entertained, and Crown Counsel did not attempt to make any such application. Was it, then, open to the Court to call Dharmadasa ? It is sufficient if I were to quote from the decision of *John Owen (supra)*.

" Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed, where it becomes necessary to rebut matters which have been raised for the first time by the defence."

The Crown not having attempted to rebut any evidence called by the defence, the action of the Court in calling the evidence of Dharmadasa, although it may not of course have been so intended, had the unfortunate effect of imperilling the defence of the appellant and placing him at an unfair disadvantage. This Court, in *The Queen v. Mendis Appu*³, stated

¹ (1952) 2 Q. B. 362.

² (1943) 29 Cr. A. R. 106.

that “ the powers conferred by section 429 should be used with caution. In a trial by jury the functions of the prosecution, the defence and the judge are laid down in the Code, and the Court should take care not to leave room for any impression that it is using its powers under section 429 to help the prosecution to discharge the burden that rests on it ”. The ground of appeal advanced is, in our opinion, sound.

For the reasons indicated above, we quashed the conviction and sentence of the appellant ; but, being of opinion that this is a case in which we should act under the power conferred by the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, we ordered a new trial of the appellant on a charge of voluntarily causing grievous hurt with an instrument of cutting, an offence punishable under section 317 of the Penal Code.

Sent back for re-trial.

1968 *Present : H. N. G. Fernando, C.J., T. S. Fernando, J., and Samerawickram, J.*

B. V. PERERA, Appellant, and P. AMBALAVANAR, Respondent

S. C. 16/66—D. C. Colombo, 61967/M

Postponement—Refusal despite production of medical certificate—Duty of Court to have considered whether the medical certificate was authentic.

On the first date of trial, despite the production of a medical certificate stating that the 1st defendant was unfit to attend Court, an application made on his behalf for postponement was refused and the Court proceeded to trial and to judgment without the 1st defendant having any chance to establish that the request for postponement was made on proper grounds.

Held, that there should be a fresh trial.

APPEAL from a judgment of the District Court, Colombo.

Nimal Senanayake, with Miss Adela P. Abeyratne, for 1st Defendant-Appellant.

H. Rodrigo, for Plaintiff-Respondent.

Cur. adv. vult.

June 13, 1968. H. N. G. FERNANDO, C.J.—

This was an action against two defendants for a sum of Rs. 50,000, the claim being based on an allegation that the plaintiff had entrusted his lorry to the 1st defendant for repairs and that the lorry had not been returned to the plaintiff. The 1st defendant answered that the plaintiff had failed to pay the bill for the repair of the lorry and that the lorry had been retained for that reason.

On the first date of trial, counsel appearing for the 1st defendant filed a medical certificate to the effect that "Mr. B. V. S. Perera is suffering from Fibrositis of the pectoral muscle on the left side. He will not be fit to attend Court tomorrow and for about one week thereafter", and moved for an adjournment. Counsel for the plaintiff objected, stating that he did not admit the genuineness of the medical certificate. The trial Judge refused the application for an adjournment, whereupon counsel for the 1st defendant withdrew from the case. The trial was held immediately thereafter as against the 1st defendant, counsel for the plaintiff having informed the Court that no relief was claimed against the 2nd defendant.

I do not understand why the trial Judge acted so precipitately. The medical certificate has all the appearances of genuineness, and, if the statement made in it was correct, the 1st defendant was not fit to attend Court. When plaintiff's counsel objected to the grant of an adjournment and challenged the genuineness of the certificate, the simple and proper course for the Court was to require the 1st defendant's counsel to prove the authenticity of the certificate. If the Judge in his discretion considered that the costs of the day should be borne by the 1st defendant, an order to that effect could have been made. Instead, the Court proceeded to trial and to judgment without the 1st defendant having any chance to establish that his request for a postponement was made on proper grounds.

The judgment and decree are set aside, and a fresh trial will be held on a date to be fixed by the District Judge. The costs of this appeal will abide the final result of the action.

T. S. FERNANDO, J.—I agree.

SAMERAWICKRAME, J.—I agree.

Case sent back for a fresh trial.

1965

Present : Tambiab, J., and Alles, J.

D. J. RANAWEEERA, Appellant, and COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 68 (Inty.)/1963—D. C. Colombo, 255/A1

Income tax—Recovery of tax by seizure and sale of property—Procedure—Capacity of Assistant Commissioner to issue certificate to District Court—“Commissioner”—Ministerial function of Court—Income Tax Ordinance (Cap. 242), ss. 2, 6 (b), 11 (1) (a), 13 (2), 84 (3), 85 (1), 86, 87, 89.

Where any income tax is in default, an Assistant Commissioner may, if he is specially authorised by the Commissioner to act on his behalf, issue a certificate to a District Court, in terms of section 84 (3) of the Income Tax Ordinance, for the recovery of the tax.

The Supreme Court has no power to grant relief to the assessee at the stage of proceedings for the recovery of tax.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with P. Navaratnarajah and D. S. Wijewardene, for the petitioner-appellant.

M. Kanagasunderam, Crown Counsel, for the respondent.

January 28, 1965. **TAMBIAH, J.—**

The only point raised in appeal is whether the Assistant Commissioner specially authorised by the Commissioner for some specific purpose to act on his behalf could issue a certificate under Section 84 (3) of the Income Tax Ordinance. Section 84 (3) enacts “where any tax is in default, and the Commissioner is of opinion that recovery by the means provided in subsection (2) is impracticable or inexpedient, he may issue a certificate to a District Court having jurisdiction in any district where the defaulter resides or in which any property movable or immovable owned by the defaulter is situate, containing particulars of such tax and the name or names of the person or persons by whom the tax is payable. On receipt of such certificate the court is empowered to issue a writ of execution to the Fiscal authorising and requiring the Fiscal to seize and sell all and any of the property movable and immovable of the defaulter or such part of it as he may think necessary for the recovery of the tax”. Commissioner is defined as follows. “Commissioner includes Commissioner of Income Tax appointed under this Ordinance, and the Deputy Commissioner or an Assistant Commissioner specially authorised by the Commissioner either generally or for some specific purpose to act on behalf of the Commissioner”.

Mr. Jayewardene contends that under section 84 (3) it is only the Commissioner who could express his opinion and that it is not competent for an Assistant Commissioner specially authorised by the Commissioner to act on his behalf. There are several sections of the Income Tax Ordinance where the Commissioner is authorised to act in a particular way when he forms a certain opinion—vide Sections 81 (3), 85 (1), 86, 87 and 89. There are also other provisions where the Commissioner has to satisfy himself on certain facts before he could act—vide Sections 13 (2), 6 (b) and 11(1) (a). If Mr. Jayewardene's contention is correct then under all these sections it is only the Commissioner who could act. We do not see any reason why we should give a restricted meaning to the term 'Commissioner' under Section 84 (3) when the Legislature has provided a clear cut definition for the term 'Commissioner'.

Mr. Jayewardene also raised the question that the Assistant Commissioner was never authorised to sign a certificate under Chapter 13 of the Income Tax Ordinance. This point was not raised before the Court

of first instance. If it had been raised the Commissioner might have led evidence on this point. It is clear principle of law that a mixed question of fact and law cannot be raised in appeal—vide *Seetha v. Weerakoon*¹.

In our view it is not necessary for the Commissioner to express an opinion that the recovery by means provided for in Section 79 (2) is impracticable or inexpedient (vide the dictum of Maartensz, J. in construing Section 79 (3), the present corresponding Section 85 of the Income Tax Ordinance, *Commissioner of Income Tax v. de Vos*²).

Mr. Jayewardene also contended that this Court has power to give relief to the assessee who has been called upon to pay tax amounting to nearly 25 lakhs. Mr. Jayewardene submitted that the Crown purported to acquire a valuable land in Matara town and subsequently abandoned that project. He said that the Crown is making it difficult for the assessee to pay the tax from the proceeds which he expected from the intended sale of this property. No doubt this is a hardship which we hope the Commissioner will take into account in giving the assessee time to pay. We are of the view that we have no power to exercise our jurisdiction to stay the hands of the Commissioner. Under the provisions of the Estate Duty Ordinance I had occasion to hold that once a certificate is issued, the Court in issuing a writ does not act judicially but does a ministerial act, vide *Ranaweera v. Commissioner of Inland Revenue*.³

For these reasons I dismiss the appeal. Under the special circumstances of this case there will be no costs of appeal.

ALLES, J.—I agree.

Appeal dismissed.

1966 *Present : Sri Skanda Rajah, J., and Siva Supramaniam, J.*

EMJAY INSURANCE CO. LTD., Appellant, and P. S. WILLIAM
and another, Respondents

S. C. 393/65—D. C. Colombo, 56178/M.

Motor Traffic Act (Cap. 203)—Sections 102 (4) and 109—Insurance policy covering 3rd party risks—“ Excluded drivers ”—Action by insurer for declaration of non-liability for breach of condition—Quantum of evidence.

An insurer is entitled to obtain a declaration of non-liability under section 109 of the Motor Traffic Act if he establishes that the accident in question was caused by the motor vehicle when it was being driven by the owner (the insured) in breach of a specific condition in the policy of insurance that it should not be driven by any person who is not the holder of a driving licence. In such a case, the inclusion of another condition in the policy that the vehicle should not be driven by any person other than the insured is not material.

¹ (1948) 49 N. L. R. 225.

² (1933) 35 N. L. R. at 351.

³ (1965) 67 N. L. R. 131.
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APPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *N. C. J. Rustomjee*, for the plaintiff-appellant.

J. A. L. Cooray, for the 2nd defendant-respondent.

Cur. adv. vult.

November 22, 1966. SIVA SUPRAMANIAM, J.—

This is an action by an insurer for a declaration of non-liability under section 109 of the Motor Traffic Act (Cap. 203). The 1st defendant was at all material times the owner of a motor car No. 2 Sri 1290 in respect of which the plaintiff company issued a policy of insurance covering, *inter alia*, 3rd party risks. While the policy was in force the 1st defendant drove the said car on the public highway and collided with the 2nd defendant who was riding a bicycle and caused him injuries. It is established that the 1st defendant was not the holder of a driving licence on the date of the accident. The 2nd defendant has been awarded a sum of Rs. 5,000 as damages by the District Court of Colombo in case No. 55878 filed by him against the 1st defendant. After that action was filed, the plaintiff company instituted the present suit for a declaration of non-liability. It is admitted that the 2nd defendant received due notice in terms of the Proviso to S. 109 of the Act.

It was a condition of the policy that the plaintiff company should not be liable in respect of any claim arising out of any accident while the vehicle was “being driven by.....an excluded driver”. The term “excluded driver” was defined in the schedule to the policy as :

- (1) “ Any person other than the insured or a person driving with the insured’s express or implied permission.
- (2) Any person who is not the holder of a driving licence unless he has held and is not disqualified from obtaining such a licence.”

S. 102 (4) of the Act provides, *inter alia*, as follows :—

“ Nothing in sub-section (1) shall apply in the case of any condition in a policy of insurance, being a condition which—

- (a)
- (b) provides that the motor vehicle shall not be driven by a person other than—
 - (i) the insured or any person driving with his express or implied permission.
 - (ii)
 - (iii)

(c) provides that the motor vehicle shall not be driven by—

- (i)
- (ii) any person who is not the holder of a driving licence.
- (iii)"

It will be seen that the condition specified in the policy was one that was permitted by S. 102 (4) of the Act and that the two categories of "excluded drivers" correspond to the classes dealt with in S. 102 (4) (b) (i) and S. 102 (4) (c) (ii) respectively.

It was argued by learned Counsel for the respondent that the class referred to in S. 102 (4) (c) (ii), viz: "Any person who is not the holder of a driving licence" will not include the "insured" as under sub-section (4) (b) (i) the "insured" has been specifically excepted from the definition of "excluded driver". The argument, however, is untenable as the two sub-sections refer to separate and distinct categories. Learned Counsel's submission amounts, in effect, to a request that we should interpolate the words "other than the insured" after the words "any person" in S. 102 (4) (c) (ii). We have no power to do so. In our view there was a breach of an essential condition of the policy and the plaintiff company is discharged from liability and is entitled to the declaration prayed for in the plaint.

We set aside the judgment and decree appealed from and enter judgment for the plaintiff as against the 2nd defendant as prayed for with costs in both courts. The plaint includes a prayer against the 1st defendant as well. The 1st defendant did not file answer or contest the action and was absent at the trial. The District Judge will enter, in the first instance, a decree *nisi* for default against the 1st defendant.

SRI SKANDA RAJAH, J.—I agree.

Appeal allowed.

1967

Present : Samerawickrame, J.

E. A. MOULIN NONA, Appellant, and J. A. V. ROUTHLEDGE,
Respondent

S. C. 839/66, with Application 372—M. C. Arissawella, 65467

Criminal trespass—Intention to annoy—Quantum of evidence.

The accused-appellant, who was a married woman working on an estate, continued to be in occupation of her lineroom after she was given notice to quit it. The evidence showed that her dominant intention was to remain with her husband and her family in the lineroom of which her husband continued to remain in occupation after his employment on the estate had been terminated.

Held, that the accused could not be convicted, upon the evidence, of the offence of criminal trespass.

APPEAL, with application in revision, from a judgment of the Magistrate's Court, Avissawella.

S. S. Sahabandu, for the accused-appellant/petitioner.

H. W. Jayewardene, Q.C., with *Ralph de Silva, I. S. de Silva* and *S. C. Crossette-Thambiah*, for the complainant-respondent.

Cur. adv. vult.

September 22, 1967. SAMERAWICKRAME, J.—

The appellant appeals from a conviction for the offence of criminal trespass in the Magistrate's Court of Avissawella. She has also filed an application in revision.

The appellant is a married woman and in the original notice served on her terminating her employment, it was stated that her services were being terminated because her husband's employment on the estate had been terminated. The notice also required her to give up her lineroom accommodation and to leave the estate on or before the 18th October, 1963.

In giving evidence, the complainant-respondent, who is the Superintendent of the estate referred not to any act of the accused-appellant alone but stated, "as a result of their continuing to live in this estate it caused me annoyance". In cross-examination too he referred to certain acts done by more than one person. He was obviously referring to the husband of the accused-appellant as well as the appellant.

The accused-appellant gave evidence and she stated that she was still living on the estate with her husband and that her husband too lived in the lineroom. In these circumstances, the learned Magistrate had to consider whether the dominant intention of the accused was to remain with her husband and her family or to annoy the Superintendent. He has failed to give consideration to this aspect of the matter.

Learned counsel for the complainant-respondent pointed to evidence given by the appellant where she stated "I was asked to shift to another lineroom about 100 yards away shortly before giving me notice to quit this lineroom. I told the Superintendent that I cannot go because of the large family". Learned Counsel for the complainant-respondent submitted that this evidence shows that there was defiance on the part of the accused-appellant and that her continued occupation of the lineroom after she was given notice to quit too is referable to such defiance. The appellant has stated that from 1963 she was living in one of the cottage type linerooms near the factory. She has also stated that nine children were born to her on this estate. If the majority of the children are

living with her, there may well have been reason for her to tell the Superintendent that she should not be removed from this cottage type lineroom in view of her large family. There can, however, be no doubt that the appellant was not entitled to disregard the direction of the Superintendent to transfer from the lineroom of which she was in occupation to another lineroom.

This is not a case where one can say with confidence that the continued occupation of the lineroom by the appellant is attributable to defiance of the Superintendent and the intent to annoy him. As I stated earlier, it is a matter for consideration whether the appellant's dominant intention was not to remain with her husband and her family in the lineroom of which her husband continued to remain in occupation. In the absence of consideration of this matter by the learned Magistrate, the conviction of the appellant cannot be sustained. Accordingly, I set aside the conviction of the appellant and the sentence passed on her and I direct an acquittal to be entered.

The application in revision appears to have been filed because strictly the appeal was out of time. Accordingly, the order made above is made upon the application and the appeal is formally rejected.

Conviction set aside.

1968

Present : Abeyesundere, J.

M. NAVAS, Appellant, and A. S. MOHAMED, Respondent

S.C. 64/1967—C.R. Colombo, 85406

Rent Restriction (Amendment) Act, No. 12 of 1966—Scope of section 4 (1) (c)—Averments of arrears of rent for more than 3 months and "reasonable requirement"—Consent decree—Interpretation—Rent Restriction Act, s. 12 A.

In this action falling under section 12A of the Rent Restriction Act (as amended by section 2 of Act No. 12 of 1966), consent decree was entered recognizing the fact that the tenant was in arrears of rent for more than three months. Another ground averred in the plaint was that the premises were "reasonably required" by the landlord. The terms of settlement provided for the payment of the amount of the arrears of rent by setting off against it the sum of Rs. 1000 deposited as security by the tenant and the amount of the taxes paid by him.

Held, that section 4 (1) (c) of the Rent Restriction (Amendment) Act No. 12 of 1966 could not prevent proceedings from being taken to enforce the decree for ejection of the tenant.

APPEAL from an order of the Court of Requests, Colombo.

C. Ranganathan, Q.C., with *A. Sivagurunathan*, for the Plaintiff-Appellant.

V. Thillainathan, for the Defendant-Respondent.

March 29, 1968. ABEYESUNDERE, J.—

This action was instituted by the plaintiff for the ejectment of the defendant from the premises described in the plaint on the ground that the defendant was in arrears of rent for the period 1st June, 1960 to 30th June, 1963 and also on the ground that those premises were reasonably required for use and occupation as a residence by the plaintiff and his family. Issue 1 relates to the first of those grounds and issue 2 relates to the second of those grounds. The case was settled and decree was entered in accordance with the terms of settlement. The plaintiff applied for the enforcement of the decree and the application was resisted by the defendant on the ground that Section 4 (1) (c) of the Rent Restriction (Amendment) Act, No. 12 of 1966, prevented proceedings from being taken for the enforcement of the decree. The learned Commissioner of Requests by his order dated 7.3.67 has held that the decree cannot be enforced. The plaintiff has appealed from that order.

The learned Commissioner of Requests has stated in his order as follows :

“ In view of the provisions of Section 4 (1) of Act No. 12 of 1966, I hold that the decree entered in this case having been entered on the grounds of reasonable requirement, which is not one of the grounds provided for under Section 2, cannot be enforced and execution proceedings cannot be continued.”

Section 2 referred to by the learned Commissioner of Requests in the passage quoted above is intended to refer to Section 12A inserted in the principal Act by Section 2 of the Rent Restriction (Amendment) Act, No. 12 of 1966. Section 12A prohibits the institution of an action for the ejectment of a tenant of any premises to which the principal Act applies and the standard rent of which for a month does not exceed Rs. 100 unless where the ground on which ejectment is sought is one of the grounds specified in that Section. The instant action was instituted on two grounds and one of them was that the rent of the premises in suit was in arrears for more than three months. That ground is one of the grounds specified in Section 12A. Admittedly the premises in suit are those to which the Rent Restriction Act applies and the standard rent of which for a month does not exceed Rs. 100. Therefore Section 12A applies to the premises in suit.

Section 4 of the Rent Restriction (Amendment) Act, No. 12 of 1966, deems to be null and void an action for the ejectment of a tenant from any premises to which the Rent Restriction Act applies if that action was instituted on or after 20th July, 1962 and before 10th May, 1966 (which is the date of commencement of Act No. 12 of 1966) and which was pending on 10th May, 1966. The instant action was instituted within the period specified in Section 4 and was also pending on 10th May, 1966. The question that has to be determined is whether the provisions of Section 4 of the Rent Restriction (Amendment) Act No. 12 of 1966 apply to that action. It is correct that Section 4 does not expressly save any action instituted within the period mentioned in that Section and pending on the date of commencement of the amending Act. Section 12A was, by the very provisions of Section 4, brought into operation retrospectively with effect from 20th July, 1962, and it would be rendering the provisions of Section 12A inoperative during the retrospective period if Section 4 is interpreted to deem to be null and void an action instituted for the ejectment of a tenant on any of the grounds specified in Section 12A. This Court has already held in a number of other cases that Section 4 of the amending Act does not apply to an action instituted for the ejectment of a tenant on any of the grounds specified in Section 12A. Therefore the test as to whether paragraph (c) of Section 4 (1) of the Rent Restriction (Amendment) Act, No. 12 of 1966, prevents the enforcement of the decree of consent entered in the instant action is whether the action was instituted on any of the grounds specified in Section 12A. Undoubtedly one of the grounds on which the action was instituted is a ground stated in Section 12A. Therefore Section 4 of the amending Act does not apply to the instant action. The learned Commissioner of Requests has misdirected himself in examining the decree in order to determine whether or not Section 4 of the amending Act applies to the instant action.

Counsel appearing for the respondent urged that the decree of consent entered in this action was bad as it was not entered on any of the grounds on which an action for the ejectment of a tenant may be instituted under the Rent Restriction Act. His submission is clearly wrong for the reason that the terms of settlement recognise the fact that the defendant was in arrears of rent for more than three months and those terms provide for the payment of the amount of those arrears by setting off against it the sum of Rs. 1000 deposited as security by the defendant and the amount of the taxes paid by him. It is on the basis of that set off that the terms of settlement state that the defendant has paid rent and damages up to 30th June, 1966.

For the aforesaid reasons I set aside the order appealed from and hold that the decree entered in this action is enforceable. The appellant is entitled to the costs of the appeal.

Appeal allowed.

1968

Present : H. N. G. Fernando, C.J.

G. P. N. SILVA, Appellant, and THE COMMISSIONER
FOR NATIONAL HOUSING, Respondent

S. C. 97/66—C. R. Colombo, 91498

National Housing Act (Cap. 401)—Section 31—“ Occupier ”— Ejectment of a sub-tenant or third party—Procedure.

Part V of the National Housing Act as originally enacted does not authorise the special procedure for ejectment to be utilised against a person who is not an “ occupier ” in the strict sense referred to in Section 31 of the Act. Such procedure therefore is not available in a case where the original occupier holding under the Commissioner sub-lets the premises or permits some other person (not being a dependant) to occupy the premises.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, Q.C., with W. S. Weerasooria, for the 3rd Respondent-Appellant.

Mervyn Fernando, Crown Counsel, for the Petitioner-Respondent.

May 5, 1968. H. N. G. FERNANDO, C.J.—

This is an appeal against the order made under Part V of the National Housing Act (Cap. 401) for the ejectment of the appellant from certain premises. The appellant, according to the evidence, entered into occupation of the premises as a sub-tenant under one Selvaratnam. Selvaratnam himself had apparently taken the premises from one Unambuwa. Unambuwa was the person to whom the premises were provided for occupation by the Commissioner of National Housing.

Section 31 (1) of the Act provides that Part V shall apply to every house provided by the Commissioner for occupation by any person and sub-section (2) of Section 31 provides that in Part V the expression ‘ occupier ’ will mean the person for whose occupation the house is provided. In the provisions of Part V as originally enacted the prescribed procedure for ejectment was designed to secure the ejectment of the “ occupier ” and his dependants. There was nothing in those provisions to deal with a case where the original occupier holding under the Commissioner sub-lets the premises or permits some other person (not being a dependant), to occupy the premises. On this ground I am compelled to hold that Part V of the Act as originally enacted does not authorise the special procedure for ejectment to be utilised against a person who is not an “ occupier ” in the strict sense referred to in Section 31.

It is clear from the amendments made by Act No. 36 of 1966 that the Commissioner himself has realised that there was a grave omission in the original provisions of Part V. The appeal is allowed with costs and the order of 9th September, made against the appellant, is set aside.

Appeal allowed.

1967

Present : Tennekoon, J.

C. P. J. SENEVIRATNE, Applicant, and R. M. MUTHUBANDA,
Party Noticed

*Parliamentary Election for Electoral District No. 120 (Mahiyangana)
helden on 22nd March 1965—Application for examination of the
Petitioner under section 219 of the Civil Procedure Code*

Election petition—Execution proceedings for recovery of costs—Jurisdiction of any single Judge of the Supreme Court—Civil Procedure Code, ss. 219, 776 (4), 777—Parliamentary Elections Order in Council, ss. 78B, 82A (5), 82B (1) (4)—Parliamentary Election Petition Rules 2, 33 (1).

Where the Judge who heard an election petition is *functus officio*, proceedings for the recovery of costs awarded by him, and by the Supreme Court on appeal, in favour of the petitioner may be taken before any single Judge of the Supreme Court notwithstanding that such Judge does not happen to be the Election Judge who was nominated to hear the election petition. Execution proceedings in relation to an order for costs are interlocutory matters within the meaning of section 78B of the Parliamentary Elections Order in Council.

ELECTION petition in respect of election for Electoral District No. 120 (Mahiyangana). Application for examination of the petitioner under section 219 of the Civil Procedure Code.

N. C. J. Rustomjee, with D. S. Wijewardene, for the respondent-applicant.

S. S. Sahabandu, for the petitioner (the party noticed).

Cur. adv. vult.

October 21, 1967. TENNEKOON, J.—

The party noticed was the petitioner in an Election Petition in which the applicant was the respondent. A sum of Rs. 5,000 had been deposited by the party noticed as security at the time of filing the Election Petition. That petition was after trial dismissed with costs by the Election Judge. An appeal was taken to the Supreme Court under section 82A of the Ceylon (Parliamentary Elections) Order in Council (Chapter 381); that too was dismissed with costs. Costs of the trial have been taxed by the Registrar of the Supreme Court at Rs. 6,681.64. After setting off the sum of Rs. 5,000 against costs from the security deposited, there is still due a sum of over Rs. 1,681.64 due from the party noticed to the applicant in regard to the costs of the Election Petition prior to the appeal. The costs of appeal have been taxed at Rs. 2,849.00 and the total amount now due as costs is Rs. 4,530.64. The applicant has moved that the party noticed be examined under section 219 of the Civil Procedure Code and when the matter came up before me Counsel for the party noticed took objection to my dealing with this application on the ground that any proceedings in regard to the execution of an order for

costs in an Election Petition can only be had before the Election Judge who heard the Election Petition upon the nomination made by his Lordship the Chief Justice and cannot be had before a Judge of the Supreme Court who had no other qualification to deal with the matter other than that of being a Judge of the Supreme Court. The Election Judge in this case was Mr. L. B. de Silva who is no longer a Judge of the Supreme Court having retired about 18 months ago.

After hearing Counsel for the party noticed and the applicant I overruled the objection and directed that the examination of the party noticed be done before me on the 19th of October. I now set out my reasons for taking the view that these proceedings can be had before a single Judge of the Supreme Court who is not also the Election Judge nominated to hear the Election Petition.

The submission of Counsel for the party noticed is that while Rule 33 (1) of the Parliamentary Election Petition Rules which reads—

“Costs when taxed may be recovered in the same manner as costs of an action at law”

contemplates the application of those provisions of the Civil Procedure Code which relate to the execution of a decree to pay money, any express or implied reference to ‘the judge’ or ‘the court’ in those provisions can have reference only to the Election Judge. He refers to the definition of the term ‘Judge’ in rule 2 of the Election Petition Rules which is to the effect that unless the context otherwise requires the term ‘Judge’ when used in the rules means the Election Judge. Counsel further submits that this meaning must be carried across to the provisions of the Civil Procedure Code when applied to election petitions for the purposes of recovery of costs and accordingly the term ‘court’ appearing in those sections can only have reference to the Election Judge who heard the Election Petition.

This submission somewhat ignores the fact that there was in this case an appeal to the Supreme Court from the determination of the Election Judge and having regard to the provisions of subsections (1) and (4) of section 82B of the Order in Council, the Supreme Court in dismissing the appeal must be taken to have affirmed both the determination of the Election Judge and also the order for costs made by the latter; on the principle applied in *Sinno Appu v. Andiris et al.*¹ that a decree of a lower court affirmed in appeal becomes the decree of the Supreme Court, the whole of the costs payable by the party noticed are now referable to an order of the Supreme Court and no part of it is based on the order of the Election Judge.

Sub-section (4) of section 82B of the Order in Council provides that—

“the provisions of the Third Schedule as to the award, taxation and recovery of costs shall *mutatis mutandis* apply in relation to the award of such costs by the Supreme Court and recovery thereof.”

¹ (1910) 13 N. L. R. 297.

One is thus again driven back to Rule 33 (1) of the Election Petition Rules (contained in the Third Schedule) which provide for the recovery of taxed costs "in the same manner as costs in an action at law". It was not contended by Counsel for the party noticed that the decision of the Supreme Court on appeal from an Election Petition must be returned to the court of first instance under section 776 (4) of the Civil Procedure Code or that the provisions of section 777 of that Code have any application here. These provisions though appearing in a Code dealing with procedure, in substance enlarge the power and jurisdiction of original courts so as to enable them to execute decrees of the Supreme Court in appeal from such original courts. The words "in the same manner" in Rule 33 (1) are not apt to invest an Election Judge with the powers given to original courts by section 777 of the Civil Procedure Code.

It seems to me therefore that this is a case in which any proceedings for the execution of the order for costs must be taken before the Supreme Court itself.

It is true that section 82 A (5) provides that any appeal from the determination of an Election Judge shall be heard by three Judges of the Supreme Court. This provision cannot be read as prescribing the number of Judges that would be necessary to constitute a bench of the Supreme Court to deal with matters arising in execution of an order for costs made by the Supreme Court in appeal. There is however section 78B of the Order in Council which reads as follows :—

"Unless otherwise ordered by the Chief Justice all interlocutory matters in connexion with an election petition may be dealt with and decided by any Judge of the Supreme Court."

The only question that then arises is whether execution proceedings, whether they be in relation to an order for costs by the Supreme Court in appeal or in relation to an order for costs by an Election Judge can be regarded as an 'interlocutory matter in connexion with an Election Petition'. Counsel for the party noticed conceded that there are many cases in which the term 'interlocutory' has been applied to incidental proceedings arising *after* the rights of the parties in the case are finally disposed of in what might be called the main or final judgment or determination. It is sufficient to refer to the cases of *Manchohamy v. Appuhamy*¹, *Egerton v. Shirly*² and *Jan Singho v. Abeywardene*³ in support of that proposition.

I am accordingly of opinion that the examination under section 219 of the Civil Procedure Code of the party noticed is an interlocutory matter in connexion with an Election Petition within the meaning of section 78B of the Ceylon (Parliamentary Elections) Order in Council and may be had before a single Judge of the Supreme Court notwithstanding that such Judge does not happen to be the Election Judge who had been nominated to hear the Election Petition.

Application allowed.

¹ (1905) 8 N. L. R. 307.

² (1945) 1 K. B. 107.

